



*CONSTITUTION OF RELIGIOUS
LIBERTY: GOD, POLITICS AND
THE FIRST AMENDMENT IN
TRUMP'S AMERICA*

*Master's Thesis 2018 (30 credits)
RELIGION IN PEACE AND CONFLICT*

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Abstract

This thesis starts by describing the legal foundation of religious liberty in the United States and the evolution of the religion clause jurisprudence. Then follows an outline of the main legal theories on religious liberty. It continues to describe a case study conducted on how Americans citizens perceive the protection of their religious liberty. Upon this there is a chapter where the detailed findings from the case study are described in juxtaposition to the relevant jurisprudence and how this can be applied to the overall legal framework protecting religious liberty. The final chapter is a discussion on what conclusions that can be drawn.

Keywords: religious liberty, First Amendment religion clauses, legal protection of religious liberty in the United States, Supreme Court of the United States religion clause jurisprudence, case study religious liberty under Trump, SCOTUS religious liberty case law, legal theory religious liberty, De Facto disestablishment, De Jure disestablishment, non-preferentialism, separationist, Jeffersonian compromise

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Introduction

“One hundred years ago, the great African American Bois famously said ‘the problem of the twentieth century is the color line.’ I believe that the twenty-first century will be shaped by the question of the faith line.”

Jonah Perlin¹

Religious freedom is one of the principles upon which the United States was founded. Many of the earliest colonists to arrive in the area of the New World were escaping religious persecution in England. One of these was Roger Williams, a puritan pastor, who believed that the purity of the religion necessitated that civil governance should be separated from the church.² He pointed out the hypocrisy in escaping a state-controlled church in England to establish a state-controlled

¹ Perlin *Religion as conversation starter: What liberal religious political advocates add to the debate about religion's place in legal and political discourse.* p. 331

² Ullman & Zott *Religious Liberty* p. 15

church in the new world. This concept became a primary feature of the US Constitution 140 years later via the First Amendment's Establishment clause. "Congress shall make no law respecting an establishment of religion." This was different to the European model where church and state were entwined and rulers were granted their powers by the will of God.³ It was considered to be an innovative and radical idea that the government would not dictate how the church operated and that the church would not dictate to government.

This separation of religious and secular laws and what religious liberty entails have been debated since the passing of the First Amendment. Conflicts arise whenever people have conscientious objections to laws and policies that bind them. Throughout American history a plethora of examples have arisen, e.g. pacifist Quakers who sought exemption from serving in the military, Amish citizens who fought to be exempt from mandatory schooling past 8th grade and paying Social Security Taxes.

There is an inherent tension between secular laws and different religions. This is especially true in a pluralistic society. America today is more pluralistic with regards to both world religions, but also more inclusive towards the protection of non-Christian religions' rights, e.g. native American religious rites. In addition to this, there is a growing number of Atheists who argue that the right to be free *from* religion is also protected by the First Amendment. Religious freedom in this increasingly diverse, interconnected American society is more complex than ever, both from a legal and political perspective.

The First Amendment encompasses more than religious freedom. It also protects other civil liberties such as Freedom of Speech, Freedom of the Press and the Right to Peacefully Assemble. These First Amendment rights are seen as freedoms that work together.⁴ There are controversies over what precisely these guarantees entail as there are clashes between these freedoms from time to time. This has been debated mostly within the legal system, but the debate is also taking place in the political arena. In the 2016 presidential election Republican nominee Ted Cruz

³ Ullman & Zott *Religious Liberty* p. 6

⁴ Corvino, Anderson & Girgis *Debating religious liberty and discrimination* p. 8

famously quipped that “we are one liberal Supreme Court Justice away from losing our religious liberty” at conservative conference CPAC.⁵

It is not only conservatives who have views on religious freedom. On the other side of political spectrum there are liberals who argue that the political right has turned religious freedom into “religious privilege” in order to stop the development of civil rights for LGBT people, non-white people and women.⁶ In one instance, a clerk in Kentucky refused to issue a marriage license to a same-sex couple, citing her religious conviction as the reason for her refusal. She even spent a few days in court for defying a court order to do so.⁷ Another case involves a baker who refused to bake a wedding cake to a same-sex couple, where Freedom of Speech and Freedom of Religion were invoked by the different sides in support of their arguments.⁸

There is also the tension between Freedom of Religion and Protection of Privacy on the one hand, and National Security concerns on the other. This has led a heated debate on the monitoring of mosques in NYC. The difference in attitudes towards Freedom of Religion was also illustrated by senator Cruz in the following statement.

“Catholic schools and Jewish Day schools will see a Supreme Court that protects their religious liberty. The fundamental freedom of every one of us to live according to our faith and our conscience will see a Supreme Court that protects our fundamental rights. We will have a President who will defeat radical Islamist terrorism and we will utterly destroy ISIS.”

Ted Cruz Victory Speech Milwaukee, Wisconsin⁹

⁵ Senator Ted Cruz speech at CPAC Conference 2016 (Youtube Clip)

⁶ Corvino, Anderson & Girgis *Debating religious liberty and discrimination* p. 8

⁷ Castillo/Conlon *Kim Davis stands ground but couple gets license*, CNN 14/9/2015

⁸ Bravin/Kendall *Supreme Court hears same sex wedding cake case*, Wall Street Journal 5/12/2017

⁹ Cruz Wisconsin Victory Speech 5/4/2016, Youtube clip

Ted Cruz was not alone, the presidential candidate Donald Trump made headlines all over the world when he suggested a ban from Muslims to enter the United States.¹⁰ His proposal was dismissed by legal scholars as unconstitutional and in violation of numerous laws (international and national). Upon his election he issued a presidential executive order to fulfill this promise. The first two versions were struck down by various federal courts. The third version of the order (hereinafter referred to as the “Muslim Ban”) was upheld by the Supreme Court in during the summer 2018.¹¹

Political scientists maintain that evangelicals did not become a factor in American politics until the Supreme Court ruled on abortion rights and school prayers. Evangelicals then mobilized into the political process and has since then had considerable influence, in particular in the Republican party where they comprise a disproportionate share of the electorate. The language in order to mobilize evangelical voters has shifted from “protecting traditional values” to “protecting religious liberty”.¹² In January 1996, 59 % of Americans believed that the government should protect traditional values, by 2014 this number had decreased to 18 %. Growing support of gay marriage had coincided with these shifts. Preliminary evidence suggests that the reframing of traditional values to religious liberty has been successful for the political right. In March 2012, 39 % believed that religious liberty was threatened, in November 2012 it was 50 % and in May 2014, 54 % thought it was threatened.

To add to the complexity, there is also what definition of religion is from a legal perspective. Some legal scholars argue that law and religion are similar in the sense that the law and religion both aim “to provide order, meaning and rule in our social lives”.¹³ However, religion also has cultural meaning, which becomes abundantly clear in the case law surrounding display of a Christmas crèche and school prayers. In addition to this, there is also the discussion on whether religion and religious arguments should be treated differently in the public square than for instance moral convictions or common sense when debating legal statutes and case law. Finally,

¹⁰ Donald Trump rally North Carolina July 12th Satellite News Clip

¹¹ Liptak/Shear *Trump’s Travel Ban is upheld by the Supreme Court*, New York Times, 26/6/2018

¹² Goidel et al. *Perceptions of threat to religious liberty* p. 426

¹³ Feldman, S. M. *Law & religion*. p. 4

there is also the fact that most justices on the Supreme Court are Christian and they typically understand the concepts of religion, neutrality and secular from a distinctly Christian perspective. During the work with this thesis it became abundantly clear that for example a Jewish or a Native American could have different attitude towards religion than a Christian. Some Jewish legal scholars maintain that the separation of church and state, a pillar of religious liberty in Constitutional Law “manifests and reinforces Christian (especially Protestant) imperialism in American society.”¹⁴ One of the Native Americans respondents in the case study highlighted that she regard religion as an integral part of life and not a “private separate spiritual practice that you focus on during the weekends like Christians think”. There are different dimensions to religiosity; religious beliefs, but also religious practices. From a legal perspective this makes the analysis of the case law even more complex. For instance, a law on mandatory closing of shops on Sundays, presents a practical problem for a Jewish butcher, as (s)he would prefer to close on day of the Jewish Sabbath rather than on Sundays. However, in the strictest legal sense, a mandatory closing on Sundays does not infringe upon religious beliefs. On the other hand, a display of a Christian crèche or Nazi swastikas can be perceived as a violation of religious beliefs, but then the Freedom of Speech has been taken into consideration by the courts. So taking the different religious views and different practices and belief systems makes the study and analysis of religion clause jurisprudence complex and challenging. For the purpose of this thesis, I have taken into all the aspects of religion as it represents many different facets of the same prism: spirituality, practice, cultural belonging/ethnicity and majority culture, or indeed subculture.

In an ideal world, religious liberty provides freedom to all people to execute their beliefs in reasonable fashion without fear of reprisal: however, interpretations of how to apply religious liberty in contemporary life differ, is leading to conflict over free expression and discrimination.

With all the considerations above, this thesis aims to examine the level of legal protection for religious liberty in America today. As there is such a vast amount of case law surrounding this I have decided to put emphasis on concerns expressed by American citizens, both in interviews

¹⁴ Feldman, S. M. *Law & religion*. p. 4

and in blogs and media. I have analyzed the jurisprudence in relation to these concerns but also in relation to the legal theory framework surrounding the First Amendment.

Scope and limitations of thesis

This thesis is focused to examine:

- a) how religious liberty is protected in US jurisprudence, with emphasis on the criteria outlined in *De Facto* disestablishment doctrine (a legal theory under which the principles of neutrality, separation and accommodation is applied to religious liberty, described under the heading Legal Theory and First Amendment Religion Clause jurisprudence)
- b) how a sample of US Citizens of various denominations perceive the legal protection of their religious freedom, with emphasis on in the criteria outlined in the *De Facto* disestablishment doctrine.

In order to determine this the following steps have been taken:

- A review of existing case law, legislation and legal theory pertaining to religious liberty. As there is a plethora of case law on religious liberty I had to limit the review to the main principles of religious freedom and the most recent cases.
- Conducting a case study where several US Citizens of various denominations were interviewed. The aspects looked into were their perceptions of how strong religious liberty in USA today, the protection of religious freedom offered by the Supreme Court and state courts and by the political establishment.
- A review of secondary sources such as the blogosphere and the media on issues relating the state of religious liberty and its protection in the US today
- A review of the jurisprudence and current case law with regards to the concerns expressed in the interviews and in the secondary sources.

Methodology

Theories on the role of the law in a religious plurality

As outlined in the introduction, religious liberty is protected by the Constitution. This may seem deceptively simple in writing; it has been increasingly difficult to apply in practice. This is probably best described by John Rawls who famously phrased it: “how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable, religious, philosophical and moral doctrines?”¹⁵

Religious pluralism pervades the legal system and this gives rise to disagreements between legal theorists and philosophers. There is a binary view between theocracy and a religiously neutral secular state where religion is for the individual and rationality is for the public and the law.¹⁶ There are also advocates for a middle ground solution where religion plays a part in public decision making, while recognizing that a separation between church and state is necessary to protect religious citizens as much as non-religious citizens.¹⁷

The contemporary legal discourse on religion and the law is vast and varied. However, there are three main positions that can be identified:

1. *The separationist position*, which represents the view that politics and law must be independent from any religions. In this framework all laws should be advocated for, acted upon and interpreted for only secular reasons. For instance, if a religious individual believes that same-sex marriage is morally wrong, he must also provide a coherent

¹⁵ Perlin, Jonah. *Religion as a Conversation Starter: What Liberal Religious Political Advocates Add to the Debate about Religion's Place in Legal and Political Discourse* p. 333

¹⁶ White, J. *Talking about religion in the language of the law: Impossible but necessary* p 179.

¹⁷ Perlin, Jonah. *Religion as a Conversation Starter: What Liberal Religious Political Advocates Add to the Debate about Religion's Place in Legal and Political Discourse* p. 334

secular reason for advocating that a marriage should be defined as a union between a man and a woman. It is always the “duty of civility” and “public reason” that is the guiding principle as this is equally accessible to all fellow citizens who do not share one’s religious views. This is sometimes referred to as a “Jeffersonian Compromise” whereby American democracy tolerates religious view in exchanges for a public discourse that is exclusively non-religious. It should be noted that some separationist thinkers, including Rawls himself, allow for certain religious language in public debate, as long as these religious views are not used as “trump cards”, e.g. arguments that “my belief is correct because God says so.”¹⁸ Separationists argue that public reasoning and laws should be justified on publicly accessible and religiously neutral grounds.

2. *The religionist critiques*, which challenges the separationist position on the grounds that religious reasoning and languages should be omitted or severely limited in public discourse and the law. Franklin Gamwell argues that “democratic participation separated from one’s religious beliefs, or the affirmation that reasons independent for them can be sufficient to determine the rightness of political and legal discussions is inconsistent with those religious beliefs”.¹⁹ In order words for the religious adherent, religious views, not democratic values must come first. In this scenario a religious person can either try and make his religious belief into secular law or retreat from the democratic process altogether. The more nuanced religionists argue that religious reasons should be allowed in the public discourse, because a religious view and non-religious views can be shared in a democratic tradition. In this theory, religion is one of many considerations. The religionists support a religiously plural discourse as it increases the chance of achieving difficult policy objectives.
3. *The theory of completely theorized agreements*, the third approach to the question how to integrate law in a religious plural society. This approach avoids any references to high-level reasoning altogether – whether religious or not. Instead legal and political questions should be based on “low-level principles”. In this scenario, the desired outcomes for

¹⁸ Perlin, Jonah. *Religion as a Conversation Starter: What Liberal Religious Political Advocates Add to the Debate about Religion's Place in Legal and Political Discourse* p. 338

¹⁹ Perlin, Jonah. *Religion as a Conversation Starter: What Liberal Religious Political Advocates Add to the Debate about Religion's Place in Legal and Political Discourse* p. 340

individuals, regardless of what reasons they may have is the guiding principle. The proponents of this theory maintains is that it is easier to reach conclusions on which a larger percentage of the population agrees than if society attempted to find agreement on large abstract principles.²⁰

Legal Theory and First Amendment Religion Clause Jurisprudence

Constitutional scholars agree on the premise that the First Amendment aims to separate church and state whilst also ensuring the free exercise of religion. Thus the United States is not a theocracy in the legal sense. The religious liberty legal framework has been described as an attempt to recreate imperial Rome where people of many different denominations coexisted in a religious pluralistic society.²¹ However, in terms of legal jurisprudence there have been substantial discussion whether the First Amendment is a *De Jure* or a *De Facto* disestablishment.

The religion clauses were designed to maximize religious freedom in both its individual and corporate forms. The clause is focused on protecting free expression of religion in all its variety and to delimit the influence of any particular religion to avoid the tyranny of the majority, whether political or ecclesiastical. Different legal scholars are now discussing whether the First Amendment religious jurisprudence is a *De Jure* and/or *De Facto* disestablishment of religion, and thus religious liberty has been realized not just as a legal formality but also as in practice.

In a *De Jure* disestablishment of religion there is formal separation between religious and state bodies. Upon the founding of the United States there was a cultural Protestant Christianity which the founders recognized as “ethical citizenry necessary for a successful operation of the American republic.”²² During the first years of the American republic there was a formal separation between the church and state, but in essence the state relied and worked with a protestant majority in mind. However, with growing religious plurality, initially Jewish and

²⁰ Perlin, Jonah. *Religion as a Conversation Starter: What Liberal Religious Political Advocates Add to the Debate about Religion's Place in Legal and Political Discourse* p. 342

²¹ White, J. *Talking about religion in the language of the law: Impossible but necessary* p 179.

²² Thiemann, R.F. *Religion and legal discourse: An indirect relation; a response to Steven D. Smith* p. 290

Catholic immigrants and later Buddhist, Hindu coupled with an increasing recognition of Native American religious practices, the jurisprudence started placing emphasis on *De Facto* disestablishment. In a *De Facto* disestablishment, there is separation between the state and all religion not only in the wording of the law, but also in practice.

The development of *De Facto* doctrine started to take shape in the case *Everson v. Board of Education*.²³ It has since then been developed into a set of concepts to establish whether there is a *De Facto* disestablishment and thus protection of religious liberty. These concepts are: neutrality, separation and accommodation which are always to be applied to First Amendment religion clause jurisprudence.²⁴

Legal Concept	Criteria
Neutrality	Is a law applied neutrally to all situations, regardless of denomination? Is jurisprudence and legislation “religion-blind”?
Separation	Is there an absolute divide between church and state? In case of tax subsidies – is this subsidy regardless of religion and only for the public good?
Accommodation	Are there minimal hurdles to overcome for any religion or spiritual practice to exercise their religion? In case of limitations on religious freedom – the neutrality principle is applicable.

Criticism of the De Facto doctrine

²³ *Everson v. Board of Education*, 330 U.S. 1 (1947)

²⁴ Thiemann, R.F. *Religion and legal discourse: An indirect relation; a response to Steven D. Smith* p. 298

The *De Facto* doctrine has been widely criticized. Many legal scholars deem it unstable with regards to religious questions and the law: “the same person who will scorn as simple-minded libertarian objections to one sort of paternalistic measure – Social Security or drug regulations – may suddenly and passionately deploy the same kind of simplistic rhetoric (what right do you have to impose your values on anyone) when the issues changes to abortion or laws disfavoring homosexual conduct.”²⁵ Professor Steven D. Smith argues that the theoretical way is wrongheaded. He suggests that the quest for principles inherent in the religion clauses of the First Amendment is futile because the Amendment was purely procedural, a federalist maneuver to designed to avoid the whole question of religious liberty on the national level by leaving it in the hands of the states.²⁶ This theory indirectly supports the argument that the Supreme Court’s Establishment clause jurisprudence is at “at war with” its Free Exercise Jurisprudence and the *De Facto* doctrine is incoherent.²⁷ Some argue that when one clause directs the government not to promote religion, and another directs it not to hinder religion, this is not possible in a state where government aid and government regulations are pervasive. If the government applies its laws neutrally it will prohibit some people from practicing their religion. If the government exempts those with religious objections, it will discriminate against those with non-religious objections. Thus a broad interpretation of each clause is in direct conflict with a broad interpretations of the other.²⁸ Other non-legal scholars have argued that the *De Facto* doctrine is conceptually unstable and incapable of giving consistent guidelines for either establishment or free exercise clause jurisprudence.²⁹

Materials

The materials used to analyze how religious freedom is protected in US jurisprudence were legal literature, case law, political commentaries, newspaper articles and academic symposiums.

²⁵ Smith, S.D. *Legal Discourse and the De Facto Disestablishment* p. 209-210

²⁶ Hankins, B. *Getting over equality: A critical diagnosis of religious freedom in America* by Steven D. Smith p. 841

²⁷ Sherry, S. *Lee v Weisman: Paradox redux.* p. 123

²⁸ Sherry, S. *Lee v Weisman: Paradox redux.* p. 123

²⁹ Thiemann, R.F. *Religion and legal discourse: An indirect relation; a response to Steven D. Smith* p. 297

Case Study

In order to determine the perception of religious freedom I conducted interviews with US Citizens of various denominations. The initial interviews were conducted face-to-face. In addition to the initial interviews I conducted follow up interviews in a videoconference later.

The questions I specifically tried to answer were:

- Do the respondents feel that their religious freedom is protected?
- If not, what are their concerns?
- Do the respondents feel that religious freedom in general is protected?
- How do the perceptions of religious liberty/lack of protection of religious liberty compare to the current jurisprudence?

The study was performed by interviews with US Citizens of the following denominations:

Denomination	Number of Interviewees	Gender
Roman Catholic	2	M,F
Protestant	2	M,F
Hindu	2	M,F
Jewish	2	M,F,
Muslim	2	M,F
Native American	2	M,F
Atheist	2	M,F
TOTAL	14	7 males 7 females

Case Study Part 1

The initial interviews were conducted in October– December 2017 in California, Wisconsin and Nevada. The conducted interviews lasted between 69 and 87 minutes. The format was informal conversations discussing the following questions:

Interview questions
1. How would you define religious freedom?
2. What are your thoughts on religious freedom in the US today?
3. How do you feel about the religious freedom for your denomination?
4. Do you think there is any difference in religious freedom depending on denomination in the US today?
5. Do you think the protection for religious freedom is getting stronger or weaker in the US?
6. After 9/11 things changed in the US– do you feel that has affected your religious freedom?
7. On a scale between 1-5, where 1 is being not religious at all and 5 being very devout, where would you rate yourself?
8. On a scale from 1-10, where 10 is completely protected and 1 is not protected at all: how would you rate the protection of religious liberty for your religion today?*
9. On a scale from 1-10, where 10 is completely protected and 1 is not protected at all: how would you rate the protection of religious liberty for any religion/Atheism today?

*I allowed at least 4 minutes per question before moving on to the next one

**When interviewing the Atheists I used the phrase “liberty from religion” instead of your religion in question 8.

Case Study Part 2

I followed up with a second individual interview via Skype or Facetime during the months of February through April 2018. In these interviews I asked the following questions:

Interview questions
1. Tell me about how you feel about religious liberty in the US today under the Trump Administration
2. Do you feel more or less confident in the protection of your religious liberty compared to the last time we spoke?
3. Do you feel more or less confident in the protection of religious liberty for any denomination including Atheism compared to the last time we spoke?
4. On a scale from 1-10, where 10 is completely protected and 1 is not protected at all: how would you rate the protection of religious liberty for your religion today?
5. On a scale from 1-10, where 10 is completely protected and 1 is not protected at all: how would you rate the protection of religious liberty for any religion/Atheism today?

*I allowed at least 2 minutes per question before moving on to the subsequent one

When interviewing the Atheists, I used the phrase “liberty from religion” in questions 1,2,3 and 4.

The conducted interviews lasted between 19 and 27 minutes. The video function was used during all interviews so I could observe facial expressions as well as the oral answers to the questions. Only first names are used in the study, as a few respondents, (the Muslims, the Jewish and the Native Americans) asked to not have their full names published. For consistency all interview respondents are therefore mentioned only by their first name in this thesis.

Limitations on theoretical framework and jurisprudence

Given the vast amount of literature, the variety of legal theories, jurisprudence and the plethora of case law on the religious freedom, I have chosen to limit the sections on the legal framework to the following:

- a) An overview of the legal theory on First Amendment Religion clauses; with emphasis on the *De Facto* disestablishment jurisprudence
- b) An overview the Constitutional clauses, the most prominent landmark cases, recent legislation and modern jurisprudence, and the underpinning principles of religious liberty in the US, e.g. church-state separation, free exercise and the Religious Freedom Restoration Act.
- c) A brief explanation of the differentiators between federal and state law and how these various legal statutes interact.
- d) The legal statutes and case law applicable to the specific concerns expressed by the respondents in the case study and in secondary sources

Limitations on case study

Given the small sample size, the results are not statistically significant and this is to be regarded as qualitative research. In addition to this, I have used secondary data points found in literature and news media to further strengthen the research. Another limitation is that people from denominations such as Amish, Paganism, Mormonism, Rastafari, Sikh, Hare Krishna and denominations are not included.

As feeling of safety is a subjective feeling and the numbering of such a feeling may differ from interview respondents to interview respondent. This feeling may also differ from the objective legal reality and the estimate of a sense of safety might therefore be impacted by this subjective feeling. Therefore, it is hard to draw any definite conclusions on the American society as a whole, particularly given the small sample size. Yet, these interviews will give an indication of

the sense of religious liberty and its legal protection in the minds of the respondents and an indication of what issues that are top of mind with regard to religious liberty. The respondents' concerns in combination with secondary sources have been used as a prism and anecdotal evidence on which religious liberty questions that American people ponder on today. This has then been juxta positioned against the relevant jurisprudence for further study.

United States Religious Freedom Jurisprudence

The framers of the US Constitution made religious liberty a political priority by setting forth what is called the “Establishment clause” and the “Free exercise clause” in the First Amendment:

*“Congress shall make no law respecting an **establishment** of religion, or prohibiting **the free exercise** thereof; of abridging the Freedom of Speech or the press, or the right of the people peaceably assemble and to petition the Government for a redress of grievances”³⁰*

These words highlight two fundamental principles of American democracy:

1. Government should not establish any religion,
2. Citizens should be able to freely practice their religion.³¹

These principles themselves receive wide assent people disagree intensely over what they signify and how they apply.

For clarity, it deserves to be emphasized that the federal protection of religious liberty is awarded on a state level and therefore also applies on localities. In the legal hierarchy the Constitution takes precedence over state law.

These religious liberty principles seem quite simple, yet in practice the realization of the values in legal standards have proven challenging and resulted in a few decisions by the Supreme Court in the last half century. Below is an overview of the Religion Clause case law and the conflicts between these clauses and other legislation, including – but not limited to – other constitutional rights.

³⁰ Bold font added.

³¹ Greenawalt *Religion and the Constitution Vol II: Establishment and Fairness* p. 11

The Establishment Clause

The Establishment clause has been interpreted as a way to depoliticize religion and allow for any religion to establish itself without government interference on a state or federal level. In essence, this Establishment clause ordains a separation between church and state. The purpose of the Establishment clause is to separate government and religion, so all denominations and non-believers are equal for the law and coexist in civil life.³²

The case law on the Establishment clause tend to cover claims that the government is establishing religion, thus favoring a dominant religion. As a consequence, decisions that government practices to be in violation of the establishment clause tend to be particularly controversial. When the Supreme Court decision that deemed school prayers in public school in violation of the free establishment clause was one of the Court's most unpopular rulings of the last fifty years.³³ The Court motivated its opinion in the following way: "the religion clauses mean that religious beliefs and religious expressions are too precious to be either proscribed or prescribed by the State".³⁴

Other issues that have been challenged under the Establishment clause are the display of religious symbols and messages on public property. Some people welcome an expression of Christian sentiment, such as a crèche at Christmas but some find this an infringement on their religious freedom.

The application of the Establishment Clause has rendered active discussion in civil life and therefore been brought to adjudication on many occasions with intricate questions, such as if the federal government supply chaplains to the armed forces or to federal prisons? Does requiring a

³² Levy, L. *Establishment Clause: Religion and the First Amendment*. p. xiv

³³ Greenawalt,, K. *Religion and the Constitution Vol II: Establishment and Fairness*. p. 12 referring to the cases *Lee v. Weisman* 505 U.S. 577 (1992) and *Abington Township v. Schempp* 374 U.S. 203 (1963)

³⁴ Harrison & Gilbert *Freedom of religious decisions of the United States Supreme Court* p. 152 referring to *Lee v. Weisman* 505 U.S. 577 (1992)

kosher butcher to close his shop on Sunday endorse the Christian Sabbath, thereby accommodating state policy with the needs of religion, contrary to the principle of separation of church and state? The answer to all the questions above have been answered affirmatively by the courts.

Other controversies have developed over actual texts such as displays of the Ten Commandments in public schools and in state office buildings. Not until 1980 did the Supreme Court decide a dispute over this use, perhaps because long-standing practices reflecting a Christian perspective had only recently begun to seem problematic. In *Stone v. Graham*, the Court struck down a Kentucky statute that required public schools to post the Ten Commandments in every classroom.³⁵

Over time, two different schools of thought have developed on the establishment clause: the non-preferentialists who believe that if public policy does not prefer one sect or religion above others, but treats all without preference, nothing in the Constitution bans government aid and sponsorship of religion. The proponents of this theory maintains that is a narrow interpretation which aims to keep the Establishment clause subordinate to the free-exercise clause that guarantees religious liberty.³⁶ Still, this thinking allows government to provide aid to religious parishes, as long as no church or denomination receives preference over others.

The separationists hold an opposing view. In their school of thought the clause should be interpreted as there is a wall between church and state. This view purports that religion flourishes best when left to private voluntary support in a free society. This view was adapted by the Supreme Court in the case of when William Bennet, secretary of education, wanted to orchestrate prayers in schools. Bennet, a non-preferentialist claimed that as no church or denomination received preference, e.g. the students could pray whichever God they decided, this did not violate the amendment's prohibition against laws respecting an establishment of religion.

³⁵ Greenawalt, K. *Interpreting the Constitution* p. 11 referring to case *Stone v. Graham*, 449 U.S. 39 (1980)

³⁶ Levy, L. *Establishment Clause: Religion and the First Amendment* p. xvi

The Supreme Court took the view that this could introduce coercion into religious obligations and thus would violate the establishment clause.³⁷

The legal community thereby assumed that the non-preferentialist position was without constitutional merit. This opinion was then disproven when Chief Justice Rehnquist of the Supreme Court wrote an opinion in 1985 stating the following about the Establishment clause: “The Clause does not prohibit the federal government from providing nondiscriminatory aid to religion.”³⁸

The degree of assistance government may offer to religious organizations have been the one of most pervasive concern in Establishment litigation. Financial support for religious groups that supply services that nonreligious organizations also provide, such as hospitals and soup kitchens has provided little controversy as long as the religious groups do not discriminate against their customers on religious grounds. The most controversial application has been financial aid to parochial schools. Over the years, the Supreme Court has become much more permissive about financial aid to religious schools and in a recent case government vouchers, which yield monetary aid for the schools, were deemed constitutional by the Supreme Court.³⁹

This case law is hard to interpret and thus both non-preferentialists and separationists maintain that their view is supported by the jurisprudence.

Free Exercise

The basic principle underlying the Free exercise clause is that the government should not interfere with people’s liberty to decide what they believe about religion and engage in religious practices. However, not all religious practices are accepted; for instance, a state will consider religious sacrifice of human beings as murder, regardless whether human sacrifices are a part of

³⁷ Levy, L. *Establishment Clause: Religion and the First Amendment* p. xvi.

³⁸ Levy, L. *Establishment Clause: Religion and the First Amendment* p. xvii

³⁹ Greenawalt, K. *Religion and the Constitution Vol II: Establishment and Fairness* p.12 referring to the case *Zelman v. Simmons-Harris* 536 U.S. 639 (2002)

a religious rite, such as the Aztecs'. The reasoning behind this is that the legislation against murder is not targeting a particular religion, unlike for instance the French law prohibiting covering your face, which is seen as legislation targeted at Muslim women.

The Supreme Court's development of Free Exercise doctrine started with a decision on a challenge by a Mormon to his conviction under a secular law that prohibited polygamy. In this landmark case the court stated, "Laws are made for governments of action, and while they cannot interfere with mere religious beliefs and opinions, they may with practices."⁴⁰ In essence this meant that Mormons might believe in polygamy, but that did not mean that they could practice polygamy in secular society.

Following this case, the Supreme Court rejected claims that conscientious objectors had a right to avoid military service during the 1920s and the 1930s. It also rejected the claim from Jehovah's Witnesses that their children should be excused from a compulsory flag salute in school.⁴¹ This ruling was reversed three years later in *West Virginia board of Education v. Barnette*.

In 1963 a Seventh Day Adventist claimed that the state had violated her religious rights by denying her unemployment compensation because she refused to work on Saturdays, her Sabbath. The Supreme Court upheld her claim and indicated that states must sometimes create exceptions from valid general laws for claims of religious conscience.⁴² It stated that when a law infringes on a person's free exercise of religion, a state can only apply it against that person if it demonstrates a compelling governmental interest in doing so. The state could not demonstrate such interest in denying unemployment compensation to the Seventh Day Adventist.

⁴⁰ Greenawalt *Religion and the Constitution Vol II: Establishment and Fairness* p. 9 *Reynolds v. United States* 98 U.S. 145 (1848)

⁴¹ Greenawalt. *Religion and the constitution Vol 1 : Free exercise and Fairness* p. 31 referring to the case *Minersville School Dist. V. Gobitis*, 310 US 586 (1940)

⁴² Greenawalt, *Religion and the constitution Vol 1: Free exercise and Fairness* p. 31 referring to the case *Sherbert v. Verner*, 374 US 398 (1963)

This “compelling interest”-test seemed to be sufficient in protecting free exercise of religion, but in practice this legal test became complex. In the case *United States v. Lee*, an Amish employer made a religious objection to paying Social Security tax as the covered employees were Amish and the Amish refuse to take advantage of Social Security. According to the Court, the government had a compelling interest in “not making exceptions to its standard of taxation”.⁴³

In 1990 the Supreme Court rejected a claim by members of a native American Church that they had a right to use peyote in the worship services.⁴⁴ In this case the Court stated that if a law is generally valid, the government can apply it against religious claimants. Justice Scalia, the opinion’s author was inclined to the principle that legislatures could choose to grant exemptions from legislation, but that the constitution does not demand them.

This principle manifested itself in the case of the Hialeah case. In this case the City of Hialeah adopted ordinances to ban animal sacrifice. Their undoubted target was the practice of such sacrifices by adherents of the Santeria religion.⁴⁵ The Supreme Court upheld the complaint against the city ordinances prohibiting animal sacrifice, but continued to allow kosher slaughtering and private slaughtering of a small hogs or cattle per week.⁴⁶ The reasoning behind the judgment was based on that if the city allowed certain practices versus animals on the basis of religion (as in the case of kosher butcher practices), the same principles should apply for all religions, including the Santeria religion.

The *Hialeah* case is unusual as legislators rarely discriminate overtly among religions or target religious practices. Instead they adopt laws that are uncontroversial in most their applications and the crucial issues becomes whether legislatures or courts should create exceptions that are based

⁴³ Greenawalt, *Religion and the constitution Vol 1: Free exercise and Fairness* p. 32 referring to the case *United States v. Lee*, 455 US 252 (1982)

⁴⁴ Greenawalt *Religion and the constitution Vol 1: Free exercise and Fairness* p. 32 referring to the case *Employment Division v. Smith*, 494 U.S. 872 (1990)

⁴⁵ Greenawalt *Religion and the constitution Vol 1: Free exercise and Fairness* p. 10

⁴⁶ Greenawalt, *Interpreting the Constitution*. p. 263 referring to the case *Church of the Lukumi v. City of Hialeah*, 508 U.S. 520 (1993)

directly on a person's religious convictions or rest on some other standard such as "conscience" that includes both religious and non-religious convictions.

Free exercise and employment law

The question of free exercise came in to focus in the case in the *Hosanna-Tabor*.⁴⁷ In this case, the Supreme Court upheld the "ministerial exception" to employment laws.⁴⁸ This has been widely criticized as it allows churches to bypass any anti-discrimination laws that are applicable to other employers.

Employment and anti-discrimination laws were also applicable in another recent Supreme Court case *Abercrombie & Fitch*. In this case a preppy clothing store refused to hire a Muslim woman because her headscarf violated the company's "look policy". The Supreme Court ruled that the company had violated laws banning religious discrimination and wearing a head scarf.⁴⁹

Free exercise and commercial interests

Another point of contention with regards to free exercise of religion was invoked in the case regarding the Dakota Access Pipeline, where the Cheyenne River Sioux argued that completing the pipeline would substantially burden their religious practice by desecrating the water used in a sacred ceremony.⁵⁰ This motion was struck down by the courts with reference that the pipeline did not substantial burden their religious freedom. The case was appealed and in its most recent

⁴⁷ *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012)

⁴⁸ Ullman C & Zott L M *Religious liberty* p. 60 referring to *Hosanna-Tabor*, 565 U.S. (2012)

⁴⁹ Thomas *Clash of Liberties* Sojourn 10/2017 p. 19, referring to *Equal Employment Opportunity Commission v. Abercrombie & Fitch*, 575 U.S.(2012)

⁵⁰ Thomas *Clash of liberties*, Sojourn 10/2017 p. 21 referring to the case *Standing Rock Sioux Tribe v. US Army Corps of Engineers*, No 16-1534 (2017)

ruling, the DC Court made a ruling imposing limitations on the US government, who was asked to take the effects on the tribes into consideration, citing environmental and cultural concerns.⁵¹

Free exercise and freedom from religion

There are also the concerns expressed by those who assert their right to freedom from religion: after a Texas cheerleaders held signs encouraging their team with Bible verses at a public-school football game the Freedom From Religion Foundation maintained that the cheerleader were violating the Constitution.⁵² In this case, the cheerleaders right to use Bible verses were upheld with reference to both the Freedom of Religion and Freedom of Speech according to the Texas court.

Which groups are afforded protection under the free exercise clause?

Not all groups who define themselves as a religious are awarded the protection from the First Amendment. The free exercise clause was also invoked by the Members of the Church of the Flying Spaghetti wanting to wear headgear (a colander) in driver's license photos. In 2016 this was struck down by the courts as "Pastafarianism" is a parody, not a real religion, thus not subject to religious protection.⁵³ On the other, the Church of Scientology is regarded as a religion and thus not paying taxes, a constant bone of contention in the debate about religious liberty and exemptions. Also, atheists and their organization argues that their right to freedom from religion should be as fiercely protected by the courts and the Constitution.

⁵¹ National Indian Law Library Federal Trial Courts Bulleting Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers

⁵² *McGaughy Appeals Court sides with Texas cheerleaders who sued to display Bible verses at football games*, Dallas News 29/9/2017

⁵³ Thomas *Clash of liberties*, Sojourn 10/2017 p. 21

Federal and State legislation on Religious Liberty

The Religious Freedom Restoration Act

As the constitutional clauses and the accompanying case law are not easy to interpret, there have been efforts to pass laws protecting religious freedom by the US Congress. These laws are lower in hierarchy to the Constitution, but still relevant in interpreting the legal status of religious liberty.

In 1993 Congress passed the federal Religious Freedom Restoration Act (hereinafter referred to as the RFRA), a bi-partisan effort that was signed by President Clinton. This effort was endorsed by a dozens of organizations, ranging from the ACLU and Americans United for separation of church and state to the National Association of Evangelicals and American Jewish Association.⁵⁴ Senator Hatch, the co-sponsor of the bill proclaimed the following upon its passing:

“The Religious Freedom Restoration Act is about allowing people with sincere religious beliefs to act upon those beliefs, to participate in the public debate without having to run the gauntlet of unnecessarily large Government roadblocks.”⁵⁵

The RFRA reinforces that the “framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution”.⁵⁶ Congress later passed the Religious Land Use and Institutionalized Person Act to safeguard prisoners’ religious liberty rights and protect houses of worship from burdensome zoning regulations.⁵⁷ As the RFRA is federal legislation, many states followed suit and passed their state bills similar to the RFRA to safeguard religious liberty in individual states.⁵⁸

⁵⁴ Corvino *Debating religious liberty and discrimination* p. 15

⁵⁵ Hamilton *God v. the Gavel* p. 18

⁵⁶ The RFRA (a) p. 1

⁵⁷ Corvino *Debating religious liberty and discrimination* p. 17

⁵⁸ Corvino *Debating religious liberty and discrimination* p. 17

The RFRA states that laws that may seem ‘neutral’ toward religion can burden religious exercise as surely as laws intended to interfere with religious exercise.⁵⁹ The legislation then states that “governments should not substantially burden religious exercise without compelling justification” and that it is “the least restrictive means of furthering that compelling governmental interest”.⁶⁰

Just as with First Amendment Religion Clause Jurisprudence, there have been a lot of clashes between the religious conscience protected in the RFRA and secular laws. For instance, the RFRA critics maintain that the RFRA has been used as a mean to refuse to do business with same-sex couples and to allow people to use religious beliefs as defense in disputes where the government was not a party.⁶¹

The RFRA has also been cited in employment laws. For example, the Affordable Health Care Act (aka Obamacare) that mandates employers to pay for their employees healthcare insurance, including birth control for female employees.⁶² The Alliance Defending Freedom maintained that this is a violation of Freedom of Religion as some employers object to contraceptive devices and abortions on religious grounds.⁶³ The Supreme Court ruled in its favor. In its judgment in the *Hobby Lobby case*, Supreme Court Judge Alito writes that the requirement that companies provide contraception coverage imposed a substantial burden on their religious liberty.⁶⁴ However, the Court stressed that this only applied to corporations run on religious principles and should be interpreted narrowly, emphasizing that even those corporations were unlikely to prevail if they objected to complying with other laws on religious grounds.

⁵⁹ The RFRA (a) p.2

⁶⁰ The RFRA (a) p.3 and (b) p. 2

⁶¹ Corvino *Debating religious liberty and discrimination* p. 17

⁶² Ullman & Zott *Religious liberty* p. 106

⁶³ Hamilton *God v. the Gavel* p. 13 referring to *Burwell v. Hobbylobby* 573 US_(2014)

⁶⁴ Liptak *Supreme Court Rejects Contraceptives Mandate for Some Corporations*, New York Times 1/7/2014

This judgment made critics of the RFRA to state that the legislation allows “large for-profit businesses invoking their owner’s religious beliefs to impose the cost of their beliefs about contraception on their employees.”⁶⁵

National security and the PATRIOT Act

Another example of religious liberty clashing with secular laws are when it comes to national security matters. The 1996 Antiterrorism Act, which has been called “one of the worst assaults on the Constitution in decades” has a distinct focus on religion and possible terrorist activities.⁶⁶

In the weeks following the 9/11 attacks, the President and Congress reacted with taking measures that could prevent possible reoccurrences. One of the chief contributions was the USA PATRIOT Act, an acronym for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.” The contents of the act included hundreds of provisions, amending previous laws that empowered justice officials to target and surveil individuals with less basis for suspicion and less judicial review. Many of these provisions threatened privacy and the freedoms of speech, association and religion. The bill’s supporters declared that this was unfortunate, but necessary as Americans had to give up some of their liberties to be safe.

President Bush made a declaration of emergency under which he seized the assets of a number of American charities, and created a highly secret “President’s Surveillance Program” under which the National Security Agency conducted surveillance of countless Americans.⁶⁷ The Administration maintained that the measures taken were necessary and that the laws applied to all Americans regardless of their religion and ethnic origin.⁶⁸ However, in practice the impact of these laws seem to have affected mostly Muslim Americans of Arab origin. Still, this is hard to determine as the measures taken under the Patriotic Act and the Emergency order are classified

⁶⁵ Hamilton *God v. the Gavel* p. 13 referring to *Burwell v. Hobbylobby* 573 US_(2014)

⁶⁶ Cole & Dempsey *Terrorism and the Constitution* p. 3

⁶⁷ Herman, *Taking liberties: the war on terror and the erosion of American democracy* p. 14

⁶⁸ Herman, *Taking liberties: the war on terror and the erosion of American democracy* p. 19

and thus it is impossible to know if these measure have disproportionately affected the groups mentioned above.

Security concerns are often cited with regards to the Muslim clothing such as *hijab* or *burqa*. In the case in Florida, *Sultaana Lakiana Myke Freeman v. State of Florida*, a Muslim woman wished to have her driver's license issued either without her photo on it or with a photo of her wearing a dress that covered her entire body except for her eyes. Citing the post-9/11 security concerns, the state of Florida insisted that the woman's driver's license is her primary form of identification and that law enforcement personnel ought to be able to determine her identity efficiently with the aid of her license.⁶⁹ In this case, the judge agreed with the state, and the ruling stated that while the woman "most likely poses no threat to national security, there likely are people willing to use a ruling permitting the wearing of full-face cloaks in driver's license photos by pretending to ascribe religious beliefs in order to carry out activities that would threaten lives."⁷⁰

The ruling has been criticized as it justifies state infringement on a fundamental liberty as a means to prevent a hypothetical crime in the future. The ruling has also been defended as it treats everyone equal: pastafarians are not allowed to wear colanders and Muslim women are not allowed to cover their whole face. Whilst this is true, the reasoning behind the rulings on the pastafarians and the Muslim *hijab* differ completely: one is not regarded as a religion in the eyes of the law and the other is a security concern.

Another example of security concerns clashing with the First Amendment is the case of Park 51 in New York City.⁷¹ This case relates to the Establishment Clause and has created one of the most heated debates over religion in the US. The Park51 project was initiated by a Muslim business man who wished to develop a multi-faith community center a few blocks from ground zero. The project was led by an imam from a nearby mosque and faced immense opposition,

⁶⁹ Ginn *Do religious groups in America experience discrimination?* p. 65 referring to the case *Sultaana Lakiana Myke Freeman v. State of Florida*, LEXIS 13904 at *22

⁷⁰ Ginn *Do religious groups in America experience discrimination?* p. 65 referring to the case *Sultaana Lakiana Myke Freeman v. State of Florida*, LEXIS 13904 at *22

⁷¹ Nussbaum *The New religious intolerance* p. 200

especially from the right-wing media. The project was awarded building permission by the landmark commission, citing “the Establishment Clause” as grounds. The landmark commission was then sued by the American Center for Justice and Law, representing a fire fighter who had survived the 9/11 attacks. A motion was also placed in the State Supreme Court to stop the development. The political debate became fierce and heated and thousands of people protested on New York streets holding signs “No 9/11 Mega-mosque” and in the political debate the Republican congressman said that his democratic opponent “wants to commemorate the tragedy by building a mosque on ground zero.” This statement was incorrect as it was a multi-faith center that was being planned.

While the political debate raged on, the legal cases were settled in the New York courts. All the judgments stated that the First Amendment protected the building of the center.⁷² The political opposition then changed its stance and stated that there was a difference between constitutional rights and good judgment, and that whilst the group had a right to build the center, it would be in better taste to build it elsewhere. The developer relented and developed a condo community in the Park51 area, citing fundraising challenges as a reason to abandon the multi-faith center.⁷³

The politicizing of religious freedom

In the presidential race for 2016, Donald J Trump dominated the news media with his views on immigration. As mentioned earlier, as President he introduced a Muslim Ban. Trump motivated this as necessary in order to fight terrorism. This illustrates an ongoing debate among American politicians: can domestic tranquility can be secured without sacrificing the blessing of religious liberty?

The Supreme Court ruled on third iteration of the Muslim ban. On its face, the executive order is religion-neutral as it pertains to all travelers from Chad, Iran, Somalia and other predominantly Islamic countries (with the exception of Venezuela and North Korea). The challengers, Hawaii, several individuals and a Muslim group argued it prohibits Muslim immigration to the US. The

⁷² Nussbaum *The New religious intolerance* p. 210

⁷³ Samtani, *El-Gamal: After the firestorm*, The real deal 4/8/2014

president made the order with reference to foreign policy and national security. In the judgment the majority (5-4) ruled that the ban was lawful. The Court's majority claimed that what began life as a Muslim ban had evolved into "a facially neutral policy denying certain foreign nationals the privilege of admission."

The dissenting Justice Sotomayor's held a different view— citing chapter and verse from Trump's Twitter logs — "the full record paints a ... harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith."⁷⁴

Supreme Court Justice Alito stated to the media " I am not sure you say it is a Muslim ban if it only pertains to 5 % of all Muslims?"⁷⁵ The President and the Justice Department argues that the action is not aimed at a certain religion, with Solicitor General Francisco arguing that "to keep out a particular race or religion, no matter what – that would undermine the facial legitimacy of the action."⁷⁶

The critics of the Supreme Court's decision to have pointed out that it is similar to the *Korematsu* decision when Americans of Japanese descent were interned during the Second World War.⁷⁷ However, from a legal perspective there is a very significant different between these cases. People interned under Roosevelt's order were US citizens with constitutional rights. The people targeted by Trump's executive order are not US citizens and thus not granted Constitutional rights. On the other hand discrimination laws stipulate that laws discriminating on the basis of religion are illegal.⁷⁸

⁷⁴ Koh, *Symposium: Trump v. Hawaii – Korematsu's ghost and national-security masquerades* 28/6/2018 SCOTUS blog referring to *Trump v. Hawaii* 585 US_2018 and *Korematsu v. United States*, 323 U.S. 214 (1944)

⁷⁵ *Angela Mitchell reports* referring to Constitutional Challenges to Trump's Muslim Ban. MSNBC 25th of April 2018

⁷⁶ Oral arguments in the US Supreme Court on April 25th 2018, played on *The Beat with Ari Melber* on MSNBC

⁷⁷ Liptak *Travel Ban Case Is Shadowed by One of Supreme Court's Darkest Moments*, New York Times 16/4/2018 referring to the case *Korematsu v. the United States*, 323 U.S. 214 (1944)

⁷⁸ Interview with Anthony Romero, executive director American Civil Liberties Union on *The Beat with Ari Melber* MSNBC 25th of April 2018

Another surprising development involving politics and religion was when House Speaker Paul Ryan fired the Chaplain of congress for being too political. This decision has been criticized by all political parties, and it is being portrayed as a preference for Roman Catholic priests by Paul Ryan.⁷⁹ When the chaplain later rescinded his resignation amid the public furor, Paul Ryan conceded and the Congress chaplain will now serve his term. However, this sparked a debate on whether a Congress chaplain really belongs in multi-faith modern United States.

Supreme Court Justices – a political appointment and the relevance of their religion

The political debate also focuses on the appointment of Supreme Court Justices. For instance, when Democratic President Barack Obama nominated a judge, the Republican Majority refused to hold a hearing as it was election year and a “judge sits for life”. After Donald Trump got elected, a different nominee (Neil Gorsuch) was named and later confirmed. Another Trump nominee was confirmed in October 2018. This was hailed as a victory for evangelicals. The current composition of the Supreme Court and their denominations are as follows:

Name	Religion	Appt. by	On the Court since
John Roberts	Roman Catholicism	Bush	2005
Brett Kavanaugh	Roman Catholicism	Trump	2018
Clarence Thomas	Roman Catholicism	Bush	1991
Ruth Bader Ginsburg	Judaism	Clinton	1993

⁷⁹ Burton *Did Paul Ryan fire the House Chaplin for criticizing tax cuts?* Vox 27/4/2018

Stephen Breyer	Judaism	Clinton	1994
Samuel Alito	Roman Catholicism	GW Bush	2006
Sonia Sotomayor	Roman Catholicism	Obama	2009
Elena Kagan	Judaism	Obama	2010
Neil Gorsuch	Raised Roman Catholic, attends Episcopal Church	Trump	2017

It deserves to be pointed out that all the Supreme Court Justices take an oath to uphold the Constitution of the United States and to uphold the law, thus their denomination should be irrelevant in the application of the law. However, the denomination of the Supreme Court Justices is often discussed in the political context. (This is also discussed in the Introduction)

Case Study: Religious liberty - the law and the perceptions

“The Trump Administration has announced the creation of a new Conscience and Religious Freedom within the Health and Human Services Department’s Office for Civil Rights. The Division will accept from citizens about potential violations of conscience and religious-freedom rights and enforce existing federal law to protect those rights, including prohibitions on forcing doctors and nurses to participate in abortions, sterilizations, and assisted suicides. Far from targeting certain individuals for discrimination, as some progressive critics have claimed, this division will work to protect First Amendment rights for all Americans, regardless of their faith or beliefs.”

The National Review, February 19th 2018⁸⁰

⁸⁰ The Week (ed.) p. 6 National Review 19/2/2018

In light of the quote above and previous considerations, it is of vital interest to examine how everyday American perceive their religious liberty and its protection. Is the legal framework enough to make them feel safe in exercising their religious liberty? In order to get an indication of this, the case study provided the following findings.

The Roman Catholics

Name	Age	Gender	Denomination	Rate of devotion *
Charles	52	Male	Practicing Catholic since childhood	4
Melissa	44	Female	Practicing Catholic since childhood	4.5

*self-rated on a scale between 1-5

Charles

Charles defines religious freedom as “a fundamental right and the first one among our civil liberties”. He feels that religious freedom in the US is protected by the Constitution, both with regards to Catholicism and other religions:

“At the heart of American life is a vision of man, government and God. This way of thinking has given us a free society with many cultural and religious expression. I don’t see any religions being mistreated in America today. And that goes for normal Muslims too. The only Muslims that are being questioned are the terrorists and they are not real Muslims anyway as terrorism has nothing to do with religion.”

During the conversation, Charles expresses that his is mainly concerned with what he refers to “political correctness” from the political left.

“The threats against religious freedom in our country are happening right now. Thankfully we now have a Supreme Court which allows employers to refuse to supply birth control to employees. We can’t have the government to interfere with the consciences of employers and doctors. It is in violation of moral convictions of not only Catholics, but also other religions.”

During our follow up interview, Charles expresses similar sentiments:

“I am very grateful that we have a Republican President who cares about religion. Trump is supporting us all. I get really provoked when libertarians try and reduce real moral religious convictions into some silly subjective beliefs. Any objections we have against abortions and same sex marriages are not based on some prejudice. It is based on two thousand years of moral experience and religious reasoning. And when we allow liberals to redefine religious belief and call it some kind of private bias our institutional ministries have no public value. To have a religious conviction is not prejudice and I don’t think that anybody should be forced to make a cake against his religious beliefs.”

Melissa

Melissa defines religious freedom as “a right to worship and a right to follow your own conscience and religious convictions without repercussions.” She feels that “the framers of the Constitution made sure that religious freedom is a core principle in the foundation of our nation.”

In her opinion, all religions are given the same protection by the law, but that the government keeps trying to limit the right of conscience, which is protected under the law:

“But I am not talking about silly things like a woman not wanting to be photographed for her driver’s license without covering all her face. That is a safety issue and if Muslim women can’t comply they just have to ask someone else to drive! But when the state starts interfering in the internal affairs of religious organizations on how to carry out their hiring and firing or force them to pay for birth control pills that is taking the nanny state too far.”

During our follow up interview; Melissa feels strengthened in her belief in the strength of religious protection in the US.

“I am so glad that the courts have stood up for religious freedoms. If the states want to provide women free birth control, the state should pay for it, not religious employers and that is exactly what the court said. If they had not done that I don’t know how the Catholic church could have continued.... They have thousands of employees.”

On the topic of other religions being afforded the same protection, she says:

“Absolutely. I think that we are very democratic society when it comes to religion. I know that some Muslims feel persecuted but to be honest: if they have nothing to hide they have nothing to worry about. If they can wire-tap other citizens, why should they not be able to wire-tap Arabs?”

Applicable case law and legislation

Overall, the respondents expressed little concerns about religious freedom and freedom of establishment for Catholics in particular. There were no concerns about building permits for churches or any similar type of hindrances for free exercise of religion. Neither interview subject expressed any particular concerns with regards to other religions and their free exercise and establishment.

Both interview subjects expressed concerns about the freedom of conscience, and the secular employment or anti-discrimination legislation infringing on Catholics’ religious liberty with regards to; contraception and abortion, hiring practices and same sex marriages.

The case law pertaining these concerns are: *Roe v. Wade*, a landmark case that establishes the right to abortion as a part of a right to privacy.⁸¹ The Supreme Court has also ruled on the hiring practices for religious organizations in the case *Hosanna*, which basically exempted religious

⁸¹ *Roe v. Wade*, 410 U.S. 113 (1973)

organizations from anti-discrimination legislation, thus allowing them to hire pastors of their own denomination.⁸² However, with regards to same sex marriage, the Supreme Court ruled in the case of *Obergefell* that this is constitutional right, much to the consternation of religious organizations.⁸³ Nevertheless, a church is not mandated to officiate same sex marriages, which is in line with the reasoning in the *Hosanna* case.

With regards to the right to refuse to bake a wedding cake for a same sex couple, the Supreme Court ruled in the favor of the religious baker.⁸⁴ The court held that the Colorado Civil Rights Commission's conduct in evaluating a cake shop owner's reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause.⁸⁵ The Court explained that while gay persons and same-sex couples are afforded civil rights protections under the laws and the Constitution, religious and philosophical objections to same-sex marriage are protected views and can also be protected forms of expression. The Colorado law at issue in this case, which prohibited discrimination against gay people in purchasing products and services, had to be applied in a neutral manner with regard to religion. The SCOTUS majority acknowledged that from bakers' perspective, creating cakes was a form of artistic expression and a component of his sincere religious beliefs.

The Muslim woman wishing to cover her face on her driver's license was adjudicated and the courts ruled in favor of the state, citing security concerns and that having a driver's license is not a requirement for free exercise of the religion.⁸⁶

De Facto doctrine considerations

All the cases above fulfill the criteria for neutrality. Neither respondents expressed any concern about legislation being applied in a non-neutral manner. In fact, the neutrality principle was

⁸² *Hosanna-Tabor*, 565 US (2012)

⁸³ *Hodges v. Obergefell*, 576 US_ (2015)

⁸⁴ *Masterpiece Cake Colorado Civil Rights Commission* 584 US_ (2018)

⁸⁵ *Master Piece Cake v. Colorado Civil Rights Commission* 584 US_ (2018)

⁸⁶ *Sultaana Lakiana Myke Freeman v. State of Florida*, LEXIS 13904

quoted in reference to the *Sultanaa* case on the Muslim woman wishing to cover her face in the photo on her driver’s license.

In terms of separation, none of the respondents expressed concerns about the church and state not being separated, however there were concerns about how the state might impose “liberal” values on Catholics who oppose same-sex marriages on religious grounds. From a strict legal perspective, the case law is mostly fulfilling the separation requirement, with the possible exception of the *Hosanna*, where churches are exempt from certain state legislation due to their religious status.

Autonomy to practice the Catholic religions was a concern of the respondents with regards to reproductive rights in *Hosanna* and *Roe v. Wade*. In these cases, the jurisprudence is threading the needle by allowing religious organizations exemptions from legislation on subsidizing birth control pills, but on the other hand abortions are legal for those who do share the Catholic values, citing a constitutional Right to privacy. Thereby, there is accommodation to practice your religion and live with your religious values whilst others can make other choices without religious organizations are forced to actively support those choices.

The Protestants

Name	Age	Gender	Denomination	Rate of devotion *
Anna	38	Female	Practicing Lutheran since childhood	4
Philip	43	Male	Practicing Lutheran since childhood	5

*self-rated on a scale between 1-5

Anna

Anna defines religious freedom as “a right to practice your religion and act in accordance with your morality without the government interfering.” She feels that “the liberals are the puritans today. They are trying to force their secular liberal values on good Christians. We have to fight this.”

In her opinion, all religions are given the same protection by the law, but that the government and the Supreme Court made a mistake when they banished school prayers:

“I think the political correctness in this country has run amok. When neutral school prayers are not allowed in our schools, I don’t know what the world is coming to. I don’t want my son to hear that God did not create the world and that we all stem from lower creatures. It is not right.”

During our follow up interview; Anna expresses that she is more comfortable with religious liberty in the US;

“I think that the discussion about our religious freedom has finally been put on the table. I think that the fact that I can send my kids to a Christian school with school vouchers is great, but I feel sorry for the children who won’t get a proper religious education in our public school system. It is God that is looking out for our nation, not the government. These liberals are trying to replace God with legislation and state authorities, but there is a back lash now. And I think we are going to win this time. Especially with a judge appointed by a Republican.”

On the topic of other religions being afforded the same protection, she says:

“All religions are allowed in this country. And let’s be honest, we all have similar morals, which is why I think that it is great that we can have moments of silence and prayers in schools. I really could not care less if someone is a Catholic, Muslim or Jew- we all want to live with our God and our values. But nobody should tell us what these values are – especially not a liberal leftist wing!”

Philip

Philip defines religious freedom as “the right to practice our faith openly and as we choose.” He feels that “religious liberty is more important than ever, now that we live in a plutocratic society, tolerance is key. If we are not tolerant towards each other, our society will not thrive.”

He believes that all religions are awarded the same protection under the law, but prejudice and political elements make judges interpret the law differently, depending on religious denominations:

“I think that we all have to admit to the fact that Muslims are being treated differently than the rest of us. I know that I am a Lutheran and that my religion is not associated with any terror suspicion. But what happens the day that I want to open my church as a sanctuary for people who are fleeing from suppression and war? If they happen to be Muslims, will that make me a terrorist?”

During our follow up interview; Philip expresses the same feelings with regards to religious inequality in the US;

“I am pretty sure that my religious freedom and convictions will be well-respected by the courts and our politicians. I feel that Evangelicals are a political force to be reckoned with, but if I were Muslim – or Atheist for that matter - I would not feel the same way today, especially not with this President.”

Applicable case law and legislation

The Supreme Court ruled on school prayers and religion in school in two landmark cases: *Engel v. Vitale* and *Abington Township v. Schempp*.⁸⁷ The case law stipulates that schools may not impose religion in public education. The reasoning behind this is that public schools may not

⁸⁷ *Engel v. Vitale*, 370 US 421 (1962) and *Abington Township v. Schempp*, 374 U.S. 203 (1963)

teach religious truth, especially not in favor of a certain denomination, but may teach about religion.⁸⁸

With regards to the teaching Darwinism and evolution, the court has ruled that “the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.”⁸⁹ As a direct result most public schools teach both evolution and Darwinism.⁹⁰ However, parents have a right to seek an exemption from these teachings in accordance with the *Yoder* case, where Amish parents were allowed to withdraw their children from school from eighth grade.⁹¹ There is also the opportunity to place your children in religious schools with the use of school vouchers, as the Supreme Court allowed in the 2002 ruling.⁹²

With regards to religious sanctuaries, the Supreme Court ruled in the 1980’s that churches could not be used to house illegal immigrants under the law. There are no pending cases on this subject-matter at this point, although the political debate on the topic of “sanctuary cities” is fierce.⁹³

De Facto doctrine considerations

Most of the case law pertains to efforts to apply the neutrality principle by banishing Christian school prayers and allowing the teaching of Darwinism in public schools. The ban on using churches as sanctuaries is also neutral, as neither Mosques, Monasteries nor Temples are not given that right either.

⁸⁸ Greenawalt *Does God Belong in Public Schools?* p. 38

⁸⁹ *Epperson v. Arkansas*, 393 US 97 (1968)

⁹⁰ Greenawalt *Does God belong in public schools?* p. 122

⁹¹ Greenawalt *Does God belong in public schools?* p. 183 referring to *Wisconsin v Yoder*, 406 US 205 (1972)

⁹² Frieden *Supreme Court affirms school voucher program*, CNN 27/6/2002 referring to the case *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

⁹³ Thomas *Clash of Liberties* Sojourn 10/2017 p. 21

In terms of separation, the respondents expressed about how the state might impose “liberal” values on Protestants. There were also concerns about school prayers not being allowed. From a strict legal perspective, the abolishment of school prayers was a direct result of a *De Facto* principle applied to the Christian school prayers. Therefore, the case law is fulfilling the requirements of a separation between church and state, with the possible exception of allowing parents to use school vouchers to send their children to a religious school, thus subsidized by tax dollars. Again, the jurisprudence is aiming at threading the needle by determining that the schools to be without prayers, yet allowing parents to use public funds to send their children to religious schools.

In terms of being allowed the autonomy to practice the protestant religion, there were no concerns expressed with regards to the building of churches. In terms of praying, prayers can be conducted outside school hours and thus by allowing parents place their children in religious schools and avoiding the teaching of Darwinism, it must be concluded that the jurisprudence applicable is fulfilling the autonomy requirement, with the possible exception of not allowing churches to be sanctuaries. However, it could be argued that hosting refugees is not a religious right and thus not protected by the First Amendment jurisprudence. The Supreme Courts has upheld criminal convictions of pastors who harbored illegal aliens in their chuchres. However, the Immigration Services are told to respect the sanctity of places of worship in their guidelines.⁹⁴

The Jewish

Name	Age	Gender	Denomination	Rate of devotion *
Rachel	32	Female	Raised and practicing Jewish	4

⁹⁴ Pashman *Sanctuary movement: Houses of worship consider offering refuge to immigrants*, Chicago Tribune 21/2/2017

Michael	41	Male	Raised and practicing Jewish	3.5
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*self-rated on a scale between 1-5

Rachel

Rachel defines religious liberty at “a constitutional right to practice your religion without any hassle.” After thinking a while she adds: “But the legal and the political challenges intertwine. So we have to be careful and not take our religious liberty for granted. We had religious liberty in the Constitution when we turned our backs on the St. Louis, a ship with thousands of Jews fleeing Nazi; we passed laws that overtly excluded and discriminated against the Chinese; and we rounded up more than 100,000 Japanese Americans and interned them in prison camps in the 1940s. So there is always reason to be vigilant.”

It is her belief that Christian and Catholics enjoy more protection in daily life than other religions. However, she states that she thinks Judaism enjoys stronger support than Islam.

“After all the president’s daughter is Jewish now, she converted when she met Jared. I worry a little about the rise of the Nazis and also about Muslims as well. They don’t like seeing the Jewish religion at display. Sometimes I ask my husband not to wear his yarmulke when we go into town. Just to be safe.”

During our second interview; Rachel expresses the same concerns, but she says that she is more worried about religious persecution for Jewish people:

“I didn’t like to hear what the President said about Charlottesville. I also have heard lots of people blaming Jewish people for 9/11. With this president who does not care for civil liberties I’m concerned. And the Muslim ban makes me ill to my stomach. We’re doing the same thing again that we did before.”

Michael

Michael's definition of religious liberty is "allowing our country and our countrymen to practice their religions in peace. This nation was awash in religious fervor when it was founded."

He feels that Christianity is "definitely more protected than Judaism", but that the overall protection from the state and government is "solid". He expresses concerns about overall attitudes among private citizens, not the legal protection.

"On college campuses it is OK to say that you are not anti-Jewish, just anti-Zionist because you support Palestine. But being anti-Zionist is being anti-Semitic. And since it is OK to criticize Israel and its policies, it is also OK to call a Jewish student a kike or attack a Hillel building. All this happened in the last year on my nephew's campus. And then the campus police talk about Freedom of Speech. And I think it's the same thing for Muslims. I heard about someone being harassed for celebrating Ramadan. But you never hear that about Christians being harassed when they are celebrating Easter."

In our follow-up interview: Michael expresses similar concerns about Jews being singled out and blamed for problems in society. "I even heard that almost 50 % of the Pakistani population here in the US believe that 9/11 is Jewish conspiracy. Really? Can you imagine blaming black people for the terrorism of Ku Klux Klan? And where is the political left when it comes to defending Jews? Nowhere."

He continues: "But then I don't like it when people cite religious beliefs and think that this is a legitimate basis for discrimination against minority groups? Take that gay cake case for instance. Orthodox Jews are on the side of the baker. How can that be? They – of all people – should know what it is like to be discriminated against! I also think it is ridiculous when people can't adapt to society. Like trying to wear a Yarmulke in the air force. Not even Israeli air force pilots wear yarmulkes."

Applicable case law and legislation

The Supreme Court ruled on the question of free speech, anti-Semitism and religious liberty in the *Skokie case*, where it stated that the displaying the Nazi Swastika and Nazi propaganda is protected under the First Amendment of free speech.⁹⁵ The Court reasoned that religious freedom was not infringed in this case.

The wearing of a *Yarmulke* was the topic in the Goldman case when an Orthodox Jewish soldier challenged the US Air Force One's regulation regarding wearing of headgear. The Court ruled that the Air Force regulation did not violate the Constitution. The reasoning behind this that “uniformity is necessary in the military”.⁹⁶

The “Muslim Ban” and the “Cake” cases were argued in front of the Supreme Court during the spring of 2018.⁹⁷ The Muslim ban was upheld by the court as discussed above. The cake case is discussed under the heading The Roman Catholics – applicable case law above.

De Facto doctrine considerations

The neutrality principle was applied in the case of *Skokie*, in the sense that Freedom of Speech was not infringed when making statements about religion. Both respondents expressed concerns about the society and culture as a whole is not neutral towards Judaism compared to Christianity. The same can be assumed in the *Goldman* case, as any headgear in the Air Force except the uniform was disallowed, e.g. the wearing of a Sikh Turban would have the same principle applied. With regards to the Muslim Ban, mentioned by one of the respondents, it has to be deduced that there is a *De Jure* but not a *De Facto* neutrality principle. This, especially in light of the political rhetoric on this issue, as quoted by dissenting Justice Sotomayor.⁹⁸ Whilst the

⁹⁵ *National Socialist Party of America v. Village of Skokie* 432 US 43 (1977)

⁹⁶ *Goldman v. Weinberger* 475 US 503 (1986)

⁹⁷ *Master Piece Cake v. Colorado Civil Rights Commission* 584 US_ (2018)

⁹⁸ *Trump v. Hawaii*, 585 U.S._ (2018) Justice Sotomayor's dissenting opinion

reasoning from the Supreme Court sounds neutral, it can only be deemed that it is not *De Facto* neutral.

In the Masterpiece cake case, the court referred to the *neutrality principle* when ruling in the favor of the baker, as the Court held that the Colorado Civil Rights' commission had violated the neutrality mandate, as members of the Colorado State Commission showing impermissible hostility toward the baker's religious beliefs.⁹⁹

In terms of separation, the respondents expressed no concern about state and churches being separated, except for maybe the comments that there is a "favoritism" towards the Christian religions. There is limited case law on the topic of religious favoritism, as it is hard for a plaintiff to show "injury-in fact" in order to have standing in the general courts. This as favoritism for a particular religion accrues to society as a whole, rather than to individuals as such. In general, when the government engages in discrimination the only plaintiffs who have standing are the ones have been actively discriminated against law per the *Allen* case.¹⁰⁰ Religious favoritism is not active discrimination in the eyes of the law. Therefore, when it comes to religious favoritism, the court have laid out a fairly broad-injury-in-fact rule for casing involving religious displays and school prayers. In brief, a plaintiff must have suffered a "personal injury" as a consequence of the claimed violation religious liberty. Such injury may arise where a plaintiff has had direct contact with a religious display or altered her behavior in order to avoid the display. This test covers religious displays on government property as well as school prayers and government proclamations on religious subjects. However, it is not clear how far this rule extends. In the case *In Re Chaplaincy* a group of Protestant Navy Chaplains claimed the Navy was operating its retirement system in a way that benefited Catholic over non-Catholic chaplains. The plaintiffs conceded that they had not themselves suffered discrimination on account of their religion. Instead they advanced the claim that they had suffered injury-in fact-based on their exposure to the message of religious preference and the Catholic favoritism communicated. The Court ruled

⁹⁹ *Master Piece Cake v. Colorado Civil Rights Commission* 584 US_(2018)

¹⁰⁰ Harvard Law Review *Nontaxpayer standing, religious favoritism and the distribution of government benefits, the outer bounds of the endorsement test* p. 2000 referring to *Allen v. Wright* 468 US 737 (1984)

that the plaintiffs lacked standing. This ruling severely limited the possible plaintiffs in a possible “religious favoritism” case.

In terms of being allowed the autonomy to practice the Jewish religion, the respondents expressed no concerns, but in fact frustration with Orthodox Jews insisting on wearing Yarmulke or being against same-sex marriages and thus refusing to sell a cake. The principles outlined in *Masterpiece Cake* and *Obergefell* are not infringing on the autonomy of being able to live as an Orthodox Jew, as you are not required to make cakes or marry same-sex couples.

The Hindus

Name	Age	Gender	Denomination	Rate of devotion *
Deepsiak	41	Female	Hindu	4
Rajeev	38	Male	Hindu	4

*self-rated on a scale between 1-5

Deepsiak

Deepsiak’s definition of religious liberty is “letting all different religions worship and live in accordance with their own spiritual practice without hurting anyone else. That is very much how I feel too, ahimsa, non-harming of others should be the bedrock of all religions.”

She feels that her religion and others are protected by the government and the state. “But Hinduism is not very common in the United States. Sometimes people think it is the same thing as Yoga. But the only thing I have ever heard is that people are curious about us and our Gods.”

She adds “sometimes people think we are Muslims because of our clothing. I don’t like that and I also notice how people change their attitude when I explain that I’m Hindu. I can understand why Muslims worry about their religious freedom. Hindus fly below the radar so I never had any problems as soon as I explained about all our Gods.”

During our second interview; Deepsiak feels that her religious freedom is as strong as before, but she expresses concerns about some of the upcoming cases in the Supreme Court: “We don’t want to discriminate and I think it would be good if people did not use religion as an excuse to discriminate against other people. I really hope that the court understands that all religions teach live and let live. Or at least they should. If there was a Hindu judge on the Supreme Court I would feel even more secure, but I don’t think that is happening any time soon.”

Rajeev

Rajeev’s definition of religious liberty is “the right to practice your religion in peace and without disturbance.” He mentions the Constitution and that the “founders frequently stated that virtue and religion are essential to maintaining a free society.”

He also feels that even though “my religion is tolerated, there is favoritism for Christians”. He feels that some of the praying before council meetings have a very Christian flavor. “And it is impossible for me to protest, because I want to fit in and be tolerant, but I wonder what would happen if I suggested that we pray a Hindi prayer next time instead of the God and his son Jesus.”

During our second interview; Rajeev had suggested that a Hindi prayer before the latest City Council meeting. “My colleagues on the city council looked shocked, but they agreed. After all we live in a multi-faith society.”

Based on this experience, Rajeev feels that the protection of religions is strong in the American society. “I think it is because the majority are Christians that they just tend to default to Christian prayer. But they are open to other religions as well. And now we are going to have a Diwali festival next year, which is a great Hindu tradition.”

Applicable case law and legislation

There is no Hindu judge on the Supreme Court, but there has been speculation about whether Sri Srinivasan could be appointed and swear his fidelity oath the Bhagavad Gita, a Hindu holy book (albeit not a canonical book – like the Bible or the Quran - in the Hindu tradition), when he started his current job on the U.S. Court of Appeals for the District of Columbia Circuit.¹⁰¹

On the question about praying before town board meeting, the Supreme Court has ruled that this is constitutional. In the majority opinion; the judge suggested that non-believers could exit the room if they “find the prayer distasteful.”¹⁰² The Hindu American Foundation and the Religious Action Center of Reform Judaism disapproved of the decisions and stated that this support “majority-rules prayer” .

The Supreme Court heard the arguments in the Cake case during the spring of 2018, as discussed above under the Roman Catholics Applicable Case Law. This case addressed Deepsiak expressed with regards to people “using religion as an excuse to discriminate”.

De Facto doctrine considerations

The neutrality principle is not strictly adhered to when allowing praying before a town meeting. Whilst the reasoning from the Supreme Court sounds neutral, by pointing out that non-believers can exit the room, this seems like the religious rite of praying is being imposed on people who will then have to act not to participate in a prayer before the town meeting., This reasoning it can only be deemed as *De Jure* disestablishment, if even that, as it is that it is not *De Facto* disestablishment.

¹⁰¹ Zausmer *What would a Hindu justice mean for the Supreme Court* Washington Post 10/3/2016. The fact that he brought this book to the swearing in ceremony gives rise to a discussion of “colonial bias” in the legal world, but that topic is for another thesis.

¹⁰² *Town of Greece v. Galloway*, 572 U.S. (2014)

In terms of separation, the respondents expressed no concern about state and churches being divided, except for maybe the comments that there is a “favoritism” towards the Christian religions. Favoritism towards Christianity is discussed above in the Jewish part of the case study.

In terms of being allowed the autonomy to practice the Hindu religion, the respondents expressed no concerns. The only concern was that religion being used as “an excuse” to impose values on other people, such as in the Cake case.

The Muslims

Name	Age	Gender	Denomination	Rate of devotion *
Ali	46	Male	Practicing Muslim all his life	4
Noor	35	Female	Practicing Muslim all her life	4

Ali

Ali defines religious freedom as “the right to living in accordance with you own religious beliefs in peace.”. He points out that “considerable research has shown that benefits of religious practice within society.” With regards to religious liberty in America, he feels that “there is a theoretical religious liberty in this country, but it does not protect Muslims. Everyone believes that we are terrorists.”

He points out that religious liberty for Muslims “are always sacrificed on the altar of national security. I don’t even want to give to Muslim charities anymore, in case someone thinks that that charity is a terrorist organization.”

In the follow up interview Ali feels that religious liberty for Muslims is more threatened. “When our President talks about a Muslim ban it is scary. I shaved my beard because I don’t want people to think that I am a terrorist. That’s sad state of affairs.” He feels that the climate for Muslims are getting worse: “Women can’t wear a scarf, we can’t have a beard and we can’t give money to our charities. We are being treated like outcasts like no other religions and they put us under surveillance without any proof, just because we’re Muslims.”

Noor

Noor defines religious liberty as “the right to believe what you want to believe.” In her opinion “there is legal protection for different religions” in the US. “But being Muslim is much harder of course. I don’t wear a headscarf unless I go to the Mosque, so I don’t have any problems, but women who want to wear a head scarf have a harder time getting a job for instance. There is very little understanding for Muslim traditions and clothing in this country.

In her opinion Christianity is more protected than Islam or Judaism. “I hear some of the chants about Jew-S-A and I saw Charlottesville footage on TV. But Jewish people have an easier time than us Muslims. They hate us more.”

In the second interview Noor expresses that she is even more concerned about the religious liberty and Islam. “There is the Muslim Ban and also Muslim women are being asked why they allow themselves to be oppressed and wear the hijab. Sometimes I feel like we are second-class citizens. Our religion is seen as a terror threat when it is in fact all about love, like most other religions.”

Applicable case law and legislation

The suspicions around Muslim charities have been well-documented since 9/11. President Bush seized the assets from a number of Muslim Charities under the highly secret “President’s Surveillance Program” under which the MSA conducted surveillance of countless numbers of Muslim Americans.¹⁰³ Whilst Obama promised his voters that their constitutional values and national security were compatible, it has been noted that the PATRIOT Act was kept during his administration. His Supreme Court Appointee Elena Kagan told the Supreme Court that a PATRIOT Act provision criminalizing the provision of material support to terrorists could be applied to lawyers filing briefs on behalf of groups the government believes have ties with terrorism. During the Trump Administration there have been no legislative efforts to diminish the PATRIOT Act. There are no court cases on this subject-matter, perhaps due to its secretive nature. Many who are surveilled are unaware of the government surveillance.

The ruling on the “Muslim Ban” ruling was deemed neutral and not targeted against Muslim by the Supreme Court.¹⁰⁴

There have also been rulings on appearance which pertain to religious liberty for Muslims. The *Abercrombie and Fitch* and the *Sultanaa* case were discussed above. Another case that is applicable was when a Muslim woman was told that she would have to take off her headscarf and cloak if she wanted to accompany her children to the public swimming pool. The pool staff told her that she could not wear “her street clothes” by the pool. She noted that other non-swimming mothers were wearing street clothes. The ACLU filed a civil rights lawsuit on her behalf.¹⁰⁵ The city then changed its policy to include “religious clothing” by the pool side and the case was dismissed.

In the *Hobbs* case, the Supreme Court ruled on the Muslim men’s right to grow a beard whilst imprisoned. In this ruling the Court stated that Arkansas corrections officials had violated the

¹⁰³ Herman, *Taking liberties : the war on terror and the erosion of American democracy* p. 14

¹⁰⁴ *Trump v. Hawaii*, 585 US_ (2018)

¹⁰⁵ Ginn *Do religious groups in America experience discrimination* p. 66 referring to the case *Lubna Hussein v. City of Omaha* (since the case settled so there is no citation)

religious liberty rights of Muslim inmates by forbidding the right to grow longer beards.¹⁰⁶ In Arkansas only quarter inch beards were allowed for inmates. The state cited security concerns as the reason for banning longer beards as it could conceal contraband, such as razor blades, drugs or homemade darts. The Supreme Court ruled in favor of the inmates writing that Mr. Holt had showed that the ban on beards burdened his religious practices and that the government had not shown a compelling reason for the regulation and no better way to achieve it.

De Facto doctrine considerations

The neutrality principle is established in both the Constitution and the PATRIOT Act. However, the respondents expressed concerns about being targeted due to their religion. The case law on neutrality and the application of the PATRIOT Act seem to indicate that there is a *De Jure* rather than the *De Facto* neutrality. There are no cases or media reports of any charities of other denominations being targeted for possible ties to terrorism. Due to the secretive nature of surveillance under the PATRIOT Act it is hard to draw any conclusions on this topic, as the data is not available on which religious charities and places of worship are under surveillance. It may be that this is only *De Jure* disestablishment, rather than *De Facto*. The jurisprudence from *Abercrombie* and *Hobbs* applies the neutrality principle. Still, the most recent ruling on the Muslim Ban is questionable.

In terms of separation, the respondents expressed no concern about state and mosques being divided, except for maybe the comments that there is a “favoritism” towards the Christian-Judeo religions compared to Islam. The topic of favoritism towards the Christian religions have been discussed above. There is no case law supporting the notion that there is favoritism towards Judaism, the only case related to Nazis when the Court cited Free Speech in the Nazi’s favor.

¹⁰⁶ Liptak *Ban on prison beards violates Muslim rights Supreme Court says*, New York Times 21/1/2015 referring to the case *Holt v. Hobb*, 574 U.S_(2015)

In terms of being allowed the autonomy to practice Islam, the respondents expressed concerns about being targeted. In terms of the case law, the reasoning in *Hobbs* and *Abercrombie* supports autonomy. The courts also upheld the right to build a multi-faith center near the 9/11, and instead it was the public opinion that stopped those plans.

The Native Americans

Name	Age	Gender	Denomination	Rate of devotion *
Asila	33	Female	Cherokee	4
Ahtunowhiho	38	Male	Cheyenne	5

Asila

Asila defines religious liberty as “a basic civil right that provides protection for all religions, including Native Americans.” In terms for the protection of religious liberty “it’s gotten better in recent years, but there is so much confusion about our religion and our religious rites. We worship nature and the land. That is very hard for those in power to understand. They think that they own the land.”

Asila feels that Native American religion is not as well protected as Christianity or Judaism. “We cannot perform our religious rites in freedom. We use eagle feathers in some of our ceremonies, but that is not allowed under the laws to protect threatened species. But the reason that they are a threatened species in the first place is all the pollution and lack of natural habitat. It is the same with Peyote, which is classified as a drug by law. We use Peyote in our ceremonies, but I don’t want to go to prison for drug crimes.”

In our follow up interview, Asila feels that the protection is eroding for Native Americans religious liberty and their free exercise:

“There is just no understanding for our culture. And it starts with the President. He allows holy land in Utah to be explored by the oil and gas industry. He shows no respect for our

contributions to this country. Look at what he did when was honoring the code talking Navajos for their efforts during the Second World War. He started talking about Pocahontas! It is a mockery of one of our most revered female heroines.”¹⁰⁷

Ahtunowhiho

Ahtunowhiho defines religious liberty as “a right to practice your religion. Period.” He is of the opinion that “religious liberty is more protected now than ever before, but the protection is not strong enough. Commercial interests always come before others”

He feels that that “main-stream religions like Christians and Catholics have the best protection.” He points out that “even though there was a law passed to protect Native Americans, the Supreme Court still ruled that peyote was unlawful much later.”

During our follow-up interview, he expresses that he believes that the protection is being eroded by the Trump Administration. “Look at what they are doing at the EPA! We will not have any holy land left in Utah because they want to exploit it. Our holy water is being polluted and our rites are used as a tourist attraction for spoilt New Yorkers.” He feels that the protection is being eroded for all religions except Christianity. “Trump wants the evangelical vote so he will allow them to discriminate against gays while he lets companies drill for gas on Native American land.”

Applicable case law and legislation

The American Indian Religious Freedom Act was passed in 1978. In this legislation Congress and the president stated that the policy of the United States is to preserve and protect Native American traditional practices and religious freedom. This legislation was deemed necessary as

¹⁰⁷ She is referring to the ceremony on November 27th 2017 where Native American Code talkers were honored. CSPAN clip.

it had been identified that Native Americans had not been protected sufficiently under the Constitution, instead there had been policies intended to make traditional religious practitioners to convert to Christianity.¹⁰⁸

However, in the case *Employment Division v. Smith*, the Supreme Court ruled that two Native Americans who had been let go because they had ingested peyote could not receive employment benefits.¹⁰⁹ The court held that the state could deny unemployment benefits to a person whose employment had been terminated for violating a state prohibition on the use of peyote, even though the use of the drug was a part of a religious ritual. The court stated that though states have the power to accommodate otherwise illegal acts performed in pursuit of religious beliefs, they are not required to do so.

The Peyote discussion continued. Peyote was classified as a hallucinogen in the Drug Abuse Control Act, which left Native Americans' religious use in even more legal ambiguity. This was rectified in 1994, when the American Indian Religious Freedom Act was amended to unambiguously protect the right of religious use of peyote for Native Americans.

The American Indian Religious Freedom Act has also been invoked in the case against the Dakota Access Pipeline where Native American tribes is protesting the building of an oil pipeline, which tribal leaders say threatens lands and artifacts they consider to be sacred. The case is pending, and both Native Americans and Native Hawaiians are involved in the law suit.¹¹⁰

The American Indian Religious Freedom Act also made provisions for use of feathers and other sacred objects and aimed to federal barriers standing in the way of Native American tradition

¹⁰⁸ Harjo, S. S. *American Indian religious freedom act after twenty-five years: An introduction*. p. 129

¹⁰⁹ *Employment Division v. Smith*, 494 U.S. 872 (1990)

¹¹⁰ Bailey *The Dakota Access Pipeline isn't just about the environment. It's about religion*. Washington Post 5/12/2016

religious expression.¹¹¹ This does not apply to eagles threatened by extinction, although their feathers can be used in religious rites.

De Facto doctrine considerations

There is the Constitutional and additional protective legislation in place to protective religious liberty for Native Americans. Still, the neutrality principle is not strictly adhered to in the *Smith* case, as the state was allowed to deny unemployment benefits. This reasoning does not support a *De Facto* disestablishment. Even though there was an amendment to the American Indian Religious Freedom Act, specifically to Peyote use, the *Smith* case has never been overruled in the case law. There are still grey areas on the application of religion clause jurisprudence and Native American religion, in the instance of eagles for instance.

In terms of separation, the respondents expressed no concern about state and religious bodies being divided, except for maybe the comments that there is a “favoritism” towards the Christian religions. Favoritism is discussed at length above under the Jewish part of the case study.

In terms of being allowed the autonomy to practice the Native American religion, the respondents expressed many concerns. The case law supports these concerns, especially in the *Smith* case and the North Dakota pipeline. This is only a *De Jure* not a *De Facto* autonomy. In addition to this, there are also question marks surrounding the neutrality principle as discussed above.

The Atheists

Name	Age	Gender	Denomination	Rate of devotion *
Margaret	35	Female	Raised Lutheran	5

¹¹¹ Harjo, S. S. American Indian religious freedom act after twenty-five years: An introduction. p.130

Douglas	46	Male	Raised Catholic	5
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*devotion to Atheism

Margaret

Margaret defines religious liberty as “Freedom to be religious or not be religious. A civil right to believe what you will and let others do the same.” It is her firm opinion that Christian religions, are more firmly protected than other religions in the US. She recognizes that being Jewish or Muslim probably awards a lower level of protection in society, even though the law is treating everyone equal in theory. “But being Atheist isn’t exactly a protected existence either. Some people don’t even think that we should be protected from all this religious privilege and entitlement that is permeating our civil society. It is fine to discriminate against us. I am gay and not welcome in church, and even though I have a right to get married to my girlfriend, some Christians feel that they have a right to discriminate against me. Not issuing a marriage license or indeed make us a wedding cake.”

In our follow up interview, Margaret feels that “the protection of religious freedom is at least on the agenda. But when people like Roy More insists that they should have the Ten Commandments in their court rooms, I really do despair for our country. As an Atheist I feel less protected from religious privilege to discriminate, but I hope that the Supreme Court rules for the gay couple in the Masterpiece case. That would be a good signal for all of us who just detest having religion impose on us.”

Douglas

Douglas defines religious freedom as “the government’s duty to protect everyone from religious intrusion.” “We have a right to choose a religion or not to be religious. I am a convinced atheist and proud of it. And just like I don’t attend churches telling them what I believe, they should not impose religious symbols on me.”

In Douglas view “all religions are protected by the Constitution, except Atheism. I felt like I was almost ‘coming out’ as an Atheist and I was told that I was un-American when I did. There is an old stereotype that all Atheists are immoral. Maybe that’s why Arkansas has a provision disqualifying Atheists from testifying in court!”

In our follow up interview, Douglas expresses that he is more concerned about the protection for Atheists than ever. “Religion is not only religion these days. It is politics. I used to be annoyed about having Christmas trees and school prayers, now I’m scared that evangelicals believe that they have a right to discriminate just because it against their moral beliefs. So they don’t have play the same rules like the rest of us? I am thinking of that clerk in Kentucky who would not issue a marriage license. Can you believe that Mike Huckabee called her refusal to do her job ‘the criminalization of Christianity? He tried to score political points on this religious privilege. That’s not religious liberty.”

Applicable case law and legislation

In the case of *Lynch v. Donnelly* the Supreme Court ruled on the legality of Christmas decorations on town property. The court decided that a Santa Clause House, a Christmas Tree and a banner reading Season’s greetings and a crèche was no an effort to advocate a particular religious message and had “legitimate secular purposes”.¹¹² The ruling refers back to the Supreme Court ruling in *Lemon v. Kurtzman*.¹¹³ This case provides a guide for such cases by creating a test for when the government violates the First Amendment’s establishment clause. The decision held that government action does not violate the establishment clause when it has a significant secular or nonreligious purpose, does not have the primary effect of advancing or inhibiting religion and doesn’t foster excessive entanglement between government and religion.¹¹⁴

¹¹² *Lynch v. Donnelly* 465 US 668 (1984)

¹¹³ *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

¹¹⁴ *Weiss Is a Christmas tree in a public park a secular symbol?* American Bar Association Journal 4/12/2017

On the concerns expressed with regards to discrimination against same-sex couples, this was ruled on in favor of the baker in the Masterpiece Cake case. The Kentucky marriage clerk was held in contempt of court and spent a couple of days in jail for her refusal to issue a marriage license to a same-sex couple.¹¹⁵

De Facto doctrine considerations

The neutrality principle is not strictly adhered to when it comes to Atheism, even though some legal scholars argue that there is “negative religious” freedom enshrined in the Constitution, there is no case law that supports the Atheist’s right to be treated as any other “religion”. However, the Atheist society is granted tax exemptions according to the same federal regulations as other non-profits.

In terms of separation, the respondents expressed concerns about state and Christian churches only being divided in *De Jure* sense. This notion is also supported by other non-Christian respondents who also mentioned a “favoritism” towards the Christian religions. The favoritism towards Christian religions have been discussed in the Jewish part of the case study.

On the topic of being allowed the autonomy to practice Atheism, the respondents expressed concerns about being bombarded by religious messaging in the public space, whereby their autonomy of not being religious was circumvented. The case law supports this idea as the test outlined in *Lemon* which has the characteristics of *De Jure* rather than *De Facto* disestablishment. In addition to this, the free exercise of Atheism is not considered at all in *Lemon*. The concerns about politicizing of religious values is correct as described in the introduction. Yet, in the absence of an established legal right to not be religious there is little that can be evaluated in the jurisprudence.

¹¹⁵ Corvino *Debating religious liberty and discrimination* p. 21

Conclusions

The purpose of this thesis is to examine the protection of religious liberty in US jurisprudence, with emphasis on the criteria outlined in *De Facto* disestablishment doctrine principles of neutrality, separation and accommodation.

From a legal theory perspective, the analysis of the case law and the case study suggest that there is some consensus that the US system is based on a moderate version of separationist position, alternatively a moderate version of a religionist critique, as these two theories intertwine in their moderate versions. In short, the American legal and political discourse is operating in a space where religious liberty and religious views are a factor to take into consideration, among other rights such as Freedom of Speech or moral reasoning in the legal sphere. There is almost no support for complete abandonment of religion as a strict separationist would argue for, neither is there any support for a theocracy.

The analysis of the case law, the respondents' answers and other secondary sources indicate that the De Facto doctrine principles are very much a part of the legal framework. The principles themselves are accepted in theory. The problems arise upon the application of these principles in court but also in the public arena. One man's religious liberty is another's man's right to discriminate as was highlighted in the Masterpiece Cake case.¹¹⁶

The American political and legal system was founded on the principles of democracy and liberties. However, the system is not perfect, which is illustrated by the constant battle about how the principles of neutrality, separation and accommodation should dictate the law and guidelines. As the critics of the De Facto doctrine point out: there seems to be inconsistencies in what religion means depending who you ask and what their denomination is. This also translates to the

¹¹⁶ *Master Piece Cake v. Colorado Civil Rights Commission* 584 US_(2018)

Supreme Court doctrine and interpretations of cases. The jurisprudence and its interpretations have shifted over time, depending on whether the Supreme Court is leaning towards the political left or is more conservative leaning. This leads to more instability, as it is uncertain whether case law from a more liberal court, such as *Roe v. Wade*, would be upheld today when the Court consists of much more conservative justices.¹¹⁷ This uncertainty leads to further politicization of the Supreme Court and its justices, which then leads to even more inconsistent jurisprudence, thus perpetuating the cycle of inconsistent case law on the religion clauses.

Another difficulty lies in the unconscious bias that we all have, judges and politicians included. Supreme Court Justices swear to uphold the law and the Constitution and whilst they aim at applying this to the best of their ability, they have their own unconscious (and mostly Christian) bias when making their decisions on how to interpret the Constitution. The fact that there is an inherent tension between the religion clauses and also the matter of Freedom of Speech, it is almost inevitable that the jurisprudence will be inconsistent and slightly erratic. Societal changes such as a more accepting attitude towards same-sex couples, non-Christian religions, Native American practices and a more pluralistic religious society add further challenges to the application of the law.

However, the analysis does suggest that there is a “favoritism” towards Christianity. This is something that can be deduced from the case law that supports Christian praying before town meetings, the display of a Christian Crèche on town property and support to parochial schools. There is limited amount of case law with regards to favoritism, as it is almost impossible to get a legal standing unless your denomination has been actively discriminated against. Yet, there are other strong indicators of favoritism towards Christianity as listed above, and in the case study results.

Still the analysis indicates that there is a trend towards a more accepting attitude towards Native American religion, with the passing of the law specially to protect their rights to use peyote in religious ceremonies. In addition to this, the fact that a Hindu prayer was said before a town

¹¹⁷ *Roe v. Wade* 410 U.S. 113 (1973) where abortion was deemed constitutionally protected as right to privacy. But women’s reproductive rights are a constant debate in the political debate.

meeting, upon one of the respondents' suggestion and that the court upheld the complaint in *Abercrombie & Fitch* does indicate that attitudes are changing both inside and outside the court room.¹¹⁸ The glaring exception to this is the Muslim Ban and the surveillance of mosques.

In his opinion in the Muslim Ban case, Supreme Court Justice Kennedy urged officials to remember the importance of religious tolerance; “an anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.”¹¹⁹ This is poetic language from a Supreme Court Justice, who is retiring. But to paraphrase a popular American expression: it seems like the jury is still out on what religious liberty actually means.

In light of all the findings in this thesis, I ponder the question on whether the religion clauses would be easier to interpret if these were regarded as structural restraint on government power rather than a guarantor of an individual right? However, that is not how it was framed in the Constitution, which means that the Supreme Court Justice will continue to apply the religion clauses to their best of their ability until the legislator agrees on a more stringent legislation on religious liberty. Given the political potency of the topic of religious liberty, the debate on such legislation will probably rage on for quite some time.

¹¹⁸ *Equal Employment Opportunity Commission v. Abercrombie & Fitch*, 575 US_ (2012)

¹¹⁹ Berenson *What's hidden inside the Supreme Court's ruling on the travel ban?* Time Magazine 19th of June 2018 p. 11

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