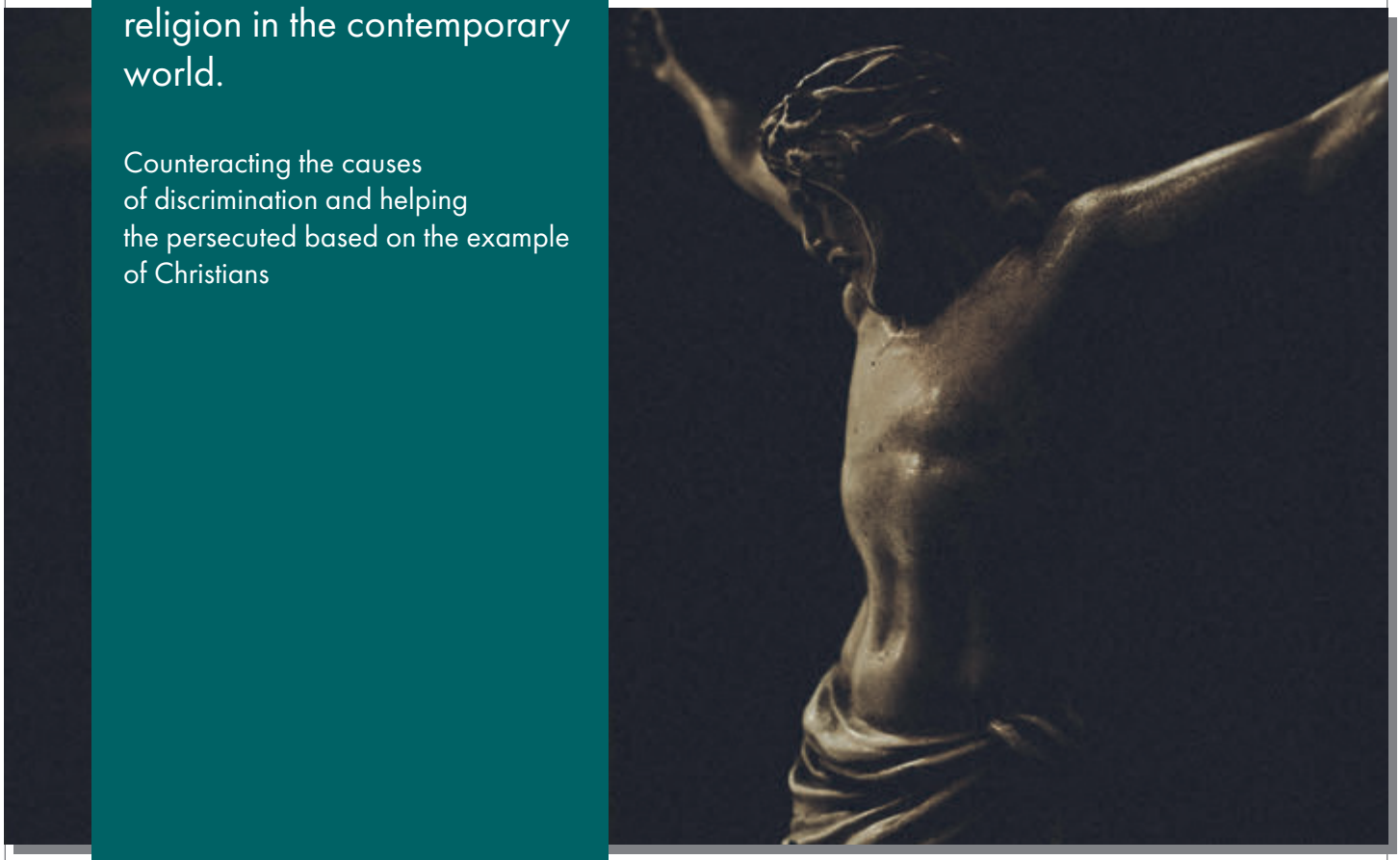
IWS
Centrum Analiz Strategicznych
Instytutu Wymiaru Sprawiedliwości

For the freedom to profess religion in the contemporary world.

Counteracting the causes of discrimination and helping the persecuted based on the example of Christians



Weronika Kudła

Freedom of Religion: American style — between overt neutrality and masked hostility

[Work for the Institute of Justice]
Warsaw 2019

MINISTERSTWO SPRAWIEDLIWOŚCI
www.ms.gov.pl
FUNDUSZ SPRAWIEDLIWOŚCI

The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

Content

1. Introduction

Regardless ever-increasing religious diversity, Christianity is still a cornerstone of American life. Recent *Pew Research Center* survey finds that still 65% of Americans describe themselves as Christians[1]. Although Christian faith still prevails, the number of religious freedom violations across the United States is in constant growth[2]. The issue of hostility regards now almost every aspect of religious activity in public forum, but for the Supreme Court of the United States, as the ultimate interpreter of the U.S. Constitution, the identification of the phenomenon still results problematic. During the last eighty years in almost forty cases the Supreme Court's Justices used the term of „hostility to religion" multiple times, but with changing social, political and cultural conditions „religious animus" assumed different meanings with many nuances and respective significance[3]. However, only recently the phenomenon of hostility to religion gained major attention from the federal Supreme Court. Exploration of this concept has been triggered by the type of cases which end up on the Court's docket and reflect current social, cultural and economic trends. These developments affect also religious liberty and the separation of church and state - twin pillars which constitute the American sense of the individual freedom of conscience. Although equality is a hallmark of American democracy, in the constitutional framework religious freedom has a special place as it's the „first freedom". Nevertheless, recent disputes reveal that uncontested position of religion in American life is now under threat.

This article provides analysis of three recent high-profile decisions issued by the U.S> Supreme Court which together portray the most actual situation concerning religious liberties in the most contentious areas of social life. During the last three terms between 2016 and 2019 the Supreme Court examined decisions involving: distribution of public financial benefits to churches and religious organization, exemptions for religious objectors from facilitating abortion and same-sex marriages and exposition of religious symbols in public square. Each ruling announced by the Court addressed the problem of hostility toward religion in relation to the concept of neutrality. The explanation of specific ways the Supreme Court interprets the idea of religious freedom on a case-by-case basis is an instructive example for other courts, which try to adjust the level of protection in changing social conditions. In American society dominated by religious pluralism there are no simple solutions, but it is important to note that the Court affirmatively opposes to the concept of hostility to religion.

[1] *In U.S., Decline of Christianity Continues at Rapid Pace*, Pew Research Center, (October 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ (last access: 10.11.2019).

[2] Report of the Family Research Council, *Hostility to Religion: The Growing Threat to Religious Liberty in the United States*, June 2017 Edition, [on-line:] https://downloads.frc.org/EF/ EF17F51.pdf (last access: 8.10.2019).

[3] See more: W. Kudła, *Wrogość wobec religii. Ostrzeżenia za strony Sądu Najwyższego USA*, Kraków 2019.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

2. Hostility to state-mandated financial aid for religious institutions

2.1. May religious schools receive state funds?

The Supreme Court's jurisprudence related to the validity of state-mandated financial aid for religiously-affiliated institutions, particularly schools, results to be, with some minor exceptions, based upon the long tradition of „no aid" principle. The evolution of the Court's doctrine departed from the adoption of „strict neutrality" standard according to which *no religion shall either receive the state's support or incur its hostility*[4]. In *Everson* v. *Board of Education* decision the Court stated that government's neutrality toward religion requires from it *to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them*[5]. Thus, for almost seventy years, till the 1997 ruling in *Agostini* v. *Felton*[6], the Supreme Court has retained that permissible aid for sectarian schools was limited only to secular and neutral services, materials and facilities[7]. The Supreme Court's hostility toward public aid for religiously-affiliated schools was primarily rooted in the *Lemon* test, articulated in 1971 decision in *Lemon* v. *Kurtzman*[8] and used to assess possible violations of the Establishment Clause. Despite the fact that from the beginning of its adoption, the *Lemon* test has been harshly criticized both by Justices, lawyers and scholars, the Supreme Court relying on this standard managed to decide a series of cases in which state's financial aid for sectarian schools and their students resulted unconstitutional. That particularly unfavorable and surely unequal treatment of religious groups culminated in the 1985' Supreme Court's decision in *Aguilar* v. *Felton*[9]. The Court ruled that the New York City's program which was sending public school teachers to provide supplemental, remedial education to disadvantaged children from parochial schools was unconstitutional since it violated the *Lemon* test's third element of „excessive entanglement". The Court concluded that the entrance of public school teachers into parochial schools' premises would inevitably lead to their indoctrination and creation of an impermissible symbolic union between church and state[10]. Ultimately, the Court stated that any public aid that goes to religious schools is unconstitutional, even if it reaches these schools as a consequence of private choice. The Court's ruling had devastating effects not only for children from low-income families who attended private parochial schools, but also for the New York State's economy. In order to comply with the ruling and still operate the program of remedial teaching destined equally to public and private schools' students, Board of Education of the City of New York decided to provide instruction at public school sites, at leased sites and in vans converted into classrooms parked outside of parochial schools properties. Students were also offered computer-aided instruction because it did not require physical presence of public teachers on religious schools' premises[11]. The additional costs were indeed exorbitant, but not sufficient enough to overrule the *Aguilar*.

During the next twelve years that passed from the 1985' decision in *Aguilar*, the Court has shifted substantially in the direction of a greater accommodation of religion in public life. In the 1986' case in *Witters* v. *Washington Department of Services for the Blind*[12] the Court ruled unanimously that the extension of aid under the Washington vocational rehabilitation program to finance petitioner's training at the Christian college would not advance religion in a manner inconsistent with the Establishment

[4] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) at 654 (Frankfurter, J., *dissenting*).
[5] *Everson* v. *Board of Education*, 330 U.S. 1 (1947) at 18.
[6] *Agostini* v. *Felton*, 521 U.S. 203 (1997).
[7] *Mitchell* v. *Helms* at 880.
[8] *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).
[9] *Aguilar* v. *Felton*, 473 U.S. 402 (1985).
[10] *Agostini* v. *Felton* at 220.
[11] *Id.* at 210.
[12] *Witters* v. *Washington Department of Services for the Blind,* 474 U.S. 481 (1986).

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

Clause[13]. Later on, in *Zobrest* v. *Catalina Foothills School District*[14] the Supreme Court decided that the Establishment Clause did not prohibit a school district from providing a sign-language interpreter to a deaf student enrolled in a Roman-Catholic high school under provisions of the Individuals with Disabilities Education Act (IDEA). In view of these decisions Justices openly called the *Aguilar* decision as *so hostile to our national tradition of accommodation, [that] should be overruled at the earliest opportunity*[15]. The overturning of *Aguilar* in *Agostini* v. *Felton* decision marked a new era of church-state relations in which state aid to sectarian schools became permissible under the Establishment Clause.

In the 2000' decision in *Mitchell* v. *Helms*[16] the Supreme Court found that distribution of federal funds to state and local educational agencies, which in turn lend educational materials and equipment to both public and private religious schools is constitutional. Justice C. Thomas authoring the plurality opinion wrote that: *hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow*[17]. Relying on *Lemon* test, reduced after the *Agostini* decision to two-parts (which ask about purpose and effect of the law under challenge), plurality concluded that as long as public benefits are available for public schools, private nonreligious schools and private religious schools, so in other words they're all given *equal treatment* to be eligible, the Establishment Clause isn't violated. Application of this new approach signaled a departure from *strict neutrality* rule. Initially the Court used this pattern to analyze only religious speech cases[18]. By treating religious speech in the same way as other types of speech and without even analyzing them under the Establishment Clause, outcomes of these cases were surprisingly favorable to religious groups. In *Mitchell* decision the Court went a one step further by deciding to apply the *equal treatment* doctrine, even though the free speech issue was in the case wholly absent[19].

2.2. Must religious schools receive state funds?

A radically new constitutional paradigm of *equal treatment* attracted new types of litigations before the Courts. Whereas it was clear that under the Establishment Clause government *may* distribute funds in religiously neutral way for religious organizations, religious groups began to ask the Court whether the government *must* deliver the aid with the aim to treat secular and religious groups equally. The outcome of *Locke* v. *Davey*[20] case from 2004 was a surprise for them[21]. The Supreme Court was confronted with a question as to whether a state that provides college scholarships for secular instruction is required to fund religious instruction if the recipient of the scholarship wishes to pursue a devotional theology degree. In ruling decided with 7–2 vote and written by Chief Justice W.H. Rehnquist, the Court admitted that between religion clauses there's *play in the joints* which means that *there are*

[13] *Id.* at 485–490.
[14] *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993).
[15] *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994) at 750 (Scalia, J., *dissenting*).
[16] *Mitchell* v. *Helms*, 530 U.S. 793 (2000).
[17] *Id.* at 828.
[18] Cases of *Widmar* v. *Vincent*, 454 U.S. 263 (1981), *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), *Capitol Square Review and Advisory Board* v. Pinette, 515 U.S. 753 (1995), *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) all dealt with the question whether religious speech is permissible in public sphere without violating the Establishment Clause.
[19] Two years later, in the 2002 case of *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) the Supreme Court upheld constitutionality of Ohio's Pilot Project Scholarship Program which provided tuition aid in the form of vouchers. In a 5–4 majority decision delivered by Chief Justice W.H. Rehnquist the Court stated that: *Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. Ibid.* at 662.
[20] *Locke v. Davey,* 540 U.S. 712 (2004).
[21] D.H. Davis, *Editorial. A Commentary on the Supreme Court's „Equal Treatment" Doctrine as the New Constitutional Paradigm for Protecting Religious Liberty*, „Journal of Church and State", 2004, Vol. 46, No. 4, p. 724.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause[22]. While the Supreme Court had no doubt that under the Establishment Clause the state was allowed to include the possibility for scholars to pursue a degree in devotional theology, it ruled that the state wasn't required to do it under the Free Exercise Clause, so the state didn't violate it. What is even more important, the Court rejected allegations that the scholarship program demonstrated animus toward religion: *[i]t imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. […] And it does not require students to choose between their religious beliefs and receiving a government benefit. […] The State has merely chosen not to fund a distinct category of instruction*[23]. Relying on a strong historical dissent of Americans against the use of public money for training of church leaders, the Court upheld the constitutionality of state's scholarship program which excluded financing of a devotional theology degree.

This reasoning, which effectively indicated limits of the *equal treatment* applicability in religious freedom cases, has been recently undermined by the outcome of *Trinity Lutheran Church* v. *Comer*[24] case which arrived to the U.S. Supreme Court's docket thirteen years after *Locke*. The facts leading to the case began when a Christian preschool affiliated with the Trinity Lutheran Church wanting to improve its playground surface in 2012 applied to a Missouri state program that provides grants to public and private schools and other nonprofit organizations to help them purchase playground surfaces made from recycled tires. Trinity Lutheran Church applied for the grant and would have received it, except for the fact that is a church and provisions in the Missouri constitution bar the state from giving money directly or indirectly in aid of any church. Although the application of Trinity Lutheran Church Child Learning Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program, it was deemed categorically ineligible to receive the grant[25]. The church sued the state alleging that the decision was discriminatory toward it and violated the Free Exercise Clause. Both district court and the Court of Appeals for the Eighth Circuit sided with the state. Having in mind what the U.S. Supreme Court said in *Locke* v. *Davey* decision about the *play in the joints* rule, it was expected that it would use this precedent to explain that the Free Exercise Clause didn't require the Missouri state to ignore its own constitutional provisions so it might lawfully deny public funds to the church. But this time the Supreme Court happened to say that the state cannot discriminate the church for its religious status and must render it eligible for public grants. The Court concluded that *the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand*[26].

Decision of the Court was supported by a series of previous precedents concerning different categories of religious discrimination. First, the Court cited *Everson* v. *Board of Education*[27] where it upheld a New Jersey law enabling a local school district to reimburse all parents public transportation costs of students from public and private schools, including parochial schools. In that opinion the Court explained that a State *cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.*[28] Court's reference to one of the earliest cases concerning the meaning of the Establishment Clause, in which at the same time the majority of Justices expressed their view that *[n]o tax in any amount, large or small, can be levied to support any religious activities or*

[22] *Id.* at 719.
[23] *Id.* at 721.
[24] *Trinity Lutheran Church* v. *Comer*, 582 U. S. ____ (2017).
[25] *Id.* at 1–3.
[26] *Id.* at 15.
[27] *Everson* v. *Board of Education of Ewing*, 330 U. S. 1 (1947).
[28] *Id.* at 16.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion[29], might seem confusing, but more importantly it should be regarded as a return to the non-discrimination principle which for many years has been shelved by the application of notoriously inconsistent *Lemon* test and its „no funding" rhetoric[30].

Second, the Court cited *McDaniel* v. *Paty*[31], the unanimous decision of the Court where it stated that the Tennessee statute barring clergy from serving as delegates to the State's constitutional convention violated the Free Exercise Clause. Although exclusion of ministers from public offices enjoyed a long historical tradition in several American states, the Court had no doubt that *the exclusion manifests patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office; and, in sum, has a primary effect which inhibits religion*[32].

Third, the Court quoted case of *Church of the Lukumi Babalu Aye* v. *Hialeah*[33], the most blatant example of religious discrimination masked in neutral in name, but hostile in fact city council's ordinances. All of that to explain that the case of *Trinity Lutheran Church* differed from *Locke* v. *Davey,* which according to Justice N. Gorsuch can be *correct and distinguished […] only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here*[34]. Justice J. Roberts writing for the Court tried to distinguish between strong and weak antiestablishment state's interests[35] by indicating that: *Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church*[36]. The Court decided to make a distinction between *who you are* versus *what you do* to emphasize that the student in *Locke* could still pursue a secular degree using the scholarship and study devotional theology at another school, while Trinity Lutheran Church was put to a choice: *[i]t may participate in an otherwise available benefit program or remain a religious institution*[37]. The Court stated that a policy which imposes substantial burden on the free exercise of religion triggers *the most exacting scrutiny*[38] test, so the state must demonstrate interest *of the highest order*[39]. In *Trinity Lutheran Church* the state of Missouri failed to withstand the test and for that reason the Supreme Court reasoned that state policy discriminated against the church.

For many observers this holding may seem a very broad one, but attention to details hampers their speculations. Footnote three to majority opinion states that: *[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination*[40]. It's not often that the Supreme Court puts limits of its decision in a footnote. However, considering that only two justices C. Thomas and N. Gorsuch decided to join the opinion except the footnote, by saying that *the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else*[41], one can doubt about wide implications of this precedent in future cases. As Justice S. Sotomayor observed in her dissenting opinion: *This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship*

[29] *Idem.*
[30] D. Laycock, *Churches, Playgrounds, Government Dollars — and Schools?*, „Harvard Law Review", 2017, Vol. 131, p. 137–138.
[31] *McDaniel* v. *Paty*, 435 U.S. 618 (1978).
[32] *Id.* at 636.
[33] *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993).
[34] *Trinity Lutheran Church* v. *Comer* at 2 (Gorsuch, J., *concurring in part*).
[35] E. Correia, *Trinity Lutheran Church v. Comer: An Unfortunate New Anti-Discrimination Principle*, „Rutgers Journal of Law and Religion", 2017, Vol. 18, p. 286.
[36] *Trinity Lutheran Church* v. *Comer* at 12.
[37] *Id.* at 10.
[38] *Ibid.*
[39] *McDaniel* v. *Paty* at. 628 (quoting *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) at 215).
[40] *Trinity Lutheran Church* v. *Comer* at 13, Footnote 3.
[41] *Id.* at 3 (Gorsuch, J., *concurring in part*).

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both[42]. In her opinion the Court should have upheld that *prophylactic rule against the use of public funds for houses of worship* [as a result of] *a permissible accommodation of these weighty interests*[43]. Her opinion should be read as a warning against potential manipulation of religious freedom doctrine which may enable government to directly subsidize religion. Although this landmark decision has significantly changed the legal framework in area of public funds available for religious organizations, it's also evident that the case related only to a playground surface, not a religious activity[44]. Much more significant for the issue of religious liberty reveals to be Justices' readiness to protect status of religious groups against state discriminatory polices, even if for some observers *it is striking to note, particularly in the current tumultuous political climate, that, as some would characterize it, a seven-Justice plurality ruled that the Constitution requires the government to provide funding directly to a church*[45].

3. Hostility to religious exemptions

3.1. Freedom of religion and same-sex marriages

Another contentious issue in the U.S. Supreme Court's case law regards situations on which citizen's civic obligation to comply with the law clashes with citizen's religious beliefs or practices. The analysis of the Supreme Court's cases dealing with this topic and decided between 1943 till present, reveals that Justices remain deeply divided over the question concerning the existence of religious exemptions. There's still a split between decisions favorable[46] to accommodate personal religious beliefs and in which the Court didn't grant[47] religious exemption from a neutral, generally applicable law. However, the most recent decision in *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*[48] shows increased awareness and better understanding of the concept of religious animus in Free Exercise Clause doctrine.

At the centre of the case there was a wedding cake, but the litigation taken as a whole wasn't a piece of cake at all. Instead, the Court was presented with a complicated question of which interest should prevail when religious freedom collides with anti-discrimination laws. Cases with similar facts had already been pending in lower American courts much earlier, but since 2015, the year when the Supreme Court announced its decision in *Obergefell* v. *Hodges*[49] which recognized the constitutional right of same-sex couples to marry and required states to license same-sax marriages, the controversy has expanded as both religious minorities and sexual minorities have been seeking protection under the Constitution. Undoubtedly, both sides of the conflict have the right to live according to their deeply felt values and identity. Courts should interfere neither in matters of religion, nor in matters regarding intimate association between two people. The Supreme Court opinion in *Masterpiece* is consistent with this view as Justices refused to prioritize interests of one side over the other[50]. Thus, those who

[42] *Id.* at 1 (Sotomayor, J., *dissenting*).
[43] *Id.* at 17.
[44] D. Laycock, *Churches, Playgrounds, Government Dollars — and Schools?…*, p. 133: *The focus on something so secular as playgrounds and the safety of children explains why the vote was 7–2.*
[45] G. Gollomp, *Trinity Lutheran Church v. Comer: Playing "in the Joints" and on the Playground*, „Emory Law Journal", 2019, Vol. 68, p. 1168.
[46] *See e.g. Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. 136 (1987), *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993).
[47] *See e.g. Goldman* v. *Weinberger*, 475 U.S. 503 (1986), *Employment Division* v. *Smith*, 494 U.S. 872 (1990).
[48] *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*, 584 U. S. ____ (2018) at 1.
[49] *Obergefell* v. *Hodges*, 576 U.S. ___ (2015).
[50] D. Laycock, *The Broader Implications of Masterpiece Cakeshop*, „Virginia Public Law and Legal Theory Research Paper", 2019, No. 35, p. 169.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

expected to receive from the highest court a definite answer ready to solve out similar cases might feel disappointed[51]. This is because the Court justified its decision by reference to hostility toward religion. Subsequently the final ruling of the case brought as much controversy as its beginning.

The litigation in *Masterpiece Cakeshop* began in 2012 when a same-sex couple David Mullins and Charlie Craig visited Masterpiece Cakeshop in Colorado, a bakery owned and operated by Jack Phillips, with the aim to order a custom-made wedding cake for their wedding reception. At that time the same-sex marriage wasn't legal in Colorado so the official ceremony took place in Massachusetts. Jack Philips as a devout Christian refused to create a cake for the same-sex wedding celebration because of his religious opposition. Facing denial of service, the couple filed a complaint with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in places of public accommodation, which is prohibited by the Colorado Anti-Discrimination Act (CADA)[52]. Jack Phillips stated that due to his sincerely held religious beliefs he can't be forced to use his artistic skills in order to create a cake that sends a clear message of support for same-sex marriage. Nevertheless, both the Commission and the Colorado state courts rejected his arguments and sided with the couple. In opinion delivered by Justice A. Kennedy the Court with a 7–2 vote reversed the ruling by holding that the conduct of the Colorado Civil Rights Commission violated the Free Exercise Clause.

Writing for the Court Justice A. Kennedy admitted that „[t]he case presents difficult questions as to the proper reconciliation of at least two principles[53]" : the first being the protection of gay persons' rights against discrimination based on sex orientation, the second being the free exercise of religion. There was also another complexity with strong implications for subsequent lawsuits which had to be clarified. Jack Phillips had to convince the Supreme Court that his custom-made wedding cakes can be qualified as an artistic expression[54]. After a heated debate the Court agreed that creation of a cake might indeed take the form of artistic expression so baker's rights have also been shielded by the Free Speech Clause of the First Amendment. Justice Kennedy observed that: „[t]his is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning"[55]. Taking into account the tradition of a wedding cake's presence at the reception it must be clearly stated that it's also packed with rich symbolism, therefore it may clash with baker's opposition to same-sex weddings[56]. According to the Court, the Colorado Court of Appeals wrongfully interpreted J. Phillips' conduct as non expressive thus non protected from compliance with Colorado's public accommodation laws[57]. Limiting this case uniquely to the application of an already shaped and consistent doctrine concerning the *compelled speech*, its result seemed clear — the Supreme Court had to rule in favor of the baker. Seventy five years earlier the Court, in the 1943' case in *West Virginia* v. *Barnette*[58] overruled its previous decision[59] that students cannot be compelled to salute the American flag and recite the Pledge of Allegiance at the beginning of lessons in public schools if it is contrary to their religious beliefs. Justice R.H. Jackson writing for the Court the unforgettable words stated that: *freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationa-*

[51] Cfr. L. Kendrick, M. Schwartzman, *Comments. The Etiquette of Animus*, „Harvard Law Review", 2018, Vol. 132, pp. 133–170.
[52] *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission* at 1.
[53] *Ibid.*
[54] R. F. Duncan, *A Piece of Cake or Religious Expression: Masterpiece Cakeshop and the First Amendment,* „Nebraska Law Review Bulletin" (Jan. 7, 2019), https://lawreview.unl.edu/piece-cake-or-religious- expression-masterpiece-cakeshop-and-first-amendment (last access: 8.11.2019).
[55] *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission* at 2.
[56] *Id.* at 6.
[57] *Id.* at 8–9.
[58] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).
[59] *Minersville School District* v. *Gobitis*, 310 US 586 (1940).

MINISTERSTWO SPRAWIEDLIWOŚCI FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

lism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us[60]. Fast-forward to 2015' decision in *Obergefell* v. *Hodges* it's evident also for the Court that: *[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here*[61]. In light of this statements Jack Phillips wasn't demanding nothing more that protection, respect and tolerance for his religiously motivated views, which unlike the constitutional right to same-sex marriage invented by the Supreme Court, are expressly spelled out in Religion Clauses of the First Amendment. Instead, the administrative bodies of the state acted with hostility to his religious convictions by ordering him to create a cake expressing a message contrary to his conscience.

Although the *Masterpiece Cakeshop* Court didn't decide the case upon the *compelled speech* doctrine, this reasoning received strong support three weeks later in *National Institute of Family and Life Advocates* v. *Becerra*[62] ruling concerning the exemption of religiously-affiliated pro-life medical clinics from providing women a *licensed notice* about state-sponsored pregnancy services (abortion and contraception included). The Court stated that California state law which required from all crisis pregnancy centers to post this notice and established civil fines, violated the freedom of speech and constituted an example of the *compelled speech*. Justice A. Kennedy in his concurring opinion observed that *here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these*[63]. If a religiously-affiliated medical clinic is exempted from informing women about their right to abortion and *[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions*[64] then at least artists (but it seems justified to expand this category[65]) providing wedding service shouldn't be compelled to act contrary to their convictions. In fact, small business owners directly involved in providing wedding-service don't single out gays and lesbians, but they single out their wedding as contrary to Christian view on marriage as a union of one man and one woman. As J. Phillips assured, he might sell other cakes and cookies to gay and lesbian customers except for their wedding cakes[66]. His assertions turned out to be irrelevant in presented issue.

The state administrative and judicial bodies in *Masterpiece Cakeshop* reasoned differently by evaluating that religiously motivated discrimination of morally unacceptable **views** is equally bad as religiously motivated racial discrimination of **people**, thus it cannot be eligible for the exemption[67]. However, in cases concerning protection of sexual minorities federal and state governments are unable to demonstrate any compelling interest which may justify limitations of the Free Exercise Clause. On the contrary, a more attentive study of *Obergefell* v. *Hodges* decision shows that the Supreme Court has admitted t*hat religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The*

[60] *Id.* at 642.
[61] *Obergefell* v. *Hodges*, 576 US ___ (2015) at 19.
[62] *National Institute of Family and Life Advocates* v. *Becerra*, 585 US ___(2018).
[63] *Id.* at 2.
[64] *Ibid*.
[65] D. Laycock, *The Wedding-Vendor Cases*, „Harvard Journal of Law & Public Policy", 2018, Vol. 41, Issue 1, p. 63.
[66] Jack Phillips' objection toward other cake-messages non consistent with his faith has been put under challenge (for the third time) in a lawsuit filed by Autumn Scardina (*Scardina* v. *Masterpiece Cakeshop, Inc.* (CO dist. Ct., June 5, 2019, Filing ID: E6608BAC4F70C). According to Scardina, a transgender female customer, the bakery refused on religious grounds to create a pink birthday cake with blue icing which was intended to symbolize her gender transformation. The bakery argues that she didn't want a „birthday cake", but a cake celebrating „sex change". The case is currently pending.
[67] Cfr. *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), a decision in which Supreme Court ruled that private university and school promoting fundamentalist Christian beliefs and using racially discriminatory policy (prohibition of interracial dating and marriage, admission of mainly Caucasian students) weren't eligible for tax exemption as they didn't meet the requirement to serve „state's interest" in eradicating racial discrimination in education. The government's fundamental, overriding interest outweighed petitioners' claim for tax-exempt status.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered[68]. As D. Laycock provocatively observes, both religious and sexual minorities *make essentially parallel claims on the larger society*[69]. At first glance his in-depth and evenhanded analysis of existing similarities between these competitive groups renders the existing conflict almost unresolvable. However, with regard to conscience dilemmas of wedding-service providers he ultimately tips the balance in favor of the religious objectors and states as it follows: *[t]he offended gay couples are referred to another wedding vendor, or readily find one, and they still get to live their own lives by their own values. They will still love each other. They will still be married. They will still have their occupations or professions. But the conscientious objector who is denied exemption does not get to live his own life by his own values. He is forced to repeatedly violate conscience or to abandon his occupation and profession. The harm of regulation on the religious side is permanent loss of identity or permanent loss of occupation, and that far outweighs the one-time dignitary or insult harm on the couple's side*[70]. According to him, the feeling of offense also described as *dignitary harm* is perceived by both sides of conflict — not only by a same-sex couple turned away by vendor's refusal to provide service, but also by the vendor. None of the side can be treated in isolation of the other one, but it's important to note that on the religious side the harm exceeds its secular dimension as believers seeking exemption a*re being asked to defy God's will—to disrupt the most important relationship in their lives. They believe they're being asked to do serious wrong that will torment their conscience for a long time thereafter*[71].

Addressing the issue that has deeply divided in half of American population[72], the Supreme Court failed to give explicit answer. By contrast, the majority Court with 7–2 vote concluded that the Commission demonstrated *clear and impermissible hostility toward the sincere religious beliefs that motivated his objection*[73]. It's worth to underline that decisions of the Commission forcing the baker to stop discriminating and deliver service for same-sex weddings were undertaken before the highest federal court gave its official *imprimatur* to the right of same-sex couples to marry. Thus, baker's refusal was additionally motivated by his moral convictions that potential customers *were doing something illegal*[74]. Colorado Civil Rights Commission didn't give weight to his assertions, but its members offered a couple of disparaging remarks over his religious beliefs during formal public hearings[75]. Justice A. Kennedy writing for the Court noted that during the second meeting the commissioner described faith as *one of the most despicable pieces of rhetoric that people can use*[76]. Inappropriate comments have

[68] *Obergefell* v. *Hodges* at 27.
[69] D. Laycock, *The Wedding Vendor-Cases…*, *op. cit.,* p. 61.
[70] *Id.* at 65.
[71] *Ibid.*
[72] The 2016 Pew Research Center's survey exploring the public stands on religious liberty against civil rights and nondiscrimination policy shows that about half of Americans (49%) say business owners with religious objections to homosexuality should be required to provide wedding services to same-sex couples as they would for any other couple. Nearly the same amount of respondents (48%) says they should be able to refuse services to same-sex couples. Less divided result only weekly church service attenders (63% of them shares the view that there should be religious exemption to refuse wedding-service to same-sex couple). *Americans Divided over Whether Wedding-Related Businesses Should Be Required to Serve Same-Sex Couples*, Pew Research Ctenter (September 28, 2016), https://www.pewforum.org/2016/09/28/2-americans-divided-over-whether-wedding-related-businesses-should-be-required-to-serve-same-sex-couples/ (last access: 8.11.2019).
[73] *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission* at. 12.
[74] *Id.* at 6.
[75] *Id.* at 12–13: *At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." Tr. 23. A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the— the law's impacting his personal belief system, he needs to look at being able to compromise."*
[76] *Ibid.: The commissioner stated: "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust,*

MINISTERSTWO SPRAWIEDLIWOŚCI FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

never been disavowed by Commission and for that reason *these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case*[77]. Surely, the elevation of matters pertaining only to the etiquette wouldn't be sufficient to side with the baker, but the hostility toward religion in this case has its own continuation, which is much more important for future claims. As the complaint against the owner of Masterpiece Cakeshop was pending, the Colorado Civil Right Commission analyzed three other cases concerning three different bakeries which refused to create a cake with images and religious text disapproving same-sex marriage. Each time, it found that the bakeries acted lawfully in refusing service[78]. The application of double standard was then evident as other bakers' secular objections were legitimate, but J. Phillips religious objection was deemed to be illegitimate. Different treatment of similar cases by the same adjudicatory body proved to be motivated by nothing else than religious animus.

Before the *Masterpiece Cakeshop* case was discussed, the Supreme Court expressly and unanimously anchored its Free Exercise Clause decision upon the concept of hostility to religion only once — in the 1993' case of *Church of Lukumi Babalu Aye* v. *City of Hialeah*[79]. Question presented before the Court regarded the constitutionality of city council's acts passed by to prohibit ritual animal sacrifice in Hialeah, Florida. The city's ordinances were enacted once the church and its congregants practicing the Santeria religion leased land and announced plans to establish a house of worship in Hialeah. Although each of the acts pursued the legitimate governmental interests in protecting the public health and preventing cruelty to animals, they were effectively crafted to address only the adherents to Santeria faith and suppress their practice. By focusing on ordinances' text and circumstances of their adoption, the Court held that they weren't neutral to religion as they were aimed to stamp out the central element of the Santeria worship service, the animal sacrifice. Ordinances targeted religious practice, so they weren't neutral to religion under the Free Exercise Clause. In order to determine their constitutionality, the Court applied the *strict scrutiny* test. To pass the highest standard of judicial review, legislative body must demonstrate that the challenged law was narrowly tailored and enacted to advance a legitimate „compelling governmental interest" with avoidance of unnecessary harm. Ordinances of the city of Hialeah didn't survive the test as they were tailored to proscribe only religious killings of animals but to exclude almost all secular killings[80]. The Court concluded unanimously that *[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt*[81]. The *Church of the Lukumi Babalu Aye* precedent was the extreme case in which the religious group had to sue in order to freely practice its religion. The Supreme Court's judgment was a strong reminder that the First Amendment allows religious groups to act autonomously and independently from state's control. Neutrality to religious sphere consists also in providing space for religious members in which they can offer understanding of reality not only different from, but also contrary to other secular groups[82].

The *Masterpiece Cakeshop* Court applied the same reasoning because assessed that comments of Colorado Civil Right Commission members' were as hostile to Jack Phillips' religion as those made by Hialeah city council's members with regard to practitioners of the Santeria religion. For some commentators the Court's decision is a narrow one, as related to highly case-specific facts and

whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."

[77] *Id.* at 14.

[78] *Id.* at 15: [the requested cake included "wording and images [the baker] deemed derogatory," *Jack* v. *Gateaux, Ltd.*, Charge No. P20140071X, at 4; featured "language and images [the baker] deemed hateful," *Jack* v. *Le Bakery Sensual, Inc.*, Charge No. P20140070X, at 4; or displayed a message the baker "deemed as discriminatory, *Jack* v. *Azucar Bakery*, Charge No. P20140069X, at 4.]

[79] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 US 520 (1993).

[80] *Id.* at 542.

[81] *Id.* at 534.

[82] S. L. Carter, *The Resurrection of Religious Freedom? Comment*, „Harvard Law Review", 1993–1994, Vol. 107, p. 136.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

concentrated exclusively on public officials' inappropriate attitude toward religious people[83]. The central question — as to whether LGBTQ groups' demands for protection against discrimination can be applied in consistence with neutrality to religion — remains open. Therefore the precedent, though momentous as to the phenomenon of hostility to religion that the U.S. Supreme Court will no longer accept, should be regarded as transitional with regard to the concept of neutrality to religion[84]. Cultural and religious landscapes are changing so existing conflicts between religious liberties and other anti-discrimination laws won't go away. On the contrary, it's only top of the iceberg as potential legal challenges might soon embrace new categories of protected rights[85].

3.2. Religious exemptions after *Employment Division* v. *Smith* decision

The jurisprudence involving limits of religious exemptions from generally applicable laws is still controlled by one of the worst Supreme Court's precedents for religious freedom. It was announced in the 1990' case of *Employment Division* v. *Smith*[86]. Opinion of the Court, delivered by Justice A. Scalia pertained to ritual use of a drug named peyote. The Oregon law prohibited possession of drugs, unless their use was prescribed by medical practitioner. Petitioners Alfred Smith and Galen Black lost their jobs in a private drug rehabilitation organization because they didn't pass a drug test as a result of consuming peyote for sacramental purpose at a ceremony of the Native American Church, of which both were members[87]. When they subsequently applied for unemployment compensation, their claims were rejected on the ground that consumption of peyote was a crime and their dismissal from work was a result of misconduct. Although at that time federal law permitted the Native American Church to use peyote for ceremonial purpose, the state of Oregon didn't make that exception in its drug law so A. Smith and his coreligionist were treated as criminals because of practiced faith. The Supreme Court had to decide whether the religious conduct should be granted exemption from law that imposes substantial burden on religious practices. In petitioners' view both religious convictions and religious conduct should be free from governmental regulation. The question presented before the Court wasn't easy to answer as its case law had already offered many inconsistencies in this area of law[88]. The outcome of the case was ultimately triggered by Court's distinction made between religious conduct which is expressly prohibited and that which is permissible under the law. To support Court's statement that: *Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government*[89], Justice A. Scalia quoted two other reasonings applied in decisions issued respectively in 1878 (*Reynolds* v. *United States*[90]) and 1940 (*Minersville School District* v. *Gobitis*[91]). In the 1878' decision, in which the Court for the first time addressed the protection of civil liberties under the Free Exercise Clause, the conviction of a member of LDS Church (better known as the Mormon church) for practicing bigamy as a religious duty was considered to be valid under the state's criminal law. However, the Court's 1940' decision which upheld a state regulation that required, under the threat of expulsion and

[83] See e.g. L. Kendrick, M. Schwartzman, The Etiquette of Animus. Comment, „Harvard Law Review" , 2018, Vol. 132, pp. 133–170.
[84] *Id.* at 169–170.
[85] The Supreme Court granted certiorari and has already heard arguments in three cases asking whether within the meaning of Title VII of the Civil Rights Act of 1964 the prohibition of sex discrimination includes discrimination on the basis of sexual orientation of employees (*Bostock* v. *Clayton County, Georgia* (No. 17–1618) consolidated with *Altitude Express Inc.* v. *Zarda* (No. 17–1623)) and transgender identity (*R.G. & G.R. Harris Funeral Homes Inc.* v. E*qual Employment Opportunity Commission* (No. 18–107)).
[86] *Employment Division* v. *Smith*, 494 U.S. 872 (1990).
[87] *Id.* at 874.
[88] Cfr. *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).
[89] *Gillette* v. *United States*, 401 U.S. 437 (1971) at 461.
[90] *Reynolds* v. *United States*, 98 U.S. 145 (1878).
[91] *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940).

MINISTERSTWO SPRAWIEDLIWOŚCI FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

penalty, all public schools' students, even conscientious objectors, to salute the flag and recite pledge of allegiance, was overruled three years later in *West Virginia State Board* v. *Barnette.* In light of much recent Supreme Court's precedents in which Justices demonstrated to be more sympathetic toward the accommodation of religious practices, the attentive observer of the Supreme Court's evolution might rightly conclude that the Supreme Court would rule in favor of A. Smith. Far from it, by applying the test which helped to balance incidental burdens on faith felt by petitioners with the compelling state interest, the Court concluded that because the Oregon drug law was constitutional, the state might deny the unemployment benefits to A. Smith and G. Black. Justice A. Scalia observed that: *[p]recisely because „we are a cosmopolitan nation made up of people of almost every conceivable religious preference," Braunfeld v. Brown, 366 U.S. at 366 U. S. 606, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind*[92]. Reasoning applied by the Court was quite simply: in the face of growing religious diversity with a wide variety of religious practices, it's now too difficult to accommodate them all at once and protect religious freedom for everyone[93]. It's not up to the Supreme Court to guarantee religious exemptions from the law. There're other branches of government that might adopt laws accommodating religious needs. The U.S. Supreme Court agreed that it would no longer use the „compelling state interest" test correlated with „substantial burden", but instead would ask if the challenged law is aimed to target a particular religious practice. Justice A. Scalia also stated that *leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs*[94]. The political response to a ruling so hostile to religion was almost immediate and unanimous. In 1993 the federal Congress enacted Religious Freedom Restoration Act (RFRA[95]) designed to fix that bad decision of the U.S. Supreme Court and restore the „compelling interest" test and its application in all cases where free exercise of religion is substantially burdened.

3.3. Freedom of religion and contraceptive methods of *Affordable Care Act* – case of *Hobby Lobby*

Almost three decades later, the battle over a private right to run afoul of the generally applicable laws due to religious convictions continues and embraces new hot-button issues, while the jurisprudence regarding the free exercise claims is in complete chaos. Lower courts result deeply divided over which legal standard should be followed in cases dealing with religious exemptions because while the *Smith* ruling still isn't overruled[96], the Supreme Court has used the federal RFRA model of protecting religious freedom in hotly-debated *Burwell* v. *Hobby Lobby Stores*[97] case from 2014. At the centre of this

[92] *Employment Division* v. *Smith* at 888.
[93] L. Goodrich, *Free to Believe: The Battle Over Religious Liberty in America*, Colorado Springs 2019, pp.55–56.
[94] Ibidem at 890.
[95] The Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4. In 1997 the U.S. Supreme Court in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) held that the application of RFRA to the states was unconstitutional. In consequence, twenty one states have enacted their own state RFRA laws, which are intended to echo the federal RFRA.
[96] In January 2019 Justices S. Alito, C. Thomas, N. Gorsuch and B. Kavanaugh in their statement respecting the denial of certiorari in *Kennedy v. Bremerton School District*, 586 U. S. ____ (2019) at 5–6 suggested that they would be open to reverse *Employment Division v. Smith.*
[97] *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014).

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

landmark decision was the regulation promulgated by the Department of Health and Human Services (HHS) under the *Patient Protection and Affordable Care Act*[98] of 2010 (also known as Obamacare), which requires specified employers' group health plans to provide their female employees coverage for the twenty contraceptive methods approved by the Food and Drug Administration, including the four that could cause an abortion. Hobby Lobby Stores is a family business owned by David and Barbara Green[99].

As devout Christians who honor the Lord in all what they do and operate the company according to Biblical principles, they couldn't provide and pay for four contraceptive methods like the morning-after pill and the week-after pill as it violated their deeply held religious beliefs that life begins at the moment of conception. They argued that by complying with the regulation they would be complicit in abortion[100]. The government argued that by requiring the Greens to provide health-insurance plans it didn't directly force them to participate in abortions so it hadn't substantially burdened their religion. The Supreme Court by 5–4 vote ruled in favor of Hobby Lobby Stores run by the Greens and found that the federal RFRA can be applied to closely held corporations composed of individuals and protect their religious freedom at all times, even in the workplace and when they decide to run a family business. The Court concluded that federal agencies cannot compel religious people to fund what is contrary to their conscience if the government's interest can be furthered by less restrictive means[101]. Justice A. Kennedy in concurring opinion also argued that religious exemptions from HHS contraceptive mandate for non-profit religious organizations should be expanded to closely held for-profit corporations in order do protect both groups of religious believers equally and offer them the same accommodation[102].

By contrast, Justice R.B. Ginsburg contended that majority opinion in *Hobby Lobby* case was precluded by the *Smith* ruling since the contraceptive coverage requirement applies generally and it has only incidental effect on the exercise of religion[103]. In conclusion, the *Hobby Lobby* opinion teaches us that federal and state RFRA provisions do matter. First, relatively recent and progressive enactment of these laws into states' frameworks indicates that religion for Americans still extends well beyond private sphere of their homes or churches. Second, they're designed to protect people's right not only to believe, but also to the right to *express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community*[104]. Third, they prove to offer better protection of religious freedom than the *Smith* ruling since courts adjudicating cases based upon RFRA's claims try to mitigate burdens on religious freedom. Unfortunately, many American states still haven't adopted laws similar to federal RFRA and over the last few years its enactment encountered serious obstacles[105]. Unfortunately also, the *Hobby Lobby* case marked only the beginning of cases in which religious organizations seek to receive exemptions from the federal contraceptive coverage mandate.

[98] Pub. L. 111 - 148.
[99] *Id.* at 1.
[100] *Id.* at 14.
[101] *Id.* at 47.
[102] *Id.* at 3 (Kennedy, J., *concurring*).
[103] *Id.* at 7–8 (Ginsburg, J., *dissenting*).
[104] *Id.* at 2 (Kennedy, J., *concurring*).
[105] The adoption in 2015 of Indiana Religious Freedom Restoration Act, identical to federal RFRA, provoked a national uproar as the opponents feared that it would endorse discrimination against LGBT communities.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

3.4. Freedom of religion and contraceptive methods of *Affordable Care Act* – case of *Little Sisters of the Poor*

Christian perspective on matters concerning life and contraception means that religious employers can't comply with that law and they risk to be fined millions of dollars if they don't provide health insurance plans covering all contraceptive methods. A Catholic order of nuns — the Little Sisters of the Poor who runs homes for the elderly poor across the country as a religious non-profit organization has been fighting against the federal government to protect their religious freedom already for six years. Despite the fact that in 2016 the federal Supreme Court in a per curiam opinion issued in *Zubik* v. *Burwell*[106] granted the sisters exemption from the contraceptive mandate, in 2017 they were given further protection by an executive order issued by President Donald Trump which in 2018 lead to the adoption of a new rule which grants broader exemptions for religious organizations from complying with the HHS mandate, the sisters are still in court and forced to pay hefty fines. This is because several states challenged the enforcement of federal rules that exempt employers with religious and moral objections from the contraceptive mandate. In the most recent decision[107] the U.S. Court of Appeals for the 9th Circuit ruled against the religious order, but also acknowledged that *we are in uncharted waters. […] we welcome guidance from the Supreme Court*[108]. Thus, the case has returned to the Supreme Court's bench and offers the Justices another chance to provide the Little Sisters and similarly situated religious groups real protection of their religious freedom.

The example of the Little Sisters fierce legal battle shows that despite federal governments' efforts (the U.S. Supreme Court decision in *Zubik* v. *Burwell* and presidential executive order) to fill the gaps of non-existing legal rules providing religious exemptions, state governments still try to oppose them and under the threat of penalties want to force religious objectors to comply with laws violating their deeply held religious beliefs. Though it has nothing in common with state's neutrality toward religion, appellate courts set precedents which ignore the importance of religious liberty called by Americans as „first freedom". Pro-abortion and emerging assisted-suicide activists fill the courtrooms across the country demanding not merely tolerance, but complicity in killing not only unborn children but even patients themselves. Given the Supreme Court's decisions in *Roe v. Wade* legalizing abortion and *Obergefell* v. *Hodges* legalizing same-sex marriage, the intensification of social conflicts over moral issues is unavoidable and they will continue to arise as long as courts will preserve individuals' freedom to live according to their own moral and religious convictions. The Supreme Court's case law from the last decade demonstrates that problem of hostility to religion has become widely discernible by Justices, but not easily reconciled with the protection of other civil rights. As for now, the Supreme Court maintains *the ability and willingness to distinguish between real threat and mere shadow*[109] in religious freedom cases.

[106] *Zubik* v. *Burwell,* 578 U. S. ____ (2016) is a consolidated case of six non-profit religious organizations arguing that the contraceptive mandate substantially burdens the exercise of their religious freedom under the federal RFRA. Since both the government and the religious organizations confirmed that contraceptive coverage could be provided to the petitioners' female employees without any notice from the organizations, the Court vacated the case for further consideration by the lower courts in light of this agreement: *Given the gravity of the dispute and the substantial clarification and refinement in the positions of the parties, the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans "receive full and equal health coverage, including contraceptive coverage." Id.* at 4.

[107] *State of California* v. *the Little Sisters of the Poor,* 19–15072 (9th Cir. 2019). See also: *Commonwealth of Pennsylvania, et al.* v. *President United States of America, et al.,* Nos. 17–3752, 18–1253, 19–1129, 19–1189 (3rd Cir., 2019) in which a Third Circuit appeals panel upheld the lower court ruling granting a nationwide preliminary injunction against the religious and moral exemptions for employers to contraceptive mandate.

[108] *Id.* at 25–26.

[109] *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) at 308.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

4. Hostility to religious symbols in public square

4.1. Hostility to the Latin cross in light of *Salazar* v. *Buono*

As Justice Oliver Wendell Holmes once stated: *[w]e live by symbols*[110]. Indeed, due to their potential to overcome language barriers, symbols can communicate ideas quickly and effectively. Historically, symbols are older than words and present in every community as they maintain the relationship between human beings. It's also true that due to their multidimensional nature and continuous development, the process of their interpretation can be sometimes problematic. This difficulty especially pertains to religious symbols as since they complement the expression of faith, one must gain knowledge of the entire belief system in order to properly understand the meaning of a religious emblem. Symbols, not only religious, are primarily designed to convey messages to insiders who are able to distinguish between the obvious and concealed meaning. Naturally, this doesn't mean that the message transmitted by a symbol is hidden for outsiders, but up to some extent it's limited and indirect. As a result, the exposition of symbols in public places results troubling as they're interpreted both by people acquainted with their content and intention and by those who aren't.

With changing religious landscape in the United States, the religious symbols have recently become the most disturbing objects in public places. The exposition of Christian symbols as the cross, the nativity scene, the Ten Commandments tablets on government-owned property, once widely accepted by local communities, now becomes the main subject of lawsuits filed by observers who feel disturbed by the view of a religious symbol and demand its removal. It's interesting to note that the most offended by the view of a religious symbol are those who identify themselves as non-believers or members of another faith group. They tend to evaluate symbol that is disturbing for them only from their own external and superficial perspective. As a consequence, presented with the question of constitutionality of religious symbols in public spaces, American courts must determine the meaning of a symbol or practice under challenge. The task becomes even more complicated when we take into account that this type of cases demands from the judicial bodies to assess religious reasons of believers who decided to put a symbol or a monument in public square. Over the last forty years the U.S. Supreme Court as the final arbiter of the law has ruled in several cases regarding the display of religious symbols in public areas, but in none of them managed to formulate workable rules which would allow lower courts to decide cases with similar facts in the same way. The multitude of concurring and dissenting opinions handed down in this type of cases indicates that every scenario can bring different result and the fundamental question — can religious symbols be legally displayed in public square — remains still unanswered.

The most recent religious symbols cases examined by the U.S. Supreme Court over the last ten years involve a memorial Latin cross. The ruling issued in 2010 in *Salazar* v. *Buono*[111] regarded not only the constitutionality of the cross as a religious symbol, but also the validity of a land exchange congressional statute which allowed to transfer the ownership of the land on which sat the Mojave Desert Memorial Cross to private party. Despite highly fact-specific and procedural complexities of the case, the central part of this legal dispute was a white Latin cross, placed on Sunrise Rock in 1934 by members of the Veterans of Foreign Wars (VFW) and hardly visible even from the nearest highway. For almost 70 years the cross stood and nobody objected to its presence. The situation changed when first in 1999 a Buddhist wanted to place a stupa near the memorial cross and then, in 2002 a retired employee of the Mojave National Preserve filed a lawsuit alleging that the display of a cross on federal land violates the Establishment Clause. As a result of these actions, Congress passed a series of bills (1) designating

[110] *Salazar* v. *Buono*, 559 U.S. 700 (2010) at 726 (Alito, J., *concurring in part and concurring in the judgment*).
[111] *Salazar* v. *Buono,* 559 U.S. 700 (2010).

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

the cross as a national memorial, (2) barring the spending of governmental funds to remove the cross and finally (3) transferring the land with the memorial cross on it to VFW and in exchange receiving another parcel elsewhere in the preserve from a private citizen[112]. Bearing these facts in mind, the exchange statute seemed to be the most reasonable solution aimed to preserve the symbol and at the same time eliminate any impression of state's sponsorship of religion. As to the removal of the cross from Sunrise Rock Justice S. Alito in concurring opinion has expressly articulated that it *would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. The demolition of this venerable if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage*[113]. By adopting the *endorsement test* the Court ruled that the implementation of the land-exchange statute was constitutional and it didn't violate the Establishment Clause since it accommodated in the best possible way all conflicting interests. The validity of the congressional statute permitting to transfer the property from public to private hands meant that the memorial cross was no longer subjected to fulfill requirements of the Establishment Clause but as a monument owned by private group it became protected by the Free Exercise Clause.

The ruling in *Salazar* v. *Buono* shows clearly that the Court was in fact willing to accept any possible solution which would protect the longstanding memorial cross from its removal. For that reason Justice A. Kennedy in plurality opinion emphasized that the intent of people who erected the cross was to commemorate fallen soldiers, not to endorse christianity. The symbolism of the cross should then be interpreted in light of history of the monument as it's not only limited to religious meaning since it has attained a broader secular significance[114]. It's indisputable that in the past the United States was much more religiously homogenous than now so the exposition of cross-shaped memorials didn't rise social objections. It should also be noted that memorial crosses in public areas serve mainly as a reminder of the past and a common place for people to gather and pay respect to American soldiers who died in World War I, not as a place of worship. Although Justice A. Kennedy evoked the secular dimension of the cross, which is only secondary to the predominant religious nature, he also reiterated that *[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. (…) The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society*[115]. However, by remanding the case for further proceedings and merely suggesting that the demolition of longstanding religious displays may be interpreted as hostile to religion, the Supreme Court refrained from giving any categorical rules which would help to assess the constitutionality of other religious displays under challenge.

4.2. Hostility to the Latin cross in light of *American Legion* v. *American Humanist Association*

The occasion to clarify deeply chaotic and incoherent jurisprudence of the lower courts, appeared when the Supreme Court addressed constitutionality of memorial cross in *American Legion* v. *American Humanist Association*[116] case. In light of *Salazar* v. *Buono* precedent, which taken alone would be sufficient to rule that longstanding monuments may continue to be exposed in public places, the 2019' ruling decided with 7–2 vote suggests that now we're dealing with rather strong consensus among Justices toward the constitutionality of religious symbols on public land. In this case the Court upheld

[112] *Id.* at 5.
[113] *Id.* at 4 (Alito, J., *concurring in part and concurring in the judgment*).
[114] *Id.* at 17.
[115] *Id.* at 14.
[116] *American Legion* v. *American Humanist Association,* 588 U. S. ____ (2019).

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

constitutionality of a 32-foot tall memorial cross which sits at the center of a busy intersection and honors American soldiers fallen in World War I. The monument, known as the Bladensburg Cross, was originally erected in 1925 on private property by local residents with the help of American Legion. In 1961 the Maryland-National Capital Park and Planning Commission acquired the cross with the land to create a traffic circle and maintain the monument[117]. In 2012 the American Humanist Association members feeling offended by the sight of the cross filed a lawsuit in which they demanded its demolition, relocation or at least removal of the arms. The district court concluded that the cross doesn't violate the establishment clause as it satisfies both the three-prong *Lemon* test and the *reasonable observer* test, but the Court of Appeals for the Fourth Circuit reversed.

Following the majority opinion (Parts I, II–B, II–C, III, and IV) authored by Justice S. Alito, the High Court by referring to history and tradition stated that after World War I the Latin cross gained a special significance in American society[118]. This historical context became crucial to conclude that although the cross is predominantly a Christian symbol, so it conveys a religious message, it's been placed in public not to worship God, but to commemorate the servicemen who lost their lives during the war. Although the symbolic displays from the moment of their creation till now remain essentially passive, their meaning might develop (e. g. the cross as a registered trademark of certain products and businesses is now almost exclusively associated as a secular symbol of healthcare)[119]. For that reason the *Lemon* test fails to resolve the *establishment clause* cases regarding the religious displays and it has already been vastly ignored or substituted by other approaches in previous Supreme Court's decisions. The Justices agree that first element of *Lemon* test, which verifies the legitimate secular purpose of the enacted law or action, is useless. First, it's particularly difficult, if not impossible, to identify the original purpose and motivation of people who created a religious monument or practice so *it would be inappropriate for courts to compel their removal or termination based on supposition*[120]. Second, the passage of time multiplies purposes and in some instances the original religious motivation can be overshadowed by the new ones. In fact, the community may want to maintain the old monuments, symbols and practices not because of their religious nature, but with regards to *historical significance or their place in a common cultural heritage*[121]. Third, similarly to the evolution and possible multiplication of purposes, the message sent by certain monument can also change with time. This mechanism can be illustrated by reference to the tragic fire of Notre Dame cathedral in Paris. Whereas the French Republic distinctively embraces the principle of secularism in public square, this Parisian house of worship constitutes both for believers and non-believers a landmark place of particular historical and cultural importance so its meaning has broadened[122]. The same can be said about originally religious names of American cities and towns which nobody now argues to change. Fourth, because of the special meaning and familiarity that a monument has taken on, its removal may no longer be seen as a neutral act. The Court reiterated once again that the possible demolition or alteration of existing religious memorials would manifest hostility to religion: *A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion (…) the image of monuments being taken down will be evocative, disturbing, and divisive*[123]. Thus, as a logical and predictable consequence of avoiding hostility to religion, the Supreme Court has ruled that the Bladensburg cross doesn't violate the establishment clause because of its historical significance and added secular meaning to the preexisting and predominant

[117] *Id.* at 6–7.
[118] *Id.* at 2: *the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home.*
[119] *Id.* at 2–3.
[120] *Id.* at 16–17.
[121] *Id.* at 18.
[122] *Id.* at 19.
[123] *Id.* at 20–21.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

religious one. The Court observed: *[f]or some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment*[124].

Although the cross remains intact and *the passage of time gives rise to a strong presumption of constitutionality*[125] of other already existing religious monuments, symbols and practices on public property, the justices split over the adoption of this reasoning to the erection of the new ones. Justice E. Kagan in her concurring opinion affirmed that undoubtedly the ruling in *American Legion shows sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands* but she still opts for a case-by-case evaluation of purpose and effect standards of *Lemon* test.

Justice C. Thomas suggested to apply in this type of cases the *coercion test* which has been already applied in *Lee* v. *Weisman*[126] ruling concerning the permissibility of a graduation prayer where the Court stated that all students participating in the ceremony were forced to listen to the prayer delivered by a member of the clergy. The coercion test applied to passive religious displays, regardless of their age and context, would be more useful than other legal standards to determine whether a religious display in public square collides with the Establishment Clause. According to this pattern only *actual legal coercion*[127] exercised by the state on its citizens can indicate the violation of the First Amendment's establishment clause while *[t]he mere presence of the monument along [respondents'- W.K.] path involves no coercion and thus does not violate the Establishment Clause*[128]. People taking offense at seeing a monument don't need to stop, look at it and support its message.

This indifferent attitude of a citizen toward passive religious displays linked with the coercion principles has been introduced to the U.S. Supreme Court jurisprudence by Justice A. Kennedy in another case concerning the constitutionality of religious symbols - *County of Allegheny* v. *ACLU*[129]. The litigation presented before the Court concerned the constitutionality of two religious symbols located on public property of the Allegheny County Courthouse: a Christian nativity scene and a Chanukah candelabrum. They were placed there by private religious groups to mark the holiday season. In 5–4 decision the Court ruled that while the menorah placed near a (now secular) Christmas tree was constitutionally legitimate, the creche placed alone without any reference to the secular dimension of winter holidays promoted Christianity, thus violated the Establishment Clause. Justice A. Kennedy in concurring opinion joined by Justices J. Roberts, A. Scalia and B. White, concluded that both displays, though religious, were permissible and the Court should have recognized the important role of religion for those citizens who celebrate Christmas or Chanukah as religious, not secular, holidays. He stated that *[a]ny approach less sensitive to our heritage would border on latent hostility to religion*[130]. According to Justice A. Kennedy the Establishment Clause doesn't impose the government to accept only the secular meaning of symbols displayed in public. On the contrary, it permits to accommodate them unless the government doesn't use coercive power to support, promote and benefit religion. Even though the *relentless extirpation of all contact between government and religion* (…) *is not the history or the purpose of the Establishment Clause*[131] and it doesn't serve to maintain neutrality between church and state, Justice A. Kennedy is convinced that *the [Establishment-W.K.] Clause forbids a city to permit*

[124] *Id.* at 31.
[125] Ibidem at 21.
[126] *Lee* v. *Weisman,* 505 U.S. 577 (1992).
[127] *American Legion* v. *American Humanist Association* at 1 (Thomas, J., *concurring in the judgment*).
[128] *Van Orden* v. *Perry*, 545 U. S. 677 (2005) at 694 (Thomas, J., *concurring).*
[129] *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989).
[130] *County of Allegheny* v. *ACLU* at 657 (Kennedy, J., *concurring in the judgment in part and dissenting in part*).
[131] *Ibid.*

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is per se suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion[132]. By stating that in general accommodation of passive religious symbols can't pose any real danger for the Establishment Clause, but still distinguishing between different legal assessment of permanent and contemporary religious displays on public property, this *passus* of Justice Kennedy's opinion seems misleading or even contradictory. At this point his suggestion that *[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech*[133] might seem more useful. However, taking into account the 1980' ruling in *Stone* v. *Graham*[134] in which U.S. Supreme Court held that the exposition of Ten Commandments in a classroom can effectively *induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments*, it's clear that again application of this principle depends from the context and surrounding of religious symbols which eventually condition court's reasoning. Whilst in *American Legion* case the presence of the memorial cross is justified by its special meaning attributed to the cross after the World War I as a symbol of sacrifice, the exposition of Ten Commandments in a public schoolroom in line with decision in *Stone* v. *Graham* is still retained as an impermissible endorsement of Christianity due to its religious nature which is deemed to lack any educational function[135].

As to the longstanding religious monuments embedded in America's history, but now under legal challenge, the Court suggests lower courts to follow precedents from *Marsh* v. *Chambers*[136] and *Town of Greece* v. *Galloway*[137]. Both cases regarded the constitutionality of prayers offered by a chaplain before a legislative session which were upheld by reference to the long history and tradition of this practice and were never deemed as violative of the Establishment Clause. Without carving out of the legislative prayer its inclusive and non-denominational character the Court affirmed that this practice was widely accepted by the Framers who at the same time enacted the Religion Clauses. The same reasoning might be applied to similar, in terms of history and tradition, category of monuments, symbols and practices.

As Justice S. Breyer emphasized in his relatively short concurring opinion, the demolition or alteration of the cross *would be seen by many not as a neutral act but as the manifestation of a hostility toward religion that has no place in our Establishment Clause traditions*[138]. Nevertheless, in his view the result of the case would be different if the organizers of the Bladensburg Cross acted with the aim to disrespect any other religious minorities. Lack of any controversy among local residents over almost hundred years until this lawsuit was filed, sufficiently proves that the cross was placed with the aim to commemorate victims and unify the community, not to proselytize and divide along religious lines[139]. He also distinguishes between the newly constructed religious displays on public property, which non necessarily result as lawful, and the pre-existing ones which can be fully embraced by the presumption of constitutionality. Lack of consensus among justices as to how and with what kind of methods courts should examine cases involving other, old or new, religious displays is mitigated by alternative solutions presented in two other concurring opinions written by Justices B. Kavanaugh and N. Gorsuch.

[132] *Id.* at 661.
[133] *County of Allegheny* v. *ACLU* at 664.
[134] *Stone* v. *Graham*, 449 U.S. 39 (1980) at 42: *The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin.*
[135] *Ibid.*
[136] *Marsh* v. *Chambers*, 463 U.S. 783 (1983).
[137] *Town of Greece* v. *Galloway*, 572 U.S. ___ (2014).
[138] *American Legion* v. *American Humanist Association* at 2 (Breyer, J., *concurring in judgment).* See also: *Van Orden* v. *Perry* at 704 (Breyer, J., *concurring in judgment*).
[139] *American Legion* v. *American Humanist Association* at 2 (Breyer, J., *concurring in judgment).*

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

Justice B. Kavanough pointed out that the Court's ruling only *allows the State to maintain the cross on public land. The Court's ruling does not require the State to maintain the cross on public land*[140]. If the Court's ruling doesn't satisfy citizens' need for broader and deeper protection of the rights secured by the U.S. Constitution, in American constitutional system there are two other — legislative and executive — authorities to fulfill this requirement and change the old law or enact the new one[141]. Citizens can't seek protection of their rights only before judicial bodies. But if courts accept to hear the case they should no longer apply *Lemon* test, but instead follow his proposition: [i]*f the challenged government practice is not coercive and if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation*[142].

Justice N. Gorsuch asked non rhetorically whether in cases regarding passive religious displays, which lack concrete injury, citizens feeling affected, disturbed, offended or excluded by looking at them should in fact have standing to sue: *An African-American offended by a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause. Who really thinks that could be the law?*[143]. By going even further he doubts whether courts are authorized to supplant other branches of government by addressing issues of social, not legal, importance. He points out rightly that the *offended observer* theory is similarly confounding as the three-part *Lemon* test, since it's based upon dramatically blurry concept of intensity and regularity of the offense. Whereas offense alone, correlated only with dislike and upset without any real harm, isn't sufficient to confer standing in other categories of lawsuits[144], it's still acceptable in cases regarding the presence of religious symbols in public sphere. To demonstrate how abstract these notion has become Justice N. Gorsuch ironically comments that in *American Legion* case the *Association assures us, its members are offended enough—and with sufficient frequency—that they may sue*[145]. He insists that courts by addressing issues founded on concept of the offense risk the infringement upon the powers of other branches of government[146]. In his view, the fault for using this misguided standard in many Establishment Clause proceedings should be attributed as a consequence of *Lemon* test, since the figure of *offended observer* was precisely invented to evaluate the level of possible government's endorsement of religion *lower courts reasoned that, if the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue*[147]. By declaring the *Lemon* test as a misadventure and identifying its flaws, Justice N. Gorsuch calls for the abandonment of the *offended observer* category as well[148]. By requiring *real controversy with real impact on real persons*[149] in order to have standing, courts will stop producing judgments that *generate more heat than light*[150] on every religious display in this country which can be perceived as offensive. While he agreed to substitute the unworkable and harshly criticized *Lemon* test with the *history and tradition* test, at the same time he expressed his doubts whether this new presumption of constitutionality referred to the age of the display, as proposed by plurality of justices, is a workable rule to monuments erected only 10 or 15 years ago. Instead of concentrating on the *age of a monument,* courts should ask whether it complies with *ageless principles* so that *a practice*

[140] *Id.* at 5 (Kavanough, J., *concurring*).
[141] *Ibid.*: *This Court is not the only guardian of individual rights in America.*
[142] *Id.* at 4.
[143] *Id.* at 4 (Gorsuch, J., *concurring in judgment*).
[144] *Id.* at 2–4.
[145] *Id.* at 2.
[146] *Id.* at 3.
[147] *Id.* at 6–7.
[148] *Id.* at 7.
[149] *Id.* at 10.
[150] *Id.* at 11.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago[151]. It's worth noting that he concluded his opinion by stating that for the sake of a *mutual respect, tolerance, self-rule, and democratic responsibility, an "offended viewer" may "avert his eyes," (…) or pursue a political solution*[152]. In light of deep inconsistence of the Courts's previous decisions, incapacity to achieve new general workable rules and unlimited potential of future litigations regarding religious displays, this approach seems appropriate as it indicates that the Supreme Court doesn't want to speculate and make hypothetical assertions. For now it says clearly that as to the already-established symbols embedded into the history and tradition of American society, lower courts should uphold their constitutionality. The future, as always, remains uncertain but current interpretation of religion clauses allows every existing religious monument to stay where it was placed in the past. Otherwise court's decisions demanding its demolitions would manifest *a hostility toward religion that has no place in our Establishment Clause traditions*[153].

Compared to previous decisions related to religious symbols, in *American Legion* ruling Justices (finally) departed from the tendency to secularize the symbol in order to preserve it in public domaine. A brief analysis of the very first rulings issued in religious symbols cases — the one from 1984 (*Lynch* v. *Donnelly*[154]) and the other one from 1989 (*County of Allegheny* v. *ACLU)* — shows that the U.S. Supreme Court has undertaken a long journey from stating that religious displays on public grounds (e.g. the creche and the menorah) are permissible only when counterbalanced by secular objects, to upholding their constitutionality despite their deeply religious nature. The reason of this shift partially lies in an altered attitude of Justices toward the phenomenon of hostility to religion and its relation to the concept of neutrality. On the one hand there's the idea of strict separation between church and state with its high probability that by cleansing public sphere from religious symbols, the government would manifest animosity toward certain religious groups or religion in general. On the other hand, there's the paradigm of accommodation still with a chance that by leaving a religious symbol of one confessional group on public property, the government supposedly favors and promotes that particular faith over others. Both ways are troublesome but, as the evolution of the Supreme Court's doctrine shows, it's better to follow the way of accommodation. Despite its bumpy potholes, it leads to a broader respect for religious diversity and makes place for the demands of Free Exercise Clause. Undoubtedly, the American jurisprudence concerning religious displays in public is, and will still remain, inconsistent and unprincipled, but perhaps we shouldn't expect that the highest federal court of the United States will invent miraculous formulas ready to be universally applied in every single litigation regarding this issue. At least the recent ruling in *American Legion* stands out for a significant disinterest of Justices to apply the *Lemon* test and for that reason it's already a substantial change. However, as commentators observe, the Supreme Court missed the opportunity to clarify the Establishment Clause for future claims[155]. Therefore, the recognition of longstanding symbols, monuments and practices as constitutionally permissible still demands many compromises between believers and non-believers.

Conclusions

At first glance, the sample of recent decisions presentes above which has been carefully extracted from the Supreme Court's vast and complex jurisprudence of religious freedom cases, should cause in

[151] *Id.* at 9.
[152] *Id.* at 11.
[153] *Van Orden* v. *Perry*, 545 U. S. 677, 704 (2005) (Breyer, J., concurring in judgment).
[154] *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).
[155] *American Legion v. American Humanist Ass'n. The Supreme Court Leading Cases*, „Harvard Law Review", 2019, Vol. 133, pp. 267–271.

MINISTERSTWO SPRAWIEDLIWOŚCI FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

reader a wonderfully refreshing effect. All three mainstream cases — *Trinity Lutheran Church* v. *Comer, Masterpiece Cakeshop* v. *Colorado Civil Right Commission and American Legion* v. *American Humanist Association* demonstrate that there's a visible and decisive doctrinal shift of the Supreme Court's Justices toward greater accommodation of religion. All three were decided with the same strong 7–2 vote, which allows lower courts assume that there's not much controversy in issues addressed by the U.S. Supreme Court.

If we add to it a „ministerial exception" created by decision of *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*[156] we might even think that hostility toward religion is an abstract notion. If religious organizations have autonomy to hire and fire people, receive public benefits for their activities, manifest their religious convictions in public by placing massive crosses at a busy intersection, legally disobey the generally applicable neutral laws through a series of religious exemptions or even discriminate other groups by refusing to deliver them service on religious grounds, then we might ask — is all that really neutral to nonreligious groups? Here lies the critical point, which for the Supreme Court is transformed into a challenging task of finding workable standards which will reconcile conflicting interests of church and state, believers and non-believers.

With *Lemon* test almost dead and buried, the Justices try to elaborate new set of rules which might bring more coherence in religion clauses doctrine. The return to „strict scrutiny" test in Free Exercise Clause cases and reference to historical meaning of the Establishment Clause are perceived as a glimpse of hope toward a more consistent doctrine that would precisely draw the new „lines" between permissible accommodation and impermissible state-sponsored advancement of religion, instead of leading some cases to the *extremum,* in which preferential treatment of one groups leads to an unjustified discrimination of the other ones. Sadly, the Supreme Court still analyzes each religion clause in isolation of the other, which might be surprising as the text of the First Amendment clearly indicates that they should be read together in order to serve one purpose — protect freedom of religion. Their pictorial representation we can find by looking at two-faced Janus god. The ability of this ancient Roman deity to see in two directions may symbolize the ways in which religion clauses work. Although each clause points in opposite direction, they're governed by one spirit which unites them. The same mechanism applies to a citizen who is a subject both of political and religious covenant[157]. Therefore, the U.S. Supreme Court rejected the idea of strict separation which aimed to extirpate any contact between government and religion, and gradually replaced it with the acknowledgment and support for religion and accommodation of religious needs. Recent decisions of the U.S. Supreme Court concentrate on religious animus as a response to political, cultural, social and economical efforts to marginalize religion. Rulings favorable to religion, that in fact don't favor it but simply protect religious people against discrimination, prove to mark only the beginning of attacks against freedom of religion. This is because religious landscape is changing. While in the past common Christian believes regarding moral controversies were mostly compatible with dominant culture, now it's the opposite. Religious objectors who want to act in accordance with their conscience are being accused of discrimination. Litigations brought against them are certainly not neutral toward religion and Supreme Court tries to reasonably solve them out.

Finally, it must be pointed out that even if the pressure on religious freedom has shifted away from certain categories of conflicts like public display of longstanding religious symbols and monuments, it has almost automatically passed to another sort of issue with less clear jurisprudence like for example the construction of new religious monuments, which hasn't been sufficiently addressed by the Court. But the Court cannot remedy every social or moral controversy, its role is to say what the law

[156] *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171 (2012).
[157] F. Longchamps de Bérier, *Uwagi o neutralnym państwie religijnych obywateli w jurysprudencji Sądu Najwyższego Stanów Zjednoczonych Ameryki*, „Czasopismo Prawno-Historyczne" T. 59, 2007, z. 2, s. 93.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

is, now what is should be. For the same reason the neutrality toward religion cannot be achieved by a court's *dictum,* even if it's the nation's highest court made up of nine prominent lawyers, because neutrality is a process in which should, first and foremost, participate citizens. This is why in the most recent decision of *American Legion* the Justices stated that other branches of government, not the court, should respond to social pressure regarding religious symbols. However, as long as the U.S. Supreme Court perpetuates the importance of religion as a vital part of American history and culture, there's no threat that religion might be eliminated from public square. We all know that it's in peril, an unprecedented one.

Bibliography

Case Law

Abington School District v. *Schempp*, 374 U.S. 203 (1963) at 308.
Agostini v. *Felton*, 521 U.S. 203 (1997).
Aguilar v. *Felton*, 473 U.S. 402 (1985).
Altitude Express Inc. v. *Zarda* (No. 17–1623).
Board of Education of Kiryas Joel Village School District v. *Grumet*, 512 U.S. 687 (1994).
Board of Education v. *Mergens*, 496 U.S. 226 (1990).
Bob Jones University v. *United States*, 461 U.S. 574 (1983).
Bostock v. *Clayton County, Georgia* (No. 17–1618).
Burwell v. *Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014).
Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995).
Church of the Lukumi Babalu Aye, Inc. v. *Hialeah*, 508 U.S. 520 (1993).
City of Boerne v. *Flores*, 521 U.S. 507 (1997).
Commonwealth of Pennsylvania, et al. v. *President United States of America, et al.,* Nos. 17–3752, 18–1253, 19–1129, 19–1189 (3rd Cir., 2019).
County of Allegheny v. *ACLU*, 492 U.S. 573 (1989).
Everson v. *Board of Education*, 330 U.S. 1 (1947).
Employment Division v. *Smith*, 494 U.S. 872 (1990).
Gillette v. *United States*, 401 U.S. 437 (1971) at 461.
Goldman v. *Weinberger*, 475 U.S. 503 (1986).
Hobbie v. *Unemployment Appeals Commission*, 480 U.S. 136 (1987).
Hosanna-Tabor Evangelical Lutheran Church and School v. *EEOC*, 565 U.S. 171 (2012).
Kennedy v. Bremerton School District, 586 U. S. ____ (2019).
Lee v. *Weisman,* 505 U.S. 577 (1992).
Lemon v. *Kurtzman*, 403 U.S. 602 (1971).
Locke v. Davey, 540 U.S. 712 (2004).
Lynch v. *Donnelly*, 465 U.S. 668 (1984).
Marsh v. *Chambers*, 463 U.S. 783 (1983).
Masterpiece Cakeshop v. *Colorado Civil Rights Commission*, 584 U. S. ____ (2018).
McDaniel v. *Paty*, 435 U.S. 618 (1978).
Minersville School District v. *Gobitis*, 310 US 586 (1940).
Mitchell v. *Helms*, 530 U.S. 793 (2000).
Minersville School District v. *Gobitis*, 310 U.S. 586 (1940).
National Institute of Family and Life Advocates v. *Becerra*, 585 US ___(2018).
Obergefell v. *Hodges*, 576 US ___ (2015).

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

Reynolds v. *United States*, 98 U.S. 145 (1878).
R.G. & G.R. Harris Funeral Homes Inc. v. *Equal Employment Opportunity Commission* (No. 18–107).
Rosenberger v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995).
Salazar v. *Buono,* 559 U.S. 700 (2010).
Sherbert v. *Verner*, 374 U.S. 398 (1963).
State of California v. *the Little Sisters of the Poor,* 19–15072 (9th Cir. 2019).
Stone v. *Graham*, 449 U.S. 39 (1980).
Town of Greece v. *Galloway*, 572 U.S. ___ (2014).
Trinity Lutheran Church v. *Comer*, 582 U. S. ____ (2017).
Van Orden v. *Perry*, 545 U. S. 677, 704 (2005).
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943).
Widmar v. *Vincent*, 454 U.S. 263 (1981).
Wisconsin v. *Yoder*, 406 U.S. 205 (1972).
Witters v. *Washington Department of Services for the Blind,* 474 U.S. 481 (1986).
Zelman v. *Simmons-Harris*, 536 U.S. 639 (2002).
Zobrest v. *Catalina Foothills School District*, 509 U.S. 1 (1993).
Zubik v. *Burwell,* 578 U. S. ____ (2016).

Legislative Acts

Patient Protection and Affordable Care Act, Pub. L. 111 - 148.
Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488.

Literature

Goodrich L., *Free to Believe: The Battle Over Religious Liberty in America*, Colorado Springs 2019.
Kudła W., *Wrogość wobec religii. Ostrzeżenia za strony Sądu Najwyższego USA*, Kraków 2019.

Journals

American Legion v. American Humanist Ass'n. The Supreme Court Leading Cases, „Harvard Law Review", 2019, Vol. 133.
Carter S. L., *The Resurrection of Religious Freedom? Comment*, „Harvard Law Review", 1993–1994, Vol. 107.
Correia E., *Trinity Lutheran Church v. Comer: An Unfortunate New Anti-Discrimination Principle*, „Rutgers Journal of Law and Religion", 2017, Vol. 18.
Davis D.H., *Editorial. A Commentary on the Supreme Court's „Equal Treatment" Doctrine as the New Constitutional Paradigm for Protecting Religious Liberty*, „Journal of Church and State", 2004, Vol. 46, No. 4.
F. Longchamps de Bérier, *Uwagi o neutralnym państwie religijnych obywateli w jurysprudencji Sądu Najwyższego Stanów Zjednoczonych Ameryki*, „Czasopismo Prawno-Historyczne"
Gollomp G., *Trinity Lutheran Church v. Comer: Playing "in the Joints" and on the Playground*, „Emory Law Journal", 2019, Vol. 68, p. 1168.
Kendrick L, Schwartzman M., *Comments. The Etiquette of Animus*, „Harvard Law Review", 2018, Vol. 132.
Laycock D., *Churches, Playgrounds, Government Dollars — and Schools?*, „Harvard Law Review", 2017, Vol. 131.

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice

Laycock D., *The Broader Implications of Masterpiece Cakeshop,* „Virginia Public Law and Legal Theory Research Paper", 2019, No. 35.
Laycock D., *The Wedding-Vendor Cases*, „Harvard Journal of Law & Public Policy", 2018, Vol. 41, Issue 1.

On-line resources

Americans Divided over Whether Wedding-Related Businesses Should Be Required to Serve Same-Sex Couples, Pew Research Center (September 28, 2016), https://www.pewforum.org/2016/09/28/2-americans-divided-over-whether-wedding-related-businesses-should-be-required-to-serve-same-sex-couples/ (last access: 8.11.2019).
Duncan R.F., *A Piece of Cake or Religious Expression: Masterpiece Cakeshop and the First Amendment,* „Nebraska Law Review Bulletin" (Jan. 7, 2019), https://lawreview.unl.edu/piece-cake-or-religious-expression-masterpiece-cakeshop-and-first-amendment (last access: 8.11.2019).
In U.S., Decline of Christianity Continues at Rapid Pace, Pew Research Center, (October 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ (last access: 10.11.2019).
Report of the Family Research Council, *Hostility to Religion: The Growing Threat to Religious Liberty in the United States*, June 2017 Edition, https://downloads.frc.org/EF/ EF17F51.pdf (last access: 8.10.2019).

MINISTERSTWO SPRAWIEDLIWOŚCI
FUNDUSZ SPRAWIEDLIWOŚCI
The Project is co-financed by the Justice Fund whose administrator is the Minister of Justice