From liberty to equality

Religious freedom in normative theory and Dutch politics

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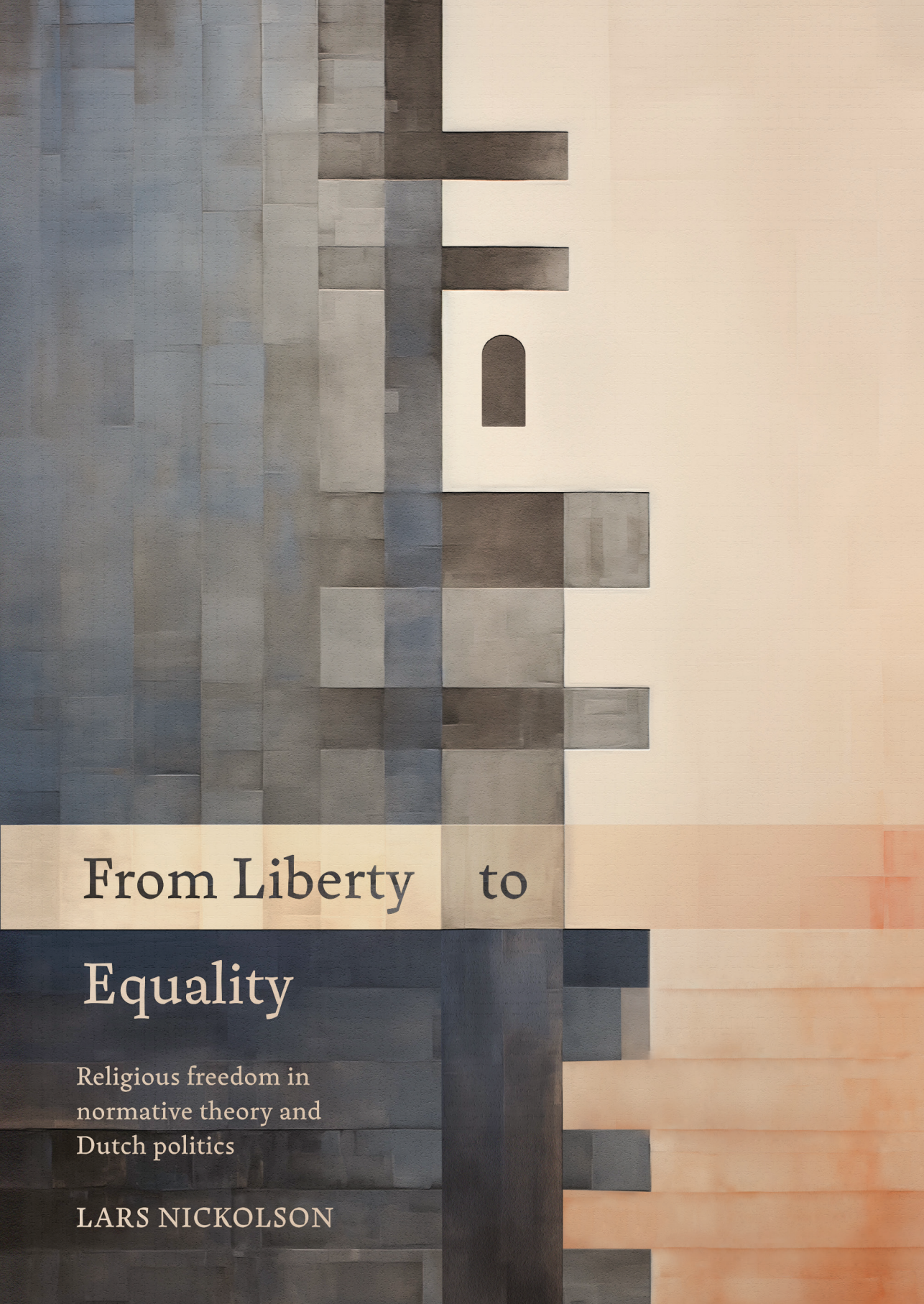
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LARS NICKOLSON

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From Liberty to Equality

Religious freedom in normative theory and Dutch politics

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Voor Hans en Annelet,
voor Ans.

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Introduction

In the middle of the COVID-19 pandemic, we were reminded just how controversial religious freedoms can be. While many lived in fear of contamination, and public gatherings were getting banned left and right, some religious communities nevertheless continued to claim their right to congregate. These claims were often met with criticism, and many states decided to severely restrict communal religious worship.[1] In countries like the United States, however, such bans were lifted after corrections from the judiciary.[2] In the Netherlands, ample exemptions from the COVID-19 (Temporary Measures) Act were carved out for churches, and the Cabinet limited itself to providing (non-legally binding) instructions for religious events. These events remained controversial in countries like the Netherlands, however, which became all too clear when conservative Reformed Protestant churches openly defied the government's instructions and continued to host large groups of (unmasked) believers. Massive outrage ensued: How can one choose the need to congregate over the lives and health of others?[3] Why would churches be exempt from laws others have to obey? And how do church services differ from other events that people hold dear, such as theater shows or football matches?[4]

The above is just one example of the many disputes surrounding religious freedom in contemporary liberal democracies. Clashes such as these have become all the more frequent with the expansion of the modern welfare state, which has gradually extended its influence over domains and issues that were previously marked by religious norms. The Dutch COVID-19 regulations are a case in point, as they stand in stark contrast with the lack of coordinated action against the 1918 Spanish flu.[5] But besides public health, domains like

1 See for example Storslee 2022 (about the United States), Berkman 2020 (about Germany) and Kudla & Bicharz 2020 (about Italy and Poland).

2 Storslee 2022.

3 *Reuters*, 2020 18 October, Churchgoers in Dutch 'Bible Belt' defy coronavirus instructions. Retrieved from: https://www.reuters.com/article/us-health-coronavirus-netherlands-church-idUSKBN2730I4 [Accessed on 8 June 2023]. NOS, 24 March, Viroloog Koompans: kerk op Urk speelt 'Russische roulette' [Virologist Koompans: church in Urk plays 'Russian Roulette']. Retrieved from: https://nos.nl/artikel/2373944-viroloog-koopmans-kerk-op-urk-speelt-russische-roulette [Accessed on 8 June 2023].

4 NOS, 4 October 2020, Onbegrip in landelijke politiek over 600 gelovigen in kerk Staphorst [Incomprehension in national politics about 600 religious believers in church Staphorst]. Retrieved from: https://nos.nl/artikel/2350949-onbegrip-in-landelijke-politiek-over-600-gelovigen-in-kerk-staphorst [Accessed on 8 June 2023].

5 Krijger 2020, 27 April, Coping with Covid-19 in Dutch Christianity: A Comparison with the 1918 Spanish Flu Pandemic (Part Two). Retrieved From: https://www.rug.nl/research/centre-for-religious-studies/research-centres/centre-religion-conflict-globalization/blog/part-two-coping-with-covid-19-in-dutch-christianity-a-comparison-27-04-2020?lang=en [Accessed on 8 June 2023].

that of education, family and security have also become extensively regulated in most liberal democracies, and religious freedom mainly persists in these areas in the shape of legal exemptions.[6] Among the more recent examples of such regulatory advances are the so-called equality laws, or anti-discrimination laws: progressive legislation which regularly clashes with more conservative religious norms and practices, resulting in a proliferation of court cases and an often fiery political and societal debates.[7]

Conflicts like these, and the conflict between regulatory and religious interests more generally, are often described through the opposition between liberty and equality. Those who disapprove of the curtailment of liberty, for example, often point to the ascent of equality or egalitarianism as the lamentable cause. In the words of legal scholar Steven Smith, it is the "equality family" which in recent decades "seems to have muscled aside even the venerable freedom family at the center of American public discourse".[8] Joel Harrison sees something similar occurring in normative theory, where appeals to equality and fairness have become "increasingly prominent".[9] And indeed, one of the main exponents of this egalitarian perspective, Cécile Laborde, also brands this as a "distinctive new approach" to religious freedom, even if it is ultimately grounded on older egalitarian theories like that of John Rawls.[10] To use one of Laborde's terms, a "family of views" has emerged over the course of the last two decades,[11] with a growing number of theorists implicitly or

6 Chapter 4 of this thesis discusses a wide array of legal exemptions, and their impact on others.

7 Tebbe 2017, 1-5. See also Foster 2016 for the discussion of the growing number of cases where sexual orientation non-discrimination rights clash with religious freedom rights. See also Brems 2018 for examples of recent cases about religious objections to same-sex marriage registrations, objections to delivering services to same-sex couples, the rejection of a job applicant on religious grounds, and the exclusion of women from the ballot on religious grounds.

8 Smith 2010, 29.

9 Harrison 2020, 27.

10 Laborde 2014a, 54. To be fair, the approach may also not be as new as Laborde suggests, as a few earlier publications also discerned an equality-based approach to religious freedom: see for example Eisgruber & Sager 1994, distinguishing between perspectives of 'privilege' vs. 'protection', and 'liberty concerns' vs. 'equality concerns'. See also Pepper 1993, distinguishing between conflicting 'paradigms' of religious freedom, based on either liberty or equality.

11 Laborde 2014a, 54.

explicitly departing from a perspective of equality.[12] And while some criticize these egalitarian theories to bolster their defense of religious liberty, the egalitarian theorists in turn elucidate their views by drawing contrasts with the "well-established traditional" views of "accommodationists",[13] "integrationists"[14] or simply "liberty-based accounts"[15] of religious freedom.

Debates about religious freedom thus seem to be marked by a fundamental fault-line, and a broad shift from 'traditional' liberty-based views to 'new' equality-based views. Such a shift towards equality would indeed square with other, broader shifts that have been observed: the slow but steady movement towards greater economic equality,[16] the gradually expanding scope and influence of cross-cultural equality culminating in the Universal Declaration of Human Rights,[17] the emergence of an 'egalitarian plateau' occupied by most (if not all) modern political theories,[18] and the rise and persistent dominance of the Rawls' egalitarian view in liberal political philosophy.[19] At the same time, painting such shifts with the generic brush of equality inevitably obscures the many ways in the movement towards equality has been opposed or thwarted,[20] let alone the various guises in which this value - as well as that of liberty[21] - may appear.[22]

There are many reasons, therefore, to zoom in further on disputes and debates about religious freedom. For one thing, the distinction between liberty- and equality-based approaches has not been elaborated in a systematic or comprehensive way. It is often implicitly alluded to, or described in a partial or limited fashion, focusing on a particular dimension or aspect of religious freedom (or equality), discussing a concrete theory or case, or situating

12 To give a small sample, works where such an egalitarian or equality-based perspective on religious freedom is developed or described are Eisgruber & Sager 2007; Greene 2009; Schwartzman 2012; Cohen 2012; 2015; Schragger & Schwartzman 2013; Dworkin 2013; Laborde 2014a, 2017; Tebbe 2017; Patten 2016, 2017a.

13 Laborde 2014a; Cohen 2015a, 96; Gedicks & Tassel 2014, 361. Or "inclusive accommodationists", in the case of Schwartzman (2012).

14 Cohen 2013.

15 Laborde 2017, 218.

16 Piketty 2022.

17 Stuurman 2017.

18 Dworkin 1983.

19 Forrester 2019.

20 McMahon 2019.

21 Political historian Annelien de Dijn, for example, shows how two competing conceptions of freedom have left their mark over the last 2500 years in the West, and how a democratic conception of freedom gave way to a contemporary conception that interprets freedom as non-interference and limited government (De Dijn 2020).

22 Bejan 2022.

the distinction in the context of a specific domain or scientific discipline. Regarding the latter, for example, seemingly similar distinctions and shifts between liberty- and equality-based views are described not only in legal and political theory, but also in (studies of) law and politics.[23] But rarely a bridge is built between these disciplines and domains, to find out to which extent these conflicts and shifts are really the same. What is lacking, in sum, is a comprehensive account of the various ways in which liberty- and equality-based perspectives conflict and compete, both in normative theory and in liberal democracies, and what the outcomes of these conflicts are.

In this thesis, I aim to map these conflicts and shifts in such a comprehensive way. But to provide more depth and clarity, I will also add a critical layer to this analysis. To which degree, I ask, do liberty- and equality-based views really differ when it comes to their practical implications when it comes to resolving exemption disputes? In other words, how consequential are the outcomes of the conflict between these views? These aims, both descriptive and critical, are incorporated in the main research question:

> *How can disputes about religious exemptions be explained and resolved in terms of liberty- and equality-based views on religious freedom, and how do conflicts and shifts between these views take shape in both normative theory and contemporary liberal democracies?*

Some preliminary and clarifying remarks are in order here. I speak of religious exemptions disputes in a broad way, as instances in which free religious exercise clashes with any kind of regulatory interest of the state, thus raising the question whether to curtail this freedom or safeguard it (to some extent) through exemptions. In that sense, the notion of religious exemption disputes can (and will) be used interchangeably with that of religious free exercise disputes. This focus on religious freedom as free exercise also means that the debate about religious freedom's dimension of non-establishment falls outside the scope of this thesis. In other words, I focus on the question of how religion

23 See for example Feldman's study of the establishment clause in the U.S. Constitution (also titled "From Liberty to Equality" (2002)). And in the Dutch context, shifts towards a dominant perspective based on equality and non-discrimination are described in Maussen & Vermeulen (2015) and Kamphuis & Bertram-Troost (2023) for the domain of education. Regarding this shift in a broader sense, legally as well as politically, see for example *Equality as a new religion* ['Gelijkheid als nieuwe religie'] by Henk Post (2010), or the edition of the Dutch Christian-democratic party's official journal titled *The burden of equality* ['De last van gelijkheid'] (Dijkman et al. 2011).

should be protected from (and by) the state, and not on the question of how the state should be protected against religious interference (and thus prevented from 'establishing' religion).[24] Furthermore, the research question mentions *religious* exemptions because these are the primary bone of contention in debates about religious freedom, but this does not mean that similar non-religious exemptions fall outside the scope of this thesis: In fact, the question whether religious practices and beliefs uniquely merit exemptions will prove to be one of the main points of disagreement between liberty- and equality-based theories.

Regarding the scope of the studied debates: This research focuses on (normative) theoretical debates in a broad sense, not necessarily limited to positions within a liberal framework, or liberal political theory more specifically. Although the discussed equality-based theories all fall squarely within these liberal confines, this probably cannot be said for all liberty-based theories. I will not enter into a discussion about whether or not the conflicts between both perspectives are situated exclusively within this framework, however, as this does not contribute to the aim of this thesis.[25] Relatedly, I will not refer to distinctions made between competing strands, traditions or concepts of liberalism, even though these might (partially) coincide with the competing perspectives of religious freedom I describe.[26] And while there is also a certain overlap with the debate about multiculturalism, or the liberalism-communitarianism debate, the fact that these debates primarily have a broader cultural focus means that I will not draw from these works either.

When it comes to conflicts and shifts in (political) *practice*, my research is indeed limited to liberal democracies. In the end, religious freedom is an essentially liberal right: its establishment coincided with the birth of the liberal state.[27] And contemporary disputes about religious exemptions mainly take place in liberal-democratic contexts. As we will see, moreover, many theorists

24 This distinction between these two dimensions of religious freedom is often clarified by referring to the First Amendment of the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (see for example Laborde 2017, 15).

25 See Pierik 2015 and Cohen 2015b for an example of such a discussion.

26 See for example Galston's distinction between two concepts of liberalism, one grounded in autonomy and the other in diversity (1995). Or see Gray's distinction between a liberalism aiming at universal consensus and another grounded in value pluralism (2000). See also Mansvelt Beck 2015 for an example of how such a distinction in liberalism (in this case between 'liberal culturalism' and 'framework liberalism') can be used to study parliamentary debates.

27 Collins 2009.

ultimately leave it to liberal-democratic procedures to produce verdicts about specific religious exemption cases. This also suggests that different outcomes can be expected in different liberal-democratic contexts, which in turn limits the possibilities of studying the extent and shape of shifts in liberal democracies as such: I will delve a bit more into the (inevitable) methodological limitations in the final concluding chapter. In each case, theoretical and political debates will not just prove to be complementary, or interesting points of comparison: When it comes to studying and resolving religious exemption disputes, they will end up being inextricably intertwined.

Structure of the thesis

The thesis starts by asking the question how liberty- and equality-based views can be distinguished to begin with. **Chapter 1** reconstructs the theoretical debate about religious freedom as a fundamental conflict between Liberty- and Equality-based Theories of Religious Freedom (LTRF and ETRF). I show how this debate can be broken down into four separate yet interrelated (sub) questions - the question of religion, competence, rights and interests - and that LTRF and ETRF offer starkly contrasting answers to each of those. After elaborating this opposition of rather generalized and static families of views, **Chapter 2** zooms in on the concrete stances of individual authors to get a better picture of the dynamics of the debate – including *shifts* between (and within) liberty- and equality-based views. It shows how ambivalences, concessions and compromises of liberty-leaning authors point to a shift towards an egalitarian consensus, but also how persisting disagreements within the egalitarian confines underline that this consensus is rather divided internally, or at the very least considerably nuanced. Laborde's sophisticated and complex theory of religious freedom is presented as an illustration of this broad and nuanced egalitarian status quo – and a point of reference for the next, critical chapter.

With the theoretical conflicts and shifts in clear view, **Chapter 3** asks to which degree religious exemption disputes can actually be resolved in terms of liberty- and equality-based views on religious freedom. Its aim is therefore a critical one, and its conclusions are sobering. Discussions about questions of religion, competence and rights are largely undecisive, and LTRF and ETRF's main principles and criteria are inherently and fatally indeterminate. In fact, the most viable approach to the decisive question of interests, namely the approach of proportionality balancing, also turns out to be the most openly indeterminate one. Even sophisticated accounts of religious freedom

like Laborde's, the chapter shows, are bound by these limits of theory. The upshot of all this indeterminacy is that the meaning and implications of central principles and criteria can only be worked out in specific contexts, and that it is not normative theories but contextual assessments that ultimately resolve religious exemption disputes.

In order to get a better grip and view on these contextual assessments, especially when it comes to balancing religious burdens against third-party harms, **Chapter 4** develops a moral classification of harms resulting from exemptions. It distinguishes - in order of decreasing severity - between physical harm, safety harm, liberty harm, opportunity harm and economic harm as different categories of harm in a material sense, which are complemented by a symbolic or dignitarian dimension of harm. The development of this classification concludes the theoretical part of this thesis, which has not only established the limits of normative theory and the corresponding need for contextual assessments, but has also yielded a rich conceptual framework which can be employed to analyze such practices.

Chapter 5 lays the foundations for the thesis' case study; a detailed reconstruction of conflicting and shifting views of religious freedom in Dutch parliamentary debates about a general anti-discrimination law. The chapter first sketches the broader context by describing the historical development of the Dutch church and state relations, analyzing these through the prism of LTRF and ETRF. It also elaborates why the parliamentary debates in question present such a good opportunity to conduct a more fine-grained analysis of contemporary conflicts and shifts in a liberal-democratic context. And it develops a methodological approach, finally, to trace conflicts and shifts in the three debates in question, which took place between 1985 and 2014. In this approach, liberty- and equality-based views are not conceived as fixed belief systems geared primarily at understanding, but rather as more flexible and action-oriented *frames*.

Chapter 6, 7 and 8 describe the results of the empirical analysis of the debates of 1985, 1993 and 2014 respectively. These chapters show how the equality-based frame has become more and more dominant, not only through the consolidation of its central terms, tenets and principles in the Dutch Equal Treatment Act, but also by determining which arguments are considered valid and legitimate to begin with. Even its staunchest critics, in the shape of the various Reformed Protestant parliamentary factions, are ultimately forced to relinquish their liberty-based resistance and instead clothe their resistance in egalitarian garb. The analysis also underlines the ambiguity of the equality-based frame, describing the many interpretative battles that take place, and the

repeated attempts that are undertaken to stretch the limits of the frame. It also shows how balancing of burdens and harms ultimately proves to be decisive, and how the views on what constitutes a disproportionate harm (and thus an adequate balancing) are constantly evolving.

Academic and societal relevance

There are several ways in which this research will prove to be relevant. Some of its academic relevance was already hinted at earlier: it provides a first systematic and comprehensive elaboration of an opposition that is often merely alluded to, or described only partially. Distinguishing between the questions regarding religious freedom - the question of religion, competence, rights and interests - may also serve to clarify and structure the theoretical debate. Furthermore, the research shows how a shift from liberty- and equality-based views on religious freedom is indeed also discernable in the theoretical debate about religious freedom, resulting in a broad egalitarian consensus. This finding may therefore also help focusing the debate, as it identifies positions that are mostly abandoned anyway, and directs attention to the (egalitarian) principles and precepts that are most widely supported and simultaneously most susceptible to disagreement.

In its critical part, the thesis also contributes to (normative) theorizing about religious exemptions. It identifies the question of interests as the most decisive issue, and proportionality balancing as the most viable approach to this question. It also shows how normative theory can only take us so far when it comes to resolving concrete religious exemption disputes. This means that, if theory wants to contribute to the resolution of religious exemption disputes, it should pay more attention to processes of contextual balancing. In this light, the moral classification of harms developed in Chapter 4 represents the most significant theoretical contribution of this thesis, as it helps to structure and analyze such balancing acts.

This also touches on the social relevance of this thesis. As some have noted, courts are not prone to purposely and explicitly balance burdens and harms, despite their explicit endorsements of the harm principle or the principle of proportionality.[28] The moral classification of harms may help them to arrive at an adequate balance in a more reasoned way. The in-depth analysis of the role of frames in parliamentary debates, furthermore, provides more insight

28 Houdijker 2012; Keall 2020.

into the dynamics that parliament members are exposed to, and may help them to relate to these frames in a more conscious and reflexive way. In sum, the insights of this research may be very relevant to actors in both judicial and legislative branches of government.

Finally, this thesis also contributes to the further empirical study of political debates, and church and state relations. Regarding the latter, it enriches the understanding of the Dutch approach of governing religion and religious diversity, nuancing and complementing existing views of the presumed Dutch 'model'. More generally, the conceptual framework provides a new lens through which such historical relations may be viewed, and with which competing views of religion may be analyzed in parliamentary debates. This will contribute to further understanding to how conflicts between liberty- and equality-based views play out, and determine whether and how the equality-based perspective is indeed becoming ever more dominant in liberal democracies.

1

Liberty- vs. Equality-based Theories of Religious Freedom

How can disputes about religious exemptions - or religious free exercise more generally - be explained in terms of liberty- and equality-based views on religious freedom? As described in the introduction, many theorists imply or assume such a theoretical opposition, often identifying with either one of these views. And sometimes they describe how these views differ when it comes to specific issues or cases. What has been lacking, however, is a structural elaboration of all the ways in which they differ, and the fundamental reasons why. In this chapter, I aim to provide such a comprehensive overview by distinguishing between what I call Liberty- and Equality-based Theories of Religious Freedom (LTRF and ETRF).[1]

As the structure of this chapter reflects, I argue that the question of religious exemptions can be broken down into four separate yet interrelated (sub)questions, and that the best way of explaining the difference between liberty- and equality-based theories is to show how these theories offer conflicting answers to each of these questions. First of all, there is the question of religion, as the phenomenon that potentially qualifies for exemptions, or legal protection more generally. The main point of contention here is whether religion is uniquely special, or in fact equal to similar non-religious phenomena. The second question is that of competence, and does not concern what is to be protected, but rather who can decide about it: is it the state that is competent in this matter, or (also) religious communities themselves – and who gets to determine who is competent about what to begin with? The third question is that of rights. Instead of establishing who draws the lines around religious freedom, it is concerned with determining where these lines are drawn: a debate which is generally waged in terms of the status and scope of rights. Underlying the conflicting rights and laws, finally, are the various interest that they protect. The fourth question is therefore one of interests, and asks not where the lines should be drawn, but *why*: what interests are protected and affected by religious freedom, and why should one interest prevail over the other?

This chapter describes the contrasting answers to these questions given by theories that are grounded in the idea of liberty on the one hand, and theories

1 I borrowed the idea of using these acronyms to denote families of related views of religious freedom from Laborde, who uses ETRF for Egalitarian Theories of Religious Freedom (2015b). In the following, I employ terms like egalitarian theories or the egalitarian perspective interchangeably with the notion of Equality-based Theories of Religious Freedom. This interchangeability is not self-evident, as Bejan shows in her exploration of equality before egalitarianism (2022) but in the context of contemporary political theory - which is the focus of this thesis - it is valid.

that are predicated on the principle of equality on the other. It is important to note that the goal here is to draw out the sharpest contrast possible, because this yields the clearest view of the stakes and parameters of the debate, as well as a conceptual framework for the empirical analysis in the second part of this thesis. In the following reconstruction of the debate, I am therefore not looking to describe an author's position in all its nuances and ambivalences, but rather refer to specific stances or arguments of these authors when they illustrate or exemplify one of the two generalized views. This also means that these perspectives as a whole cannot be traced to one author in particular, nor do authors necessarily subscribe to all parts of the view in question – if only because they often have not elaborated a position on each of the four questions.[2] This does not mean that the resulting theories are arbitrary collections of arguments and positions, however, as the aim is to organize and elaborate the views in question in the most coherent and consistent way possible. As a result, a picture emerges of two comprehensive and fundamentally opposing perspectives on religious freedom.

1.1 The question of religion: uniquely special or equally special?

Any position on religious exemptions of religious freedom unavoidably departs, either implicitly or explicitly, from a view of the phenomenon of religion itself. Those arguing for special legal protection for religious practices and beliefs generally do so because they believe that religion is special, or even uniquely special. This begs the question, of course, of what precisely sets religion apart, and so a debate ensues about religion's allegedly distinctive features. This is not only a technical descriptive exercise but, given its potential normative implications, also a highly divisive issue.

The contrast between the views of Liberty- and Equality-based Theories of Religious Freedom on the question of religion can be described very succinctly: Liberty-based theories argue that religion is uniquely special, for (at least) six reasons: its truth, its inaccessibility, the weight of its obligations, its importance in providing meaning and identity, its role of victim or perpetrator when it comes to persecution and social strife, and its social benefits and historical

2 This is why these broad perspectives can also be described as families of views, as Laborde does (2014, 54), given that they share family resemblances but do not completely coincide on all different aspects of religious freedom.

importance. Equality-based theories, on the other hand, deny these claims. According to them, the criteria that LTRF put forward for distinguishing religion as unique are often either under- or over-inclusive. That is to say, they apply only partially to religion, thereby overlooking certain religions or important aspects of religion - which makes them under-inclusive - or they also apply to similar non-religious aspects or features of human life, and therefore do not single out religion as such – making them over-inclusive.

1.1.1 Liberty-based Theories: six reasons for religion's uniqueness

There are at least six features of religion that are invoked by liberty-based theories to ground their claim that religion is unique. Roughly speaking, two of them have to do with religion's content. The most controversial claim here is that religion is simply true. As is argued by Michael Stokes Paulsen, religious freedom only makes sense when assumed that God exists ("or very likely exists", he adds), and specific claims for religious freedom can (and should) be justified when they are consistent with the "clear, universal command of God".[3] A weaker version of this claim is forwarded by Michael McConnell, who argues that perhaps religion's truths cannot be independently established, but also cannot be categorically ruled out[4] – and this brings us to the second type of content-related claim, which is of a more epistemological nature. In an argument similar to McConnell's, Abner Greene stresses the *inaccessibility* of the source of religious faith for nonbelievers.[5] Only religious citizens have access to this specific "extra-human" source of value and authority,[6] not through human reason or shared experience but by a "leap of faith".[7]

A second pair of claims of uniqueness centers on religion's impact on the individual's life. The first of these - and thus the third overall - argues that the fact that religious obligations emanate from the abovementioned extra-human source of value and authority means that they are exceptionally (even uniquely)

3 Stokes Paulsen 2013, 1160, 1162. Similar to this theological claim is the metaphysical claim made by Michael McConnell, who suggests that adherence to "the supreme authority of the universe" is "ontologically superior" to "personal conclusions about right or wrong" (McConnell 2013, 792).

4 McConnell 1985, 15.

5 In Greene's argument, religion's inaccessibility *indirectly* justifies religious exemptions. Because its inaccessibility disqualifies religion from being the express purpose behind a law, he argues, religious believers should be granted legal exemptions as a compensation for this "Establishment Clause burden" (Greene 1993).

6 Greene 1994, 538; Greene 2012, 154.

7 Greene 1993, 1614.

weighty. The conflicts of conscience that ensue when these duties clash with the state's laws are incomparable to those suffered by non-believers. Sidestepping the discussion on truth and epistemology, McConnell claims that even these non-believers should understand the value of avoiding "conflicts with what are perceived (even incorrectly) as divine commands".[8] Such conflicts are even more urgent, it is argued, because of the *extratemporal* consequences for going against a divine command: A religious conscientious objector to military suffers a far greater psychological turmoil than a nonreligious objector, because he or she is threatened not only with punishment by the state, but also with punishment after death.[9] But it is not all doom and gloom: a fourth feature of religion that is invoked also concerns the impact on the believer's life, but focuses on the ultimate meaning it provides, and more generally on the important role it plays in constituting the individual's identity. In Berg's words, the individual's relationship to God is understood here as "one less of duties and punishment than of love and fulfillment".[10] It is typically religions that help us find the ultimate meaning of life,[11] LTRF argue, and proves to be of vital importance of an individual's sense of self.[12]

A final pair of claims of religion's uniqueness focus on its social dimension, again distinguishing negative from positive effects. Starting with the negative, Liberty-based Theories argue that religious believers are uniquely prone to be either the victim of persecution,[13] or rather the driving force behind societal violence. The latter type of claim, about religious believers as perpetrators of violence, invokes religion's unique role in providing meaning and security, and argues it is only natural that challenging or stifling this essential function stokes emotions like fear and hatred – which in turn can easily lead to civil strife.[14] Other social and behavioral arguments concerning religion's uniqueness look at religion's bright side. Religion, it is argued in this sixth type of claims, is uniquely conducive to morally desirable social or political behavior, and is essential for maintaining a vital liberal democracy. "Without religion, there

8 McConnell 2000a, 30.

9 See Schwartzman 2012, 1366 for a discussion of this argument. See also Berg 2013, 36 for a version of this claim.

10 Berg 2013, 36.

11 Nussbaum 2008, 168. In fact, ultimate-meaning arguments often exclude non-religious belief-systems that are concerned only with this world and not transcendental realities (see Cornelissen 2012, 96).

12 See Cornelissen 2012, 92-95 a broader discussion of this argument.

13 See Nussbaum 2008, 165, and Gedicks 1998, 563-4, where Nussbaum and Gedicks describe the argument. See Laylock 1996, 317 for an elaboration of this argument.

14 Smith 1991, 2007-2010. See also Marshall 1993 (as described by Schwartzman 2012, 1372).

can be no morality", British Judge Lord Denning argues,[15] while McConnell similarly states that "historically and to the present day, no such institutions are as important to the process of developing, transmitting, communicating and enforcing concepts of morality and justice as are the churches".[16] On a societal level, this contributes not only to general well-being,[17] but more specifically also bolsters democracy, for it provides an essential buffer against state power.[18]

These latter claims typically have a clear historical component: Religious institutions have *historically* proven to be beneficial to liberal democratic society. Some related claims of religious uniqueness focus exclusively on this temporal aspect, and argue that religion should be considered uniquely special because of its longevity and traditional nature as such.[19] A related 'textual' claim argues that proof of religion's uniqueness lies in the fact that its protection is secured in some of the oldest and most central constitutional clauses, namely the first Amendment.[20]

1.1.2 Equality-based Theories: debunking claims of uniqueness

While LTRF invoke various features of religion to ground their claims of uniqueness, Equality-based Theories are primarily concerned with debunking these claims. When it comes to the claims of truth and inaccessibility, their response is quite straightforward: Invoking religious truth is a non-starter, and is not likely to gain any traction with nonbelievers[21] – even McConnell's weaker version of religion's potential truth cannot be verified or reasonably discussed between believers and non-believers.[22] What is more, this argument

15 Ahdar 2000, 2.

16 McConnell 1985, 18.

17 See Doe & Anthony 2017, describing versions of a "public utility"-argument (425-427).

18 See Berg et al. 2011, 180. See also Ahdar and Leigh 2005, 53-4, and Cornelissen 2012, 89-90, for descriptions of this argument.

19 Garnett 2007, 529; see also Bedi 2007, 242-3 and Gedicks 1998, 560-2 for descriptions of this argument, and references to authors who make a similar argument, such as Charles Taylor and Bikhu Parekh.

20 McConnell 2000a, 14. See also Laylock 1996, 314, and Gedicks 1998, 558-560 for a discussion of this argument.

21 "Unless one adopts an internal point of view with respect to religion, it is unlikely that arguments premised on the existence of a transcendent reality will have much force", Schwartzman states (2012, 1373). See also Eisgruber and Sager 1994, 1262, and Greenawalt 2006b, 1631.

22 As Eisgruber and Sager state: "From an external, secular perspective, there is no reason to assume that any specific religious practice (particularly one prohibited by law) is *really* commanded by God" (2007, 103).

also works in the opposite direction: If the state cannot know for sure, why would it not rely on the possibility that a religion is *not* true?[23] ETRF also address the implicit epistemological dimension in this argument in their rejection of the inaccessibility-based claims. In short, they argue that this inaccessibility criterion is both under- and over-inclusive. It is under-inclusive because it does not include religions that do not rely on extra-human sources of authority, like Buddhism.[24] At the same time, religion's supposed inaccessibility also does not really set it apart from certain nonreligious phenomena. Religious beliefs or religious claims, ETRF hold, are not relevantly different from beliefs about certain types of moral claims, which may also rely on intuition or on experiences that are not universally shared, from beliefs about aesthetics or other "controversial domains of value" such as morality.[25] These epistemic aspects of religion, egalitarian critics therefore argue, do not make it unique.

The claims centered on religion's impact on the individual's life are scrutinized largely along the same lines, with ETRF pointing to their either under- or over-inclusive nature. Starting with the latter, they claim that non-believers face the same kind of moral conflicts as religious believers do.[26] Secular forms of morality (like Kantian ethics) are also based on universal laws that transcend the individual,[27] and non-religious duties to take care of one's children or refrain from harming others are surely not seen as optional or non-binding by many non-religious citizens.[28] Moreover, the extra-temporal dimension of religious obligation also works the other direction, Cornelissen notes, as an atheist that believes she has only one available life may feel at least equally distressed by the thought that she has "marred her one and

23 This, in fact, is argued by the liberty-leaning theorist Smith 1991, 188-189.

24 Liberty-leaning Abner Greene also admits that this criterion does not cover all religions. He nevertheless holds on to his inaccessibility argument by referring to pragmatic considerations: "As to the objection that some religions - e.g., Buddhism - don't rely on extrahuman sources of normative authority: They haven't been the key players in seeking religious influence on laws; those have been theists, by invoking God's will. So to some extent my argument is nation- and practice-specific" (2012, 154-155).

25 Schwartzman 2012, 1364, 1384, 1393. See also Eisgruber and Sager 2007, 300-01; Marshall 1993 and, interestingly, the liberty-leaning theorist McConnell (2013, 187-8).

26 Schwartzman 2012, 1373; Gedicks 1998, 562-563. See also arguments about the (equal) depth, strength and intensity of religious and nonreligious beliefs as forwarded by Marshall (1983, 587) and Nussbaum (2008, 167).

27 Boucher 2013, 175.

28 Eisgruber and Sager 2007, 301 (note 39).

only existence forever with a terrible wrong".[29] When it comes to under-inclusiveness, equality-based theories again point out that the weight of religious obligation rests on a view of an extra-human source of authority that is only present in western and theist religions, and excludes religious believers that do not believe in consequences in the afterlife, or (parts of) whose religious experience or identity does not have anything to do with divine commands.[30] This brings us to the ultimate meaning- and identity-based claims, where equality-based criticism does not as much center on under-inclusiveness - given that all religions arguably contribute to meaning-giving and identity -, but rather emphasizes that so many non-religious beliefs or practices fulfil a similar role: think of the ultimate meaning provided by the pacifist beliefs of non-religious conscientious objectors,[31] and all the aspects of human life that are integral to many individuals' identity, such as gender, culture, ethnicity, or (other) social or political relationships.[32]

The type of objections raised against the claims of religion's uniqueness in a social sense, finally, will by now seem familiar: religions are not always or unambiguously a source of (democratic) public virtue, or even interested in contesting the state or political engagement in general.[33] Also, religious groups do not always have such an impressive history or longevity,[34] and are not always persecuted – in fact, the case can be made that it is precisely atheists and nonbelievers that have suffered most in (modern) history.[35] Religion also does not have a monopoly on tradition,[36] and is not the *only* source of public virtue: non-religious organizations - such as the Boy Scouts or political parties - also offer moral and ethical guidelines, stimulate civil disobedience, or form 'intermediate communities' that shield the individual from the state.[37]

29 Cornelissen 2012, 97. Eisgruber and Sager levy yet another criticism against the extratemporal argument, stating that it implies a kind of self-centeredness that runs counter to the transcendent nature of religion and religious experience (1994, 1263).

30 Gedicks 1998, 562; Schwartzman 2014b, 1089; Koppelman 2013a, 43-45, 139.

31 Cornelissen 2012, 96.

32 See Marshall 1991, 320-1; Jones 1999, 66.

33 Ahdar and Leigh 2005, 55-6.

34 Cornelissen 2012, 89.

35 Nussbaum 2008, 165. See also Mahoney 2011, 314.

36 Bedi 2007, 243.

37 See Schwartzman 2012, 1388; Gedicks 1998, 566-8; Bedi 2007, 244; Marshall 1991, 321; Cornelissen 2012, 90. To be sure, even authors that (in other instances) are sympathetic to claims to uniqueness, like Garnett and Horwitz, acknowledge that religious organizations are not the only "mediating institutions" (Garnett 2007, 522) or "first Amendment Institutions" (Horwitz 2009) that contribute to a free and democratic society.

1.1.3 Conclusion: religion as a site of contestation

To summarize, there are (at least) six different features of religion that are invoked to support the claim of religion's uniqueness, from religion's transcendental nature and (inaccessible) content to its psychological impact and social benefits. And although Liberty-based Theories of Religious Freedom (LTRF) may not all agree on each and every claim, they do share an overarching view that religion, by virtue of one or several of its defining features, is a uniquely special phenomenon (see Table 1 at the end of this chapter). This can be contrasted with the view of Equality-based Theories of Religious freedom (ETRF), which deny that there is a feature of religion as such that distinguishes it as unique, and hold that it is often similar to other (non-religious) phenomena. While this might seem like a 'mere' descriptive or interpretative disagreement at first glance, it has profound implications for normative debates about religious freedom. As we will see, many of these conflicting views and assumptions resonate in discussions about the other questions of religious freedom, from the question of competence to the question of interests.

1.2 The question of competence: who gets to draw the lines?

Establishing the degree to which religion is a (uniquely) special phenomenon is a fundamental issue, but does not get us close to actual decisions about the meaning and scope of religious freedom. When speaking of the scope of the freedom that religious believers and their communities enjoy, the question that comes first is: who draws these lines? And what or who, in turn, confers the authority to draw these lines to begin with? The first is the question of competence (who gets to decide), and the second a question of '*Kompetenz-Kompetenz*' (deciding who gets to decide about what) or sovereignty. On one side of the debate, Liberty-based Theories of Religious Freedom argue that religious communities and their organizations are sovereign in the sense that only they are competent to organize their own affairs, and that this competence is not granted by (or grounded in) anything outside of their borders. Equality-based Theories, on the other hand, do not recognize that religious communities are sovereign, or even that they share sovereignty with the state: The state may confer competence to groups or associations, but only the (liberal) state enjoys exclusive sovereignty.

As we will see, this general question of *Kompetenz-Kompetenz* or sovereignty is unavoidably tied to other questions. If one holds that religious communities or the liberal state sovereign, for example, then what is the source of this

sovereignty? When states and/or religious communities are sovereign, what does this say about the relative importance of one's duties as a believer and as a citizen? And how are these views on competence and duties tied up with underlying moral evaluations of the role of the state and religious communities – is it the state that has to be protected against encroachments by religious communities, or the other way around? On each of these questions, LTRF and ETRF provide fundamentally different answers.

1.2.1 Liberty-based Theories: theology, religious duties, organic order, and pluralism

When arguing for religious sovereignty, LTRF regularly invoke some of the supposedly unique characteristics of religion discussed in the previous section. Michael Stokes Paulsen, for example, refers to religion's truth in order to justify the church's sovereignty: "Freedom of religion ... is the government's recognition of the priority and superiority of God's true commands over anything the State requires or forbids."[38] Michael McConnell, in turn, alludes to religion's obligatory nature when arguing that the scope of religious freedom is defined by religious duty - a "duty to a higher authority"[39] -, and that this duty will always take precedence over the state's laws.[40] Joel Harrison, finally, refers to religion as an extra-human source of authority when he speaks of "a higher good, beyond law, that ... grounds a parallel authority" - namely that of the church - and correspondingly rejects a democratic "sovereign will necessary for balancing rights and interests".[41]

Such views on religion's truth and authority are often embedded in broader theological traditions and theories that distinguish between different realms or spheres – all of which are granted legitimacy by God. One influential theological doctrine that is used in LTRF to justify religious sovereignty is that of the so-called 'two realm' or 'two world' theory.[42] This theory, which is often summarized through the biblical proverb 'render unto Caesar the things which be Caesar's, and unto God the things which be God's', distinguishes between two jurisdictional realms (Church and State) both of whom ultimately derive their authority from the "overarching truth" of God.[43] Other instances where

38 Stokes Paulsen 2013, 1160.
39 McConnell 2000a, 23.
40 McConnell 1990, 1453.
41 Harrison 2020, 228 and 16.
42 This theological doctrine is critically discussed, at length, in Cohen 2015a.
43 See Smith 2015, 114-115.

theology is used as a justification of religious sovereignty is the invocation of the Catholic *libertas Ecclesiae*,[44] and the Calvinist theologian Abraham Kuyper's theory of sovereign spheres. According to this latter theory, God confers authority to various independent and equal spheres, such the state, the church, the family, science, art and so forth.[45] None of these spheres is subordinate to another in Kuyper's view, but some do have an ontological priority. The so-called social spheres (such as the family, the church) arose from 'the order of creation', whereas the state is an artificial and human construct, and therefore a product of sin.[46]

This touches on another justification for religious *Kompetenz-Kompetenz*, albeit one which is not necessarily limited to religion as such. In this view, it is the organic nature of churches (and a select number of non-religious institutions) that grounds their sovereignty. Churches, the argument goes, are a 'natural' and intrinsically worthy part of the social landscape,[47] which must be contrasted with the 'artificial' state and its "made-up world" of the law.[48] This latter state-centered, rights-based perspective, LTRF argue, will never be able to fully grasp the meaning of religion and the church; concepts that can hardly be categorized or delimited. Harrison, for instance, understands the church not merely as an institution, but as a practice of "forming communion" that extends to "any sphere of life". Moreover, in his "expansive" and Augustinian (and thus Catholic) understanding of the church, the same good that grounds the church should even shape politics and society as whole.[49] This "depth of moral gravity", Harrison argues, cannot be generated by an "anti-social" liberal account that is only focused on "negotiating and furthering individual claims of right".[50]

According to Liberty-based Theories, the liberal state not only fails to grasp the meaning of religion and the church in a spatial sense (in terms of domains), but also in a temporal sense. Organic religious communities preceded the state

44 Brennan 2013.

45 Rosen (2014, 745-6) and Horwitz (2009) refer to various authors whose views on sovereignty are explicitly based on Kuyper's theological writings.

46 Rosen 2014, 746.

47 Horwitz speaks of so-called first Amendment institutions, among which are churches, which are "natural features of the social landscape and … courts would do well to recognize this fundamental fact" (2009, 87). Perry Dane also speaks of sovereignty as a "dynamic, organic whole" (1990, 967).

48 Garnett 2008, 274-276. Kuyper himself speaks in similar terms, for example when distinguishes the "*organic* life of society" with the "*mechanical* character of the government" (1931, 91 (emphasis added)). See also Horwitz's discussion of this distinction (2009, 96).

49 Harrison 2020, 16-17.

50 Harrison 2020, 230, 181.

and - in the case of the state's demise - will also outlive it.[51] Their longevity, combined with their social importance, is regularly referred to in justifications of religious sovereignty; justifications that focus on religion's traditional nature, for example.[52] This history is often frozen or abstracted away in what is seen as artificial "rights-talk", while in "sovereignty talk" this history is "alive": "It is not the weight of the past, but the chain linking past and present."[53] The importance of history and tradition is therefore a recurring theme in liberty-based accounts of religious sovereignty, which tie past and present by referring to historical periods such as the eleventh-Century Investiture Controversy - the conflict between Emperor Henry IV and Pope Gregory VII about the 'freedom of church' to appoint bishops - in order to legitimize as an autonomous and independent religious sphere.[54] A similar (yet less sectarian) source of inspiration of is found in the early twentieth century pluralists, who more broadly refer to medieval corporations such as the town, university and the church in order to emphasize their existence prior to, and independent of, the state.[55]

This pluralist and 'organic' perspective also entails a specific view of the relationship between these groups or corporations and their members. The former, they argue, are irreducible to the latter.[56] Religious institutions are not a mere aggregate of the rights and interests of their members: As we will also see in the next section about the question of rights, LTRF hold that these institutions and their broader communities actually enable and give meaning to these individual rights to begin with.[57] Their members, therefore, are oriented primarily at the collective instead of their own individual interests – or one could say that the individual's interests necessarily coincide with that of the

51 As Esbeck argues, "churches preexisted the state, are transnational, and would continue to exist if the state were suddenly dissolved or destroyed" (1998, 55). Elsewhere, Gerhard Robbers speaks of "institutions of pre-constitutional existence" which are "not formed by the constitution" and whose freedom "has to be respected by the law" (Lægaard 2015, 225).

52 As Perry Dane ruminates, "maybe religions need time to prove themselves to be true legal orders. Maybe religions have a natural history, and must outgrow their founding before they get their sense of center, their organic identity" (Dane 1990, 996). In his view, however, this is historical legitimation of legal autonomy is not necessarily limited to religion; he compares religious communities with native-American tribes in this regard.

53 Dane 1990, 968, 996.

54 Schragger & Schwartzman 2013, 932-4.

55 See Muniz-Fraticelli 2014. Another clear example of a nonsectarian pluralist theory of sovereignty is that of Abner Greene, albeit without the historical references. According to Greene, "the sources of normative authority to which people turn are plural, and therefore we should see the state's sovereignty as permeable-full of holes, rather than full" (2012, 20).

56 Garnett 2008, 292,

57 Schragger & Schwartzman 2013, 926 (referring to Garvey 2000).

collective.[58] And, given that such religious collectives are grounded in a higher or highest good or authority, this also means that LTRF consider the individual's duty as a religious believer to be higher and weightier than that of the individual as a citizen.[59]

In these theories, the fact that the liberal-democratic state cannot fully grasp institutions like the church, and the fact that the individual's duties lie with these institutions rather than with the state or even oneself, is not seen as a detriment to democracy itself. In fact, from the pluralist perspective, intermediary associations like the church play a vital social role; not only in enabling people to exercise their liberties, but also in simultaneously limiting the power of the monistic, absolutist state that, if unchecked, could easily encroach on these freedom.[60] The secular state is not necessarily neutral,[61] and cannot be expected to exercise its power in a just and beneficiary way.[62] In fact, without pluralist checks and balances, the democratic state essentially exercises it power arbitrarily, based on the will (or, more pejoratively, the whims) of the people.[63] This opens the possibility of "totalitarian tyranny" by the state,[64] which is therefore viewed with suspicion by Liberty-based Theories. When the state is unchecked by religious sovereignty, Kuyper states, it becomes "an octopus, which stifles the whole of life".[65]

Whilst pluralist accounts, and LTRF in general, seek to contain the state's arbitrary exercise of power, they also allow for a certain arbitrariness themselves. In fact, given pluralism's reliance on contingent history and 'natural' entities, and the general absence of an overarching normative framework in which conflicts of sovereignty are settled, such arbitrariness is inevitable. "A certain element of the arbitrary must remain", Dane argues, "because any act of encounter is necessarily beyond the complete systematic

58 See Schragger and Schwartzman's description of this view (2013, note 27 at 924) See also Cohen's description of the 'real entity theory' in Cohen 2015a, 185.

59 E.g. McConnell 1990, 1516.

60 E.g. Smith 2014, 194, and Garnett 2016. See also Schragger & Schwartzman (2013, 926); Laborde (2017, 167), referring to various (other) liberty-leaning authors that point to the potential dangers of an unchecked state, and the vital role of religious (and non-religious) institutions play in limiting the state's power.

61 McConnell 2000c, 103-4 ('Believers as Equal Citizens'), discussed by Cohen 2015a, 187.

62 McConnell 2013.

63 This is the voluntaristic account of state sovereignty that pluralists like Muniz-Fraticelli refer to as the alternative to pluralism. See Muniz-Fraticelli 2014, 101-117 (see also Laborde 2017, 167).

64 McConnell 1990a, 1516.

65 Kuyper 1931, 96, cited by Horwitz 2009, 93 (note 27).

ordering of either party to the encounter".[66] The notion of encounter is telling here, which also suggests that sovereigns do not have a shared point of departure; there is no presumed shared identity. If they "intervene in each other's affairs", Dane elaborates, it is the "intervention of strangers". Conflicts of sovereignty are not resolved with a "calculus of governance", then, but the "complicated ethics of encounter".[67] And it is precisely this arbitrariness, this lack of common ground on which to resolve conflicts, that Equality-based Theories of Religious Freedom want to address.

1.2.2 Equality-based Theories: social contract, civic duties and the modern sovereign state

Despite Liberty-based Theories' distinctions between separate spheres, realms or jurisdictions, matters often cannot be neatly divided between religious and non-religious, between matters of religion and matters of the state. These theories thus have a blind spots for the conflicts that unavoidably arise between spheres and competences, Equality-based Theories argue, and do not have the tools to adequately resolve these.[68] If we want to prevent people falling victim to the arbitrary will of others, as could be the case in a LTRF-condoned sovereign community or association, we need an ultimate authority that resolves conflicts in a fair and just way. We need an impartial arbiter, legitimized by an ultimate source of sovereignty; the secular liberal state.[69]

The argument for state sovereignty is not only a pragmatic but also a principled one, based on a specific view on the source of sovereignty. And that source, Equality-based Theories argue, is the *demos*,[70] or rather the social contract that binds (and even constitutes) this *demos*. In Laborde's words, ETRF hold that it is the "will of individuals to live together under terms they can reciprocally justify and accept" that grounds the sovereignty of the liberal-democratic state.[71] Compared to LTRF's organic order, the social contract as source of legitimacy is indeed 'artificial', but this is necessarily so, because impartiality can only be achieved through laws which are not grounded in

66 Dane 1990, 970.
67 Dane 1990, 971.
68 As Mark Rosen argues, "Separate Spherists do not have the conceptual resources to resolve interinstitutional conflicts; after all, Separate Spheres does not even recognize the possibility of conflicts" (2014, 749).
69 See Laborde 2017, 161-2; Koppelman 2013b, 146.
70 Cohen 2015a, 202.
71 Laborde 2017, 163.

any 'lived' view of what our natural duties are.[72] The social contract also differs from the organic order in the sense that it is primarily a theoretical and not a historical construct, even though of course the conception and rise of the ideas of the sovereign state and the social contract can be linked to a specific historical context: the establishment of the modern secular state in the aftermath of the Reformation and the post-Reformation religious wars.[73]

One enters the contract as an individual first and foremost, and it is therefore the individual that is at the center of Equality-based Theories of Religious Freedom. Essential to the democratic state's legitimacy, Laborde states, is that it "represents the interests of individuals *qua* individuals, regardless of their contingent features, identities and memberships".[74] What becomes clear here is that, compared to their liberty-based counterparts, Equality-based Theories have a fundamentally different view on what constitutes an individual to begin with. While Liberty-based Theories argued that the person and its rights and interests are inextricably intertwined with their (religious) communities, ETRF depart from the assumption that the individual can and should - in theory at least - be separated from said contingent features, identities and memberships. And because it is the liberal-democratic state that represents the paramount interests of this 'bare' individuals, namely to be a free and equal citizen,[75] it is the state to which its citizens - religious and non-religious alike - owe their allegiance first and foremost. The civic duties of the individual ultimately prevail over its religious duties.[76]

Taken together, these interrelated egalitarian views about sovereignty, its (contractarian) source and the corresponding civic duties reflect a particular interpretation of equality. In the debate about the question of competence, the 'equality' in equality-based theories of religious freedom is, in Teresa Bejan's terms, an 'equality-as-unity': the idea that the various parts of a unified whole

72 Laborde 2017, 161-162. In this vein, Cohen states that democracy is "incompatible with any transcendent source of binding law or law-making authority: democracy cannot 'acknowledge' or 'recognize' the this-worldly jurisdiction of any other sovereign than the people" (2015, 202), and Schragger and Schwartzman argue that "there is nothing "natural" about [the] assertion of democratic control" (2013, 943).

73 Laborde 2017.

74 Laborde 2017, 162. Similarly, Cohen states that "liberal constitutional democracy is committed to respecting *individuals* as equal and free persons" (2015, 206 (italics in original)).

75 Laborde 2017, 162.

76 Laborde 2017, 163.

were equal by virtue of their shared membership[77] – in this case, the shared citizenship of individual citizens. This clearly sets it apart from LTRF, which do not propagate a similar equality in the debate about sovereignty and authority.

Contrary to Liberty-based Theories, finally (and unsurprisingly), it is not the state but rather the religious communities and institutions that are regarded with the most suspicion.[78] A church, Equality-based Theories observe, can be a very powerful institution that rivals and competes with the state in many instances. It is totalizing in the sense that it assumes authority over many different aspects of religious believers' lives – and to a certain extent even the lives of non-members, since the authority is asserted generally, over *all* spiritual matters, without specifying what matters should be considered as spiritual to begin with.[79] As egalitarian critics argue, liberty-based accounts of religious sovereignty generally do not attempt to formulate limits to the reach of religious communities' power, and so potentially legitimize a vast range of religious claims. Specific reasons for the expansive potential of this non-state sovereignty are the absence of any clear specification of the notion of 'church' - what other religious institutions could be said to be part of the church and therefore be eligible for protection? - as well as the lack of a convincing defense of the uniqueness of religious institutions – which would enable similar non-religious institutions to make immunity-claims as well.[80] Together, critics say, these arguments generate a giant slippery slope,[81] with potentially disastrous effects for vulnerable people inside these communities, as well as non-members.[82] From the egalitarian perspective, then, the octopus that stifles freedoms is not the state, but rather the religious community.

77 Teresa Bejan 2017, 11. The unified whole to which Bejan refers in her article is the body of Christ, but the idea itself can be applied to the modern state as well. See also Bejan's *First Among Equals: A History of Equality in Theory and Practice* (forthcoming) for an elaboration of equality-as-unity and other interpretations of equality.

78 Other criticism levied against the liberty-based view on religious sovereignty focus on its theological foundations (see Cohen 2015a), or their selective use of history (see Schragger and Schwartzman 2013).

79 Schragger & Schwartzman 2013, 945-946.

80 Schragger 2013.

81 Rosen 2014, 757.

82 Rosen 2014, 747-749. See also Koppelman, who refers to the church's immunity in matters such as robbery, rape, and murder in 12th century England; a period regularly invoked by authors such as Garnett and Smit as the origin of church autonomy and its proper meaning (2013b, 151-2). Put differently, Laborde states that the liberty-based view described here "seems to imply that any interference is pro tanto suspect and illegitimate (ultra vires)" (2017, 169).

1.2.3 Conclusion

The debate about religious freedom as a question of competence can be adequately described as a fundamental disagreement between Liberty- and Equality-based Theories of Religious Freedom. The opposing camps give fundamentally opposing answers to questions about who (ultimately) holds sovereignty (or *Kompetenz-Kompetenz*), and what this sovereignty is based on. Related to these ideas, moreover, are contrasting views on the duties which should be prioritized, and on the general image or moral appraisal of both the state and religious communities. Liberty-based Theories stress that religious groups (and sometimes other comparable non-state actors or communities) decide for themselves - at the most in negotiation with the state - where the limits of their authority and jurisdiction lie. The source of this sovereignty is found either in a specific theology or theological view, or in a more general view on the primacy of an organic social order. Equality-based theories, on the other hand, stress that the ultimate holder of sovereignty can only be the modern liberal state, which is legitimized not by a pre-existing 'natural' or organic order but rather a theoretical social contract between the individual members of a society. Corresponding with these opposing views, LTRF and ETRF also have fundamentally different views on which duties of (religious) citizens should be prioritized (religious duties versus civic duties respectively), and general moral appraisal of the state and religious communities: which of those is primarily seen as benign and essential, and which should be considered a potential threat? These differences are summed up in the table at the end of this chapter.

1.3 The question of rights: religious freedom as a distinctive or equal right?

Despite their dim view of the 'artificial' world of law, Liberty-based Theories do engage in 'rights talk' themselves. After all, it is through these rights that the scope of religious freedom is determined, with this specific liberty being one of the (if not *the*) first and foremost rights established by modern states. This does not mean that this 'first liberty' is uncontested, however. Given the stakes, it is only natural that theories of religious freedom would vehemently disagree about the nature and scope of religious freedom and other (conflicting) rights. Specifically, the disagreement regarding this question of rights revolves around three (sub)questions: Is religious freedom a distinctive right? Is religious freedom a presumptive right, enjoying priority also compared to other rights?

And does this right primarily protect the individual or the religious collective or community?

1.3.1 Liberty-based Theories: a distinctive, presumptive, prioritized, communal right

In Liberty-based Theories, freedom of religion is generally seen as distinctive, *sui generis* right, which is often justified by referring to the earlier discussed reasons for religion's supposed uniqueness. Whether it is religion's truth, inaccessibility, weighty obligations, identity-constituting features, social impact or historical or traditional nature; LTRF argue that there is at least something about religion that sufficiently sets it apart, and entitles it to protection through a unique, distinctive right.

The debate on rights does not only overlap with the discussion on religion's uniqueness, but also with the debate about competence. Among the reasons that LTRF put forward in support of religious freedom's distinctiveness is the contention that this right derives its legitimacy from a specific extra-human, religious (or even specifically Christian) source that grounds a religious sovereignty separate from (and outside the reach of) the state.[83] Although the discussion on rights generally takes place within the liberal-democratic framework, here LTRF seem to place at least one foot outside its confines. In what Stokes Paulsen calls the liberal [sic] view, religious freedom is seen as a natural right; a right "which precedes the social compact and is never superseded by it":[84] Religious freedom as a legal right is "government's recognition of the priority and superiority of God's true commands over anything the State requires or forbids".[85] Similarly, McConnell holds that "the freedom the carry out one's duties to God is an inalienable right, not one dependent on the grace of legislature".[86]

Such accounts suggest that religious freedom might not be the only right in a strictly legal sense, but its unique grounding does elevate it above the other fundamental rights. McConnell again provides an apt illustration of this view, arguing that "no equivalent can be given or received" for a right like religious liberty, especially given the fact that this right represents "*duties to God* as opposed to *privileges of the individual*".[87] This categorical priority is also implied

83 See also Cohen 2015a, 205-206.
84 Stokes Paulsen 2013, 1168.
85 Stokes Paulsen 2013, 1160.
86 McConnell 1991, 692.
87 McConnell 1990, 1151 (italics in original).

in theories like that of Joel Harrison, who objects against the demarcation of religious freedom through the balancing of different rights by the sovereign state.[88] Apparently, religious liberty is not a regular right comparable to other rights. Instead, it is seen as grounded on a "higher good" or "higher sociality" toward which the state should not be impartial but rather encouraging and "nurturing" – and which elevates it above "other claims of liberty".[89]

But whether or not an extra-human realm is invoked, the distinctive nature of religious freedom means that in each case religious believers and organizations have a presumptive right not to be interfered with.[90] Religious believers, LTRF hold, have the right to religious exemptions from worldly laws, also when those laws are generally justified and applicable.[91] The guiding principle of Liberty-based view on rights - and arguably of Liberty-based Theories in general - is therefore that of non-interference. Religious freedom may be infringed only in very special or extreme cases, when so-called 'compelling interests' are at stake.[92]

Here we see the influence of legal practice and constitutional theory on the philosophical-theoretical debate, as the notion of compelling interest was employed by the Supreme Court of the United States in the cases of *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972), as part of a specific form of judicial review called strict scrutiny.[93] In strict scrutiny, a government interest can only trump a constitutional right if it is more than just 'legitimate' or 'important': it should also 'compelling' in the sense of being crucial or necessary, and even then this infringement should be tailored in the narrowest and least restrictive way. Martha Nussbaum agrees with applying this approach to cases involving religious liberty. She "applauds" what she calls the "Sherbert-regime", in which denying a request for accommodation "becomes a difficult matter".[94] Similarly, Stephen Pepper similarly defends the "*Sherbert-Yoder* doctrine" which he sees as the "legal core" of the "liberty-paradigm": a paradigm represented by

88 Harrison 2020, 228.

89 Harrison 2020, 143.

90 Abner Greene also advocates a presumptive right to exemptions, but states that "[r]eading the Free Exercise Clause to require exemptions from law [does not] render religious conscience "a law unto itself"" (1993, 1613).

91 Horwitz 2009, 126, Laborde 2014a. This also roughly coincides with what Gedicks calls liberty rights. Where "equality rights generally prevent government from imposing a burden on one person unless it imposes the burden on everyone", he states, "Liberty rights generally prevent the state from imposing the burden at all, even if it imposes it on everyone" (1998, 568).

92 Laborde 2014a, 55.

93 *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

94 Nussbaum 2008, 147.

framer George Madison and radical protestant groups, opposed by Jefferson's "enlightenment-oriented" view which Pepper describes as the "equality-paradigm".[95] From the perspective of this liberty-paradigm, or the liberty-based view in general, liberty is not only the baseline but also the objective, with the ultimate aim of creating a "autonomous sphere of conscience, ritual and community, from state interference and regulation".[96]

Speaking of a such a sphere outside of government interference already hints at the communal focus of the liberty-based views on rights; a perspective that was also clearly present in liberty-based views on sovereignty and authority, and more specifically on the (ir)reducibility of religious associations. And indeed, LTRF see religion primarily as a collective phenomenon, and religious freedom primarily as pertaining to religious groups: In Harrison's words, religious liberty should fundamentally be understood as "the free creation of communities ... seeking the truth about God and instantiating this in manifold contexts".[97] And these groups, Liberty-based Theories argue, are more than mere aggregates of individual rights, or the sum of the interests of its members.[98] In fact, it is argued that individual rights can only be derived from religious communities and organizations, and that it is thanks to so-called "mediating institutions" that these rights can be exercised to begin with.[99] As we will see, this communal focus - just like the endorsement of religious freedom as a distinctive, presumptive and prioritized right - stands in stark contrast to the views of Equality-based Theories of Religious Freedom.

95 Pepper 1993. A similar distinction is made by Wintemute (2014), who in the context of European jurisprudence distinguishes between the "liberty approach" and the "equality approach" (225-8).

96 Laborde 2014a, 54-55.

97 Harrison 2020, 143.

98 Harrison 2020, 180. Consequently, religious groups are not to be understood as "vehicle[s] for individual interests" (2020, 48). Similarly, Horwitz notes that "In any communal religious setting, individuals derive their religious obligations from those of the religious community as a whole. Their practices, and the burdens they experience at the hands of generally applicable and neutral laws, are thus part of the broader fabric of the group religious experience" (Horwitz 2009, 125).

99 McConnell 1985, 18; Pepper 1993, 24; Smith 2011 (as described by Schragger and Schwartzman 2013, 930). Such primacy of religious institutions does not necessarily imply a liberty-based view on religious sovereignty, however. Rosen (2014), for instance, rejects the view that religious institutions are jurisdictionally independent of the modern state, but also rejects the "effort to ground religious institutions in voluntary association and conscience" and argues that "religious institutions cannot be reduced to the individuals who compose them" (2014, 742).

1.3.2 Equality-based Theories: (individual) equal rights and equal treatment

We have seen that, contrary to LTRF, Equality-based Theories of Religious Freedom deny that religion is a unique aspect of human experience, fundamentally different from non- or otherwise religious ways of life. This also has implications for how it should be protected in a liberal rights-based framework. It may be that religion, envisioned as the 'first freedom', has historically served as a paradigm for beliefs, identities and practices that are held especially dear, but that does not mean the label 'religion' uniquely captures those valuable concerns, or that religious freedom sufficiently safeguards all of them.[100] Equality-based theories hold that when it comes to constitutional protection, religion is not relevantly different from aspects human life that are protected through general freedoms such as the freedom of conscience, the freedom of speech, and the freedom of association.[101] Religious freedom, in sum, is not a distinctive right.

Furthermore, any right that protects religious beliefs and practices should not be viewed in isolation, but rather as part of a larger framework or scheme of rights. It is a right among rights, and it is the liberal-democratic state's role - as the ultimate sovereign - to ensure a fair balance between them. Correspondingly, religious believers are not exclusively entitled to a presumptive right to exemptions. Instead, they have a claim - just like all other citizens do - to a fair scheme of equal rights and liberties;[102] a notion that was developed by John Rawls.[103] Equality-based Theories recognize that such a scheme, aiming at a fair distribution of burdens and benefits, "unavoidably limits the ... pursuit of people's life projects" to some extent.[104] And so where the liberty-based view on rights coincided with the rulings in the *Sherbert* and *Yoder* cases, ETRF are generally in line with the ruling in the case of *Employment*

100 Laborde 2014a, 55.

101 Laborde 2014a, 55; Regarding conscience, see Rawls' "equal liberty of conscience" (1971, 206), or Leiter 2013, 29-30. Other authors focus on religious collective freedoms which in their view should fall under a more general freedom of association; see Eisgruber and Sager 2007, 66; Schragger and Schwartzman 2013, 921; Cohen 2015a; Sager 2016. See also Pepper's 'equality-paradigm' (1993, 26).

102 Laborde 2014a, 55.

103 The notion of such a fair scheme was introduced in Rawls' *Theory of Justice* (1971), and further refined in his Tanner Lectures of 1981, and *Political Liberalism* (1993). I will not go into the specifics of this fair scheme here; the general idea and the way it contrasts with the liberty-based view on rights suffices in this context.

104 Laborde 2017, 218; Rawls 1981, 9.

Division v. Smith (1990).[105] According to Eisgruber and Sager, in that case the United States Supreme Court "was entirely correct in rejecting the idea that religiously motivated persons are presumptively entitled to disregard the laws that the rest of us are obliged to obey".[106]

It is clear that the guiding principle here does not resemble LTRF's non-interference, as religious freedom is unavoidably curtailed as the result of being part of a scheme of equal liberties – a scheme, moreover, that all citizens have equal access to. The guiding principle of the equality-based view on rights is therefore that of equal treatment of similarly situated citizens.[107] From this perspective, religious believers can still benefit from exemptions, but these are not justified by the costs of state interference as such. They can only claim such freedom if they are unjustifiably treated in an unequal way; if they can make a successful *comparative* claim that not granting such an exemption would entail unfair discrimination against them.[108] In other words, citizens - whether they are religious or non-religious - should be treated on a par with each other, and so the equality that is at play here is different from the interpretation employed in the competence debate. Instead of 'equality-as-unity', ETRF's views on the question of rights are based on 'equality-as-parity'.[109] Another way to contrast the equality-based view from the liberty-based view is that the latter employs a clear *vertical* perspective, focusing on the liberty of religious groups vis-à-vis the state, while the former's egalitarian perspective is primarily directed at the comparative position among these groups (and the individuals that constitute them), which marks it as distinctly *horizontal*.

One of the question this principle raises is whether it is individuals or groups that should be treated on a par. Or to turn the focus on religious freedom as such: Is this freedom primarily an individual or a collective right? Given the equality-based views on the question of competence, where individuals figured as source of sovereignty and religious communities were seen as potential threat to these individuals, the answer to this question seems quite straightforward. Religious freedom may have communal expressions, but just like any other liberal right it is ultimately located in the individual, and is not

105 *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872. (1990). In this case, the court ruled that the state could deny unemployment benefits to a person fired for violating a state prohibition on the use of peyote even though the use of the drug was part of an important religious ritual.

106 Eisgruber and Sager 2007, 96.

107 Laborde 2014a, 55; Eisgruber and Sager 2007.

108 Laborde 2014a, 56.

109 Bejan 2017. See also Bejan 2019; 2022; forthcoming.

derived from any collective.[110] And so if there is a conflict between the religious group and the individual rights of its members, it is generally the latter that should prevail.[111]

1.3.3 Conclusion

In the debate about religious freedom as a question of rights, a clear contrast can be drawn between liberty- and equality-based views. These opposing theories differ on three main questions in this debate. Firstly, liberty-based theories argue that religious freedom is a distinctive right, given that it protects a unique aspect of human experience, while equality-based views deny such uniqueness and hold that religious freedom can also be protected through more general rights like the freedom of speech, conscience or association. Secondly, liberty-based theories argue that religious freedom should be presumptive, and prioritized above other rights, and may in principle not be interfered with, while equality-based theories see religious freedom as part of a broader set of rights; a fair scheme of equal rights that every citizen has equal access to. The guiding principle of liberty-based theories is therefore that of non-interference - which entails a vertical perspective - while equality-based theories champion the principle of equal treatment of similarly situated citizens and thus employ a horizontal perspective. Thirdly, liberty-based theories hold that individual rights are derived from religious institutions, and that religious freedom therefore is primarily a collective right, while equality-based theories argue that collective rights can always be reduced to individual rights, and that legal protection should primarily apply to the individual. These contrasting views are summarized in Table 1 at the end of this chapter.

1.4 The question of interests: how to address conflicts of burdens and harms?

However self-evident the importance of a right or a law seems, there is one question that is ultimately unavoidable: What precisely is the interest that it protects, and how is this interest affected in a specific legal conflict? It is the answer to this question that provides the rationale for the resolution of religious

110 This general stance is clearly visible in writings of a wide range of liberal-egalitarian authors, such as Marshall (1983; 2000), Cohen (2012; 2015), Dworkin (2011, 328), Laborde (2017) and Eisgruber and Sager (2007).

111 Cohen (2012; 2016) is among those who make this case most explicitly.

exemption disputes; the 'why' that ultimate determines the 'where' when it comes to drawing the lines around religious freedom. Obviously, this matter is intimately connected to the questions described above, given, for example, that establishing the type and relative weight of the religious interest at stake largely corresponds with the feature of religion that is highlighted. And when one categorically prioritizes religious freedom over other rights, it is safe to assume that the underlying interests are also classified under a special (and an especially weighty) category.

The distinction between Liberty- and Equality-based theories of Religious Freedom is therefore particularly useful to describe this debate about interests as well. The most insightful contrast emerges when we focus on the particular thresholds and boundaries that are established by these opposing theories, reflecting the relative importance and weight they ascribe to the conflicting interests in question. Generally, they each focus on a different side of the conflict. Liberty-based theories emphasize the weight of religious interests, and the urgency of any burden that is placed on these interests. The threshold that determines when these burdens may be placed - if religious interests may be burdened at all - is therefore particularly difficult to reach. Equality-based theories, on the other hand, focus on the importance and weight of the interests furthered by the law and/or other fundamental rights, and establish equally demanding thresholds when it comes to justifying exemptions, or any harm on the basis of religious freedoms. In their approach to resolving conflicts between burdens and harms, then, each side draws different lines in the sand.

1.4.1 Liberty-based Theories: presumption against burdens and skepticism towards harm

In Liberty-based Theories, religious freedom generally protects the highest goods, the deepest desires, the strongest commitments and the weightiest obligations. Just like religious freedom is prioritized over other rights, religious interests are categorically elevated above other interests, labeled as "ordinary",[112] for example, or as "privileges of the individual".[113] If the parity of fundamental rights is already criticized from this perspective, then balancing religious freedom against a broader category of 'individual' interests or "self-interests" must be downright rejected.[114]

112 Ten Napel 2022, 159.
113 McConnell 1990, 1151.
114 Harrison 2020, 228-30.

Correspondingly, LTRF generally approach claims of third-party harms resulting from religious freedom with little concern, or even with outright skepticism. At times, they simply do not recognize such impact as (a relevant) harm to begin with. Some point to the fact that the harm principle was developed by John Stuart Mill in a time with much less coercive legislation, and that providing an exemption merely brings the involved parties back to how it was before – the so-called baseline objection.[115] In other instances, the harm to others is in fact recognized, but is then seen as an unavoidable (and acceptable) 'cost' of protecting fundamental rights. As Esbeck states, "[t]here is nothing unusual about the exercise of an individual constitutional right that results in harm to others".[116] Or, in Greene's words, when addressing the harms resulting from religious practices: "To permit religion to flourish we must sometimes accept the bitter with the sweet."[117]

Subsequently, Liberty-based Theories are often highly critical of the application of Mill's harm principle in a way that it permits the state to interfere in liberties in order to prevent harm to others. Their main criticism is that this principle is "prodigiously malleable",[118] and could be interpreted in a very expansive way. "Insistence on treating third-party harm as a categorical bar on religious exemptions has no logical stopping point", Esbeck argues.[119] It is therefore, in Smith's words, "uncertain whether Mill's principle ... is robust enough over the long run to control the aspirations, and the encroachments, of political rulers".[120] And indeed, it is argued, the contemporary interpretation of harm as a violation of (symbolic) dignity even threatens to eliminate religious difference as such.[121]

Wary of such encroachments of religious freedoms, LTRF do not reason from a perspective of harm but rather share a presumption against burdens; burdens, to be precise, that are placed on religious believers by general laws. Such burdens should in principle be avoided, and can only be imposed if the

115 See for example Esbeck 2016, 370; McConnell 2013, 805, 807 ("My sense is that very few free exercise claims seek authorization to invade the private rights of third parties or to inflict harm (in the Millian sense) upon them" (807)).

116 Esbeck 2017, 358, note 7. Or, in Lund's words: "It is tempting to say that constitutional rights are fine as long as they impose no harm on others. It is tempting, but it cannot survive scrutiny. Constitutional rights always involve some degree of harm to others" (2016, 1384).

117 Greene 1996, 39.

118 Smith 2011, 47.

119 Esbeck 2017, 375.

120 Smith 2011, 47.

121 Harrison 2020, 47-48.

state has a very good reason to do so.[122] This position largely coincides with the '*Sherbert-Yoder* doctrine' mentioned in the context of the rights discussion, which proposes the so-called 'Sherbert test' that was applied in this 1963 case as the best way of assessing claims for exemption. In this test, of which a similar version would later be encoded in the national Religious Freedom Restoration Act (RFRA) of 1993, it is these burdens on religious citizens generate a pro-tanto claim for exemption,[123] which can only be overridden by a 'compelling state interest'.

In liberty-based theories, the threshold of compelling state interest sets a high bar, which allows for exemptions only in the most exceptional cases.[124] Quoting justice Brennan in the verdict on *Sherbert v. Verner,* "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation".[125] Nussbaum, as we have seen earlier, states that such interests are only at stake in case of "extremely evident" threats to stability or "other extremely strong state interests",[126] whereas McConnell argues that "peace and good order" as such should be at stake,[127] or that a law must be "so necessary to the common good that exceptions would be intolerable".[128] Stokes Paulsen arguably employs an even stricter interpretation, defining compelling interests as the protection only from "grave harms" such as murder, rape, robbery, theft, slavery, oppression, fraud and "violent attacks from others of all kinds" – he even excludes all harms "purely internal to the religious community" from this category, even when this concerns harm or injuries to children of religious parents.[129]

To conclude: Liberty-based Theories of Religious Freedom above all aim to prevent burdens being placed on religious citizens, and generally dismiss third party harms as a justification for such burdening. And when they do recognize

122 Since burdens are normally avoided according to this position, it is called the 'no burden' principle by Patten (2017b, 130). A similar avoidance of burdens in general is also part and parcel of McConnell's favored 'pluralist philosophy' when it comes to interpreting the so-called Religion Clauses of the U.S. Constitution (1992b).

123 The RFRA also prioritizes religiously motivated claims, by establishing a duty to grant only religious conscientious exemptions rather than any conscientious exemption (Nehustan 2012, 35).

124 As Nehustan notes, the 'compelling state test' is a specific implementation of the general 'strict scrutiny test', which in the United States is used to settle conflicts between general public interests "and more central and weighty" constitutional rights (2012, 39).

125 *Sherbert v. Verner,* 374 U.S. 398, 406 (1963).

126 Nussbaum 2008, 63, 117.

127 McConnell 1991, 692.

128 McConnell 1991, 693.

129 Stokes Paulsen 2013, 1208.

the relevance of these harms, they set the bar so high that it is only the gravest harms and the most essential societal interests - formulated as broadly as the preconditions of a peaceful society as such - that can (theoretically) outweigh religious interests.

1.4.2 Equality-based Theories: 'one law for all', no harm, and equality-as-parity

While LTRF fear the effects of an expansive harm-based limit on religious freedom, Equality-based Theories are instead concerned about overly permissive thresholds for burdens justifying religious exemptions. Rather than worrying about the elimination of religious freedom, they worry about the undermining of state power. Eisgruber and Sager, for example, paint a dark picture of a situation in which religious citizens may disregard "any rule that falls short of satisfying the compelling interest test": no modern society, they argue, could function in this way.[130] Especially given that egalitarian theories generally recognize a wider range of conscience claims than the merely religious, Brian Leiter notes, this would practically boil down to "a legalization of anarchy!"[131] This threat of anarchy is also invoked by Brian Barry - who speaks of the "moral anarchy" that the results from the rule that grants exemptions to burdened religious believers[132] - and by justice Scalia in the influential US Supreme Court case of *Employment Division v Smith*, who argued that "if "compelling interest" really means what it says, ... many laws will not meet the test", and that "any society adopting such a system would be courting anarchy".[133]

The ruling of *Smith* - and the later ruling of *City of Boerne v Flores* (1997) which follows the same logic[134] - obviously contrasts with *Sherbert v Verner* and the previously discussed rationale of its ruling judge Brennan, and shows clear overlap with the equality-based view on interests. According to the ruling of *Smith*, "[A]n individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate".[135] As long as the law itself is valid, and is not aimed specifically at a religion or at religious practices, there is no constitutional

130 Eisgruber and Sager 2007, 83-4.
131 Leiter 2013, 94 (his exclamation mark).
132 Barry 2001, 133.
133 *Smith,* 494 U.S., 885-88.
134 *City of Boerne v. Flores*, 521 U.S. 507 (1997).
135 *Smith*, 494 U.S., 878-79.

claim for exemptions. In fact, burdens to religiously motivated conduct are an "unavoidable consequence of democratic government"[136] – practically the mirrored opposite from the liberty-based view discussed earlier, where it is rather the harms to third parties that are seen as the unavoidable costs of maintaining fundamental rights; the aforementioned 'bitter' that has to be accepted with the 'sweet'.

This strict egalitarian stance, which draws a firm line regarding exemptions, can be called a justificatory approach: if the law is justified, there can be no exemptions. And the specific type of justification - a democratic justification - of course clearly aligns with the equality-based view on sovereignty. In this view, after all, it is the social contract between individual citizens that grants sovereignty to the state. Democratic procedures lead to self-evidently legitimate laws that should be consequently upheld by the state. This justificatory approach can also be found in the theories of Brian Barry and Ronald Dworkin. According to Barry, if there is *any* valid rationale or reason for a law, it should be applied universally and without exemption.[137]And reversely, if the case for exemption is strong enough, it means that the law in question was not justified to begin with. Dworkin in a similar vein argues that as long as a law is appropriately neutral, it can curtail rights such as religious freedom. In his own words, "religions may be forced to restrict their practices so as to obey rational, nondiscriminatory laws that do not display less than equal concern for them".[138] Legitimate justifications, in Dworkin's eyes, are those that do not violate citizens' ethical independence, and are constituted by 'impersonal' reasons for general policies, such as environmental protection and the need for taxation and education.[139]

Related to this justificatory approach is the argument that exemptions violate the ideal of the rule of law. A necessary condition for this rule of law is the principle of formal equality before the law - one law for all -, and from this perspective any divergence from the universal application of the law is obviously viewed with suspicion.[140] If all the laws and policies would be expected to be 'fair' in the sense that they do not burden some more than others, Stephen Macedo argues, then all "particularistic requests for exceptions" that refer to

136 *Smith*, 494 U.S., 888–90.

137 Barry 2001, 40-50. See also Bardon 2023 for a more recent defense of this no-exemption stance.

138 Dworkin 2013, 136.

139 Dworkin 2006.

140 Shorten 2010, 101; Sirota 2013, 299 ("an exemption is always at odds with the ideal of the Rule of Law").

such unfairness would be automatically granted, and "there would be no such thing as the rule of law".[141] In the end, then, both the justificatory approach and the rule of law approach are blind (or indifferent at most) when it comes to recognizing burdens caused by the law.[142]

On the other hand, ETRF are very alert to any 'third-party harm' caused by religiously motivated conduct. Some argue, for example, that causing any harm to others as the result of an exemption constitutes the (prohibited) establishment of religion, which means that such claims for exemptions should be categorically denied.[143] To be sure, this does not rule out exemptions as such, as the justificatory or rule of law approach proposes, but rather all exemptions that cause harm to others. And this brings us to a second approach that equality-based theories employ in order to draw a line against religious exemptions, namely the no-harm approach. The general harm-principle - liberty and exemptions can only be granted as long as others are not harmed - is part and parcel of many egalitarian theories.[144] A few examples:[145] Leiter endorses the harm principle and states that "the state is under no moral obligation to tolerate acts of conscience that cause harm to other persons";[146] Jean Cohen argues that religious or church autonomy are trumped when, among other things, "harms to third parties" are inflicted;[147] Tebbe, Schwartzman and Schragger emphasize that "the crucial conceptual point is that government accommodation of religious practices must avoid harm to others";[148] and Hamilton argues that citizens and entities should be subjected to the law "unless they can prove that exempting them will cause no harm to others".[149]

Typical of Equality-based Theories of Religious Freedom, moreover, is also that they also include harm to the equal standing of citizens in this category of unjustified impact. This is the harm that Harrison targets in the previously

141 Macedo 2000, 204-5.

142 Nehushtan 2012, 40.

143 See Esbeck 2016, citing the opinion of Justice Ginsburg for a potential example of this view (p. 358). See also Gedicks and Tassel 2014, 347, Micah Schwartzman, Richard Schragger, and Nelson Tebbe, "The Establishment Clause and the Contraception Mandate," http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html.

144 Hamilton (2004) makes an even broader claim, that the no-harm rule also significantly informed the Framers in the United States, and is consistent with various theological theories.

145 See also Wintemute's criteria that accommodations cause no direct or indirect harm to others (2014).

146 Leiter 2013, 110.

147 Cohen 2015a, 208.

148 Tebbe, Schwartzman and Schragger 2017, 13.

149 Hamilton 2005, 5.

discussed liberty-based criticism of the harm principle; the harm that is not necessarily material or tangible, but rather refers to a more symbolic social or civic order, or abstract notions of human dignity. This type or dimension of harm, which will be discussed in some more detail in Chapter 4, is therefore also labelled as "moral harm",[150] "status harm"[151] or "dignitarian harm".[152]

The (no)harm-based approach is closely related to a third way in which ETRF establish fixed boundaries to curb exemptions. Here the threshold is not predicated on a broad notion of harms as such, but is perhaps best characterized by the maxim 'do not harm others as you are burdened yourself'. Equality-based Theories do not only apply the principle of equality-as-parity to the question of rights, but also to that of interests, invoking the same interest or impact to both ground *and* refute exemption claims. These central notions can take many specific shapes.[153] Leiter employs the notion of burdens, which is still very broad and vague, and argues that exemptions may only be granted if a burden is not shifted onto others[154] – thus recognizing 'burdens' on both side of the dispute. But there are also more specific criteria, such as those revolving around the notion of opportunities. Authors like Jonathan Quong contend that exemptions are required when the effect of a law is such that it unfairly denies some citizens a basic opportunity, but argues that equal opportunity also entails that others should not be withheld of their opportunities as a consequence of such an exemption. As Quong states, principles of justice should ensure that "we do not ruin other people's chances of pursuing their conception of the good while we pursue our own".[155] Michael McGann is instead inspired by resource-egalitarianism and states that the provision of an exemption should not "threaten either claimants' or other people's enjoyment of primary goods".[156] And yet other equality-based views on interests chose dignity as their comparator: Leonid Sirota, for example, states that "exemptions intended to protect the dignity and rights of one person should not do so at the expense of the dignity and rights of another".[157]

150 Dworkin 2005.
151 McCrudden 2004.
152 Harrison 2020, 39, 47. See also Waldron who focuses on the specific harm to *civic* dignity (2012).
153 Although it is not an interest per se, Schwartzman et al. also suggest this parity when they argue that "when religious exemptions generate harms to third parties, there is liberty of conscience on both sides" (2017, 707).
154 Leiter 2013, 4.
155 Quong 2006, 56.
156 McGann 2012, 23.
157 Sirota 2013, 301.

To conclude, whether it is the justificatory approach, the (no) harm-based approach or the parity-based approach, Equality-based theories of Religious Freedom all depart from the legitimacy of the state's law, either because it is democratically justified or because it prevents a certain harm. They all draw their firm lines against harmful or partial religious exemptions through a specific interpretation or application of the notion of equality: either by focusing on equal respect and concern in the (democratic) justificatory process, by equally (read: universally) prohibiting harm amongst citizens (including harm to one's equal standing), or by establishing parity between religious burdens and third-party harms (with the latter having the last word).

1.4.3 Conclusion

When it comes to the question of interests, Liberty- and Equality-based Theories draw different lines in the sand; fixed thresholds that imply a clear assessment of the relative weight and importance to the interests of the involved parties. LTRF establish a relatively low threshold for religious citizens to qualify for exemptions from laws that burdens them, also given that they generally consider these religious burdens to be heavier and more significant than similar setbacks experienced by non-religious citizens. The affected interests of third parties - if they are recognized as relevant or sufficiently important to begin with - have to be exceptionally weighty to overthrow the presumptive claim of the religious believer. ETRF, on the other hand, depart from the legitimacy of the law, derived from the (democratic) justificatory process and/or the harms that it aims to prevent. If the subsequent burdens on citizens - religious- and non-religious citizens alike - are recognized at all as a basis for potential exemptions, then the principle of equality-of-parity ensures that a similar harm will not be inflicted on others as a result of such an exemption.

These contrasting views on resolving conflict of interests thus reflect fundamentally different approaches to the harm (or no-harm) principle. To put it somewhat crudely, for LTRF harm to third parties, if recognized at all, is often seen as 'part of the game'; as an unavoidable consequence of upholding (weightier and more central) fundamental rights and the interests they protect. ETRF, on the other hand, want to prevent such 'collateral damage' at all costs - including the typically egalitarian harm to one's equal standing as a citizen -, also if that means limiting fundamental rights like the freedom of religion. For Liberty-based Theories, such a use of the (very expansive) harm principle potentially results in the stifling of religious freedom and the undermining of the interests of religious citizens, but for Equality-based Theories, the main

threat is rather the collapse of the state or the rule of law, and the unbridled harm to third parties ensuing from a proliferation of exemptions. These opposed views are summarized in Table 1 at the end of this chapter.

1.5 Conclusion: LTRF vs. ETRF

As this chapter has shown, the theoretical debate about religious freedom can be divided into four (sub)questions, and can adequately be described and explained as a fundamental disagreement between Liberty- and Equality-based Theories of Religious Freedom (LTRF and ETRF) on each of these questions. By drawing this sharpest possible contrast, this reconstruction offers the clearest view of what is at stake in debates about religious exemptions – or what, in terms of the main research question, is the nature of the *conflict* in theoretical debates about religious freedom. It also yields a solid basis for a conceptual framework that enables the empirical analysis of conflicts and shifts between political views on religious freedom in the second part of this thesis. The opposing views of Liberty- and Equality-based Theories of Religious Freedom are summarized in the table below (Table 1).

Exclusively focusing on such a fundamental and abstract opposition also has its limitations, of course, as the reconstruction of such abstract theories of views overlooks the specific dynamics of debate: the nuances, the ambivalences; the concessions, the compromises. In each case, it does not enable us to establish whether any shifts have taken place in the debate, and whether there are perhaps any internal debates ('conflicts') among members of either family of views. In the next chapter, we therefore do not focus on the ideal-typical conflict between Liberty-based and Equality-based Theories, but rather take a closer look at the often volatile and ambivalent views of individual authors – both liberty- and equality-leaning theorists.

Table 1: Contrasting views of Liberty- and Equality-based Theories of Religious Freedom

Issue	LTRF	ETRF
The question of religion		
Religion's uniqueness	Religion, by virtue of one of its defining features, is a uniquely special phenomenon	Religion as such is not uniquely special, and is often similar to other (non-religious) phenomena
The question of competence		
Holder of sovereignty (or *Kompetenz-Kompetenz*)	Religious groups (and possibly other comparable non-state actors)	The liberal-democratic state
Source of legitimacy	Theology or an organic social order	Social contract
Prioritized duties	Religious duties	Civic duties
Moral appraisal of the state and religious communities	State as a potential threat to the liberty and sovereignty of religious communities	The state as a beneficial force, protecting the interests of its citizens against the potential threat posed by religious communities
The question of rights		
Religious freedom's distinctiveness	Religious freedom is distinctive and *sui generis,* and therefore not reducible to other rights	Religious freedom is not distinctive, and can also be protected through other, more general rights
Religious freedom's relative status	Religious freedom enjoys moral priority over other rights, and entails a presumptive right to religious exemptions	Religious freedom is part of a fair scheme of equal rights and liberties, to which every citizen has equal access. It does not entail a presumptive right to exemptions
Guiding principle	Non-interference	Equal treatment of similarly situated citizens

Table 1: *Continued.*

Issue	LTRF	ETRF
Subject of religious freedom	Religious freedom is primarily a communal, collective right	Religious freedom is ultimately an individual right
The question of interests		
Threshold posed by the interests of citizens affected by the law	Burdens on religious citizens resulting from general laws generate a pro-tanto claim for exemptions	At the most, the impact on the interests of religious *and* non-religious citizens justifies an exemption if this does not inflict a similar harm to others
Threshold posed by the interests that are protected by the law	Only an extremely important (or 'compelling') state interest can override claims of exemptions for religiously motivated conduct	Generally valid laws allow for no exemption at all. At the least, the interests protected by the law weigh heavier than similar interests affected by the law
Harm principle	Harm to third parties is an unavoidable consequence of protecting the freedom of religion.	The prevention of harm to third parties justifies the curtailment of fundamental rights like the freedom of religion

2

Shifts Towards a Broad (but Divided) Egalitarian Consensus

In broad brushstrokes, the previous chapter painted a picture of two opposing families of views, two contrasting perspectives on the four main questions regarding religious freedom. Drawing such a stark contrast shows what is at stake in the debate, but does not fully do justice to the dynamics of these disputes itself. In terms of the research question; it establishes the essence of the fundamental *conflict*, but it does not identify potential *shifts* in the theoretical debate about religious exemptions.

This chapter aims to shed light on these dynamics by taking a closer look at the debate. By analyzing stances of individual authors rather than describing abstract families of views, I show that theorists generally do not maintain their (initial) puritan stances. They often leave their ideological trenches to make concessions or strike compromises, thus suggesting a much more nuanced view than they themselves would perhaps care to admit. When it comes to actual shifts between the liberty- and equality-based perspective, these usually head in the direction of the latter. Even the staunchest defenders of liberty-based views are often forced to admit, for example, that only the state can draw the boundaries of competence, that fundamental rights are equal and mutually limiting, or that claims which conflict with the interests of religious believers are not to be ignored or rejected from the outset, but rather ask for thorough and thoughtful balancing. These shifts towards the equality-based view are detailed in the first part of this chapter.

Such more tangible shifts are not the end of the story, or the only way to confirm the prevalence of the equality-based view. Liberty-leaning theorists also actively take part in debates within egalitarian confines, thus reinforcing the egalitarian dominance. And equality-leaning authors, in turn, also soften or nuance their views on a regular basis, in their attempt to incorporate concerns raised by liberty-based theories and theorists.[1] The result, which I sketch in the second part of this chapter - and which will serve to further refine the conceptual framework of Chapter 1 - is the emergence of a broad but nuanced egalitarian consensus, harboring a wide array of internal disagreements about the meaning and implication of its main precepts and principles. And if there is one theory that is illustrative of this egalitarian consensus, it is that of Cécile Laborde. Her theory is briefly presented in the third and final part of this chapter, as one of the most elaborate and sophisticated exponents of the

1 I borrowed the notions of equality- and liberty-*leaning* from Pierik (2015a), who speaks of equality- and tolerance-leaning liberals and liberalism. 'Leaning' captures what I am trying to say because, as I have noted in the previous chapter, the positions of individuals do not always or completely coincide with either Liberty- or Equality-based Theories, even though one can generally discern a clear tendency towards either one of these perspectives.

theoretical status quo. As such, it also serves as a useful point of reference for the next critical chapter.

2.1 Shifts towards the equality-based view

Liberty-based Theories of Religious Freedom, as depicted in the previous chapter, seem an especially tight family of views. Together, they appear to form a stable edifice founded on the view of religion as a uniquely special phenomenon; a view which in turn grounds distinct and uncompromising views on unbreachable religious competence and sovereignty, on religious freedom as an inevitably prioritized right - or at least a primus inter pares - and religious interests as categorically elevated above those of non-religious citizens. As soon as one focuses on the positions of specific liberty-leaning authors, however, tiny cracks and tears start to appear in this structure, or at least in the liberty-based credentials of these individual theorists. At best, their stances are more ambivalent than they are made out to be, and taken together, their concessions and compromises strongly suggest a shift towards a broad egalitarian consensus.

2.1.1 Religion's fall from grace

The view of religion as a uniquely special phenomenon is the bedrock of Liberty-based Theories of Religious Freedom. It is therefore surprising that, despite their repeated insistence on this uniqueness, some liberty-leaning authors considerably nuance their stance – sometimes to the point that the liberty-based view as such seems to be abandoned. A theorist like McConnell, the previous chapter showed, points to various features that supposedly set religion apart from non-religious phenomena, ranging from its inaccessibility to the weight of the obligations it imposes. In the end, however, he concedes that these features of religion do not single out religion separately; at the most, religion is unique in *combining* these special characteristics:[2]

2 A similar point has been made by Kent Greenawalt, who argues that religious liberty is supported by many different considerations, which might individually also apply to non-religious groups, but which "together constitute a strong basis to mark religion for special protection" (Greenawalt 2006a, 439).

> In any particular context, religion may appear to be analogous to some other aspect of human activity – to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human phenomenon that combines all of these aspects; if there were such a concept, it would probably be viewed as a religion.[3]

McConnell still sees religion as a whole as paradigmatic - "if there were such a concept, it would probably be viewed as a religion" -, despite his nuances as to the (lack of) uniqueness of religion's separate features. But these nuances about religion's features also open the door for religion being more (or something else) than a paradigm, namely a *proxy* for similar non-religious phenomena. This becomes all the more relevant given the fact that, as Gemma Cornelissen also argues, it does not matter whether religion as a whole is multi-faceted and irreducible, because it is always a specific aspect or underlying good of religion that is at stake in a particular context.[4] This shift - from viewing religion as a whole as unique to viewing it as a multi-faceted proxy - also takes place in Andrew Koppelman's thinking: After initially viewing religion as a 'distinctive' and 'ultimate' good,[5] an exchange with the equality-leaning Schwartzman has him admitting that "religion is not just a proxy for something else. It is a proxy for many something elses. It is a bundle of proxies".[6] Viewing religion as such a proxy suggests that religion, far from being the ultimate good Koppelman held it to be, instead represents or harbors other *underlying* goods not limited to religion. And if these goods could be identified directly, Koppelman also notes, this could even mean that the very notion of religion as a (legal) proxy

3 McConnell 2000a, 42. See also McConnell 2013, 784: "Personally, I think it is futile to draw up a list of features descriptive of religion and only of religion. What makes religion distinctive is its unique *combination* of features, as well as the place it holds in real human lives and human history."

4 According to Cornelissen, McConnell's statement about religion's unicity as a phenomenon that combines different aspects overlooks the importance of the particular context in which religion appears. "However,", she notes, "it is precisely the context in which the believer asserts the special character of her belief within which we must examine religious beliefs" (2012, 87). Similarly, Schwartzman states that "any given claim for protecting religion will appeal to different aspects of religion, which, in turn, will make relevant different values" (Schwartzman 2012, 1090).

5 Koppelman 2006.

6 Koppelman 2014, 1081.

is replaceable or redundant.[7] At the hands of liberty-leaning theorists like McConnell and Koppelman, then, religion gradually devolves from a unique phenomenon to a potentially discardable label.

2.1.2 Allegiance to the sovereign liberal state

As views on religion's alleged uniqueness are nuanced, positions on the question of competence are too. Even though they generally suggest uncompromising stances on religious sovereignty, liberty-leaning theorists often concede that this sovereignty cannot be absolute.[8] There are, they acknowledge, "some cases",[9] "some appropriate occasions"[10] in which intervention is justified, or, reversely, only "some questions" which the civil courts do not have the power to answer and merely "some wrongs" that are beyond the secular law's reach[11] (and thus where there is freedom from "some aspects of secular control"[12]). The question, as liberty-leaning theorist Richard Garnett approvingly echoes egalitarian authors Eisgruber and Sager, "is not whether the state should be permitted to affect religion, or religion permitted to affect the state; the question is how they should be permitted to affect each other".[13] The state's role as some kind of arbiter is, then, is generally recognized by liberty-leaning

7 Koppelman 2014, 1082. Nussbaum holds a similar view of religion as a proxy, which in her eyes needs to be interpreted as broadly as possible as to offer protection for non-religious beliefs and practices. And even then, she argues, it is unavoidable that some of these beliefs and practices are wrongfully excluded (Nussbaum 2008, 173). In the end, Nussbaum's pragmatic approach also means that religion as a proxy may be abandoned when a fairer alternative is found.

8 McConnell compares church autonomy with family autonomy, also in the sense that both are considerably (but not absolutely) protected by law (2000, 19). Smith, similarly states that sovereignty is presumptive and not absolute (2014, 6).

9 Garnett, in correspondence with Mark Rosen, agrees that some of the cases brought forward by the latter - such as self-immolation, child molestation - justify intervention by society (Rosen 2014 note 60, at 748).

10 Horwitz 2009, 112.

11 Berg et al. 2011, 176.

12 Smith 2011, 23.

13 Garnett 2007, 519. Harrison, despite his statements elsewhere about a parallel authority grounded in a higher good, also speaks of "unavoidable intermingling" and a "blurred line" between the two 'offices' of the church and the state, and that the former does not enjoy "jurisdictional immunity": the state could even "intervene" (and thus "cross a jurisdictional boundary", which is a paradox at best and a contradictio in terminis at worst) in the internal affairs of religious groups (2020, 232-3).

authors, albeit somewhat hesitantly, and sometimes for reasons that seem more pragmatic than principled.[14]

But liberty-leaning theorists also regularly adopt a more principled egalitarian stance. They (implicitly) recognize the state's exclusive (meta-) sovereignty by rephrasing their claims in terms of liberal rights,[15] or by employing the liberal distinction between public and private sphere.[16] Likewise, their argument that the state must "internalize" (and thus take into account) the "external limit" imposed by a non-state authorities also betrays an adherence the egalitarian view of an (exclusively) sovereign (liberal) state.[17] This line of reasoning leads various authors - including some liberty-leaning theorists - to conclude that talk of sovereignty is ultimately largely rhetorical, semantic, metaphorical: The aim is not to actually establish or defend religious sovereignty equal to that of the state, but rather to strengthen the claims of institutional autonomy *within* a liberal framework.[18] As Garnet admits in a relatively recent publication, freedom of the church might not be a "rule,

14 Smith, for example, states that when it comes to resolving conflicts there are "pros and cons to having an ultimate authority" like the state, and labels the question "a pragmatic one" (2014, 21-22).

15 As we will see later, many liberty-leaning authors also endorse the principle of compelling state interest, a principle that is prominently featured in the discussions on rights and interests, and which also implies the ultimate sovereignty of the state. As Koppelman notes: "Michael Paulsen correctly observes that the compelling interesting formulation "subtly implies ultimate state supremacy, rather than the priority of God" (2013b, 152).

16 As Schragger and Schwartzman observe: "sphere theorists do not escape the public/private distinction that they try so hard to undermine. Because they have to decide when to apply constitutional and democratic restraints on institutional action, they too must decide which institutions are "public" and which are "private"" (2013, 944-945). What is interesting, in this context, is that authors like McConnell (2000, 17) and others (see Schwartzman 2013, 930) argue that the public and private distinction might be seen as inherently secular and liberal, but actually originates from the Christian two-realms theory. McConnell himself does also agree, "in a general sense", that religion is properly understood as an example of the "private" that is protected from government intervention (2000, 18).

17 As noted by Laborde, discussing the views of Smith and Muniz-Fraticelli (2017, 169-170, with the same point also made in Laborde 2019b, 157). Similarly, Lægaard shows how (liberty-leaning) proponents of church autonomy also often phrase their claims in terms of (human) rights, and recognize that claims for religious self-determination need to be made "within the limits of the law necessary in a democratic society" (2015, 229). In this context, Joel Harrison refers to liberty-leaning author Harold Berman, who argued that "the grounding and limiting of power in a 'transcendent reality' is now found in 'human rights, democratic values, and other related beliefs')" (Harrison 2020, 229, note 7). Harrison himself also proposes this type of internalization by recognize that the church does not co-legislate on the same level as the state, but that the state should rather be "responsive" to the same good that grounds or guides the church (2020, 230-231).

18 Laborde 2017, 169; Rosen 2014, 747; Schragger & Schwartzman 2013, 970; Smith 2014, 8.

standard or doctrine", but "might - somewhat maddeningly - work more like an animating value or principle, even a mood".[19]

2.1.3 Towards equal and individual rights

And how about views on the question of rights, where liberty-leaning authors generally argue in favor of a religious liberty that is presumptive (if not absolute) in nature, and has to be prioritized over other (fundamental) rights? It is striking that despite arguing for a logical and historical priority of the right to religious freedom, a liberty-leaning theorist like McConnell at times also seems to move closer to an egalitarian perspective when he states, in a footnote, that "of course, the right [to religious freedom] is limited by the rights of others, including the public right of peace and good order",[20] or when he admits that "some laws are so necessary to the common good that exceptions would be intolerable".[21] McConnell's statements are interesting, for one thing, because they might seem to place his view squarely *within* a liberal egalitarian framework where (equal) rights impose limits on each other and are therefore unavoidably curtailed. In each case, it seems to contradict the categorical priority McConnell assumed when he referred to religious freedom's exclusive grounding in an extra-human source.[22] And McConnell is not the only liberty-leaning author making such concessions: Abner Greene, who holds that the state shares sovereignty with other sources of normative authority and argues that religious believers have a presumptive (or 'prima facie') right to be exempted from the state's laws,[23] also posits that such exemptions can be accommodated "to the extent possible consistent with protecting the liberty of others"[24] or, as he notes elsewhere, with "the stable operation of government and the liberty of other persons".[25] By not only endorsing the equal status of rights, but also referring to additional considerations like governmental

19 Garnett 2016, 43.

20 McConnell 1991, note 28, at 692.

21 McConnell 1991, 693.

22 See page 40 of this thesis. McConnell attempts to escape this dilemma by referring back to the argument of history: "it does not matter whether the differences [between the religious and the secular, LN] are essential or contingent, because historical experience provides a rational justification for constitutional arrangements" (2000a, 23). This argument of history, however, ultimately begs the same questions: what is it about religion that apparently stood the test of time, and entitles it to special consideration?

23 Greene 2012,123.

24 Greene 2009, 974.

25 Greene 2012, 124.

stability and the common good, McConnell and Greene lean even more into an egalitarian perspective where it is the whole of (affected) rights and interests that needs to be brought into a certain balance.

Another step that liberty-leaning authors take towards their theoretical adversaries is their endorsement of the idea of exit rights; the opportunity for individuals to opt out of a (religious) collective.[26] This means that, despite their emphasis on religious freedom as a communal right, these authors also recognize that religious groups can be oppressive or otherwise disagreeable to their members, and that the protection of these members sometimes means that individual rights prevail over communal rights – a stance that is essentially egalitarian.[27] In other words, religious organizations and communities are important, but they need to be *voluntary*, which is another egalitarian tenet.[28] Mark Rosen, for example, criticizes egalitarian accounts for being too individualistic, but also underline the importance of substantial exit rights.[29] And Horwitz looks to (neo)Calvinists and pluralists for inspiration, and also finds that their insistence on sovereign spheres goes hand in hand with the protection of individual rights *within* these spheres.[30]

2.1.4 Dismantling liberty-based thresholds

These shifts and nuances on the question of rights - where (communal) religious freedom is not held to be the privileged right LTRF argue it should be - obviously go hand in hand with changing (or at the least ambivalent) views on the question of interests. Liberty-leaning theorists may sometimes suggest that religious interests are categorically elevated above those of non-religious citizens, but rarely persist in such stances. In fact, most of the time they gradually (and often inadvertently) soften their previously uncompromising liberty-based threshold of 'compelling state interests', to the point that their stance can hardly be called

26 A notion that in a sense mirrors the notion of exit right is the 'right to resign': the idea "that there can be no interference with religious freedom in cases where employees have voluntarily accepted a role that does not accommodate their religious practice" (Billingham 2017, 16).

27 The idea of exit-rights was already adopted by Rawls in his 1971 *Theory of Justice*: "particular associations may be freely organized as their members wish, and they may have their own internal life and discipline subject to the restriction that their members have a real choice of whether to continue their affiliation" (1971, 212).

28 Schragger and Schwartzman note that no proponent of church autonomy seems to reject voluntarism "understood as a *right of exit*" (2013, 960, italics in original).

29 Rosen 2014, 787-788.

30 Horwitz 2009.

liberty-based to begin with. McConnell, for example, does not only cite 'peace and good order' as an interest overriding religious liberty, but also approvingly refers to other more flexible interpretations of compelling interests, some of which are even reminiscent of the egalitarian no-harm principle. When it comes to justified limits to exemptions, for example, he invokes a criterion that seems rather easy to meet, namely "a demonstrable and unavoidable relation to public purposes", and even states that "we are free to practice our religions so long as we do not injure others".[31] And elsewhere, he concedes that even "[t]he economic and other interests of other persons ... need not automatically yield to religious needs".[32] Nussbaum, who is similarly liberty-leaning when it comes to the question of interests, enters a similarly slippery slope with her interpretation of compelling state interests: She establishes "public order and safety" as her preferred threshold, and rules out "a mere desire for homogeneity" – concepts which are highly flexible, and which she does not clearly define.[33] In other contexts, moreover, she includes the right to marital consent and to divorce among compelling state interests, and refers to interests like equal opportunities in areas such as health, political equality and the labor market.[34]

Such nuances almost amount to an endorsement of a general no-harm principle; at the very least, McConnel's abovementioned plea to reject freedoms "that injure others" suggests as much. But instead of erecting a no-harm threshold like ETRF do, liberty-leaning theorists such as McConnell and Greene propose to include third party harms in a kind of balancing process. The latter, despite his suggestion to accept "the bitter with the sweet" when it comes to harms resulting from religious freedom (see Chapter 1), also concedes that he does not "completely ignore harm to nonbeneficiaries" of exemption, and is generally in favor of the legislature weighing burdens and benefits against each other.[35] McConnell even explicitly distances himself from his earlier views regarding fixed thresholds, given that "an accommodation that that imposes costs on others disproportionate to the alleviation of a burden on religious practice could be a form of favoritism for religion".[36] Referring to notions like 'substantial burdens' is not a good idea, he states, "because it appears to refer

31 McConnell 1990b, 1128.
32 McConnell 1985, 38.
33 See Greene 2009, 993-995 for criticism of Nussbaum's interpretation of compelling state interests in her *Liberty of Conscience* (2008).
34 Nussbaum 1999 and Nussbaum 2000. Skeje (2007, 476) points this out.
35 Greene 1996, 82.
36 McConnell 1991, 703.

to the absolute magnitude of the burden rather than to the to the possible disproportionality between the burden imposed and the burden alleviated".[37] His (and Greene's[38]) preferred criterion, then, is one of proportionality, which significantly differs from the no-harm threshold of Equality-based Theories of Religious Freedom. At the same time, as the next section will argue, the proportionality approach is also unmistakably egalitarian, which places these liberty-leaning theorists squarely inside the emerging equality-based consensus.

2.2. Behind the egalitarian consensus

Although Chapter 1 described how the debate on religious freedom is most fundamentally characterized by an opposition between liberty- and equality-based perspective, the first part of the present chapter suggested a contrast that is much less stark when one zooms in on the positions of individual authors, and that it is mostly liberty-leaning theorists that tend to adopt the tenets and principles of their egalitarian adversaries. But this does not mean the debate is over – far from it. In this second part, I will show how egalitarian tenets do indeed enjoy broad support, but are interpreted in widely diverging ways, generating new disagreements, new oppositions. It will become clear that it is not only the liberty-leaning theorists that have made concessions, or have watered down their views; this is only one half of the story.

2.2.1 Religion: substituted, disassembled, or functioning as a proxy?

Most theorists of religious freedom agree: Religion, as a whole but most definitely in its specific aspects, is not relevantly different from other non-religious phenomena.[39] But this does not mean that there is a consensus about what it is precisely that needs to be recognized and protected by the law, and how.[40] Many theorists argue, for example, that what makes both religion and

37 Id.

38 Greene formulates a proportionality maxim in a more recent publication, albeit in terms in sovereignty: "The weaker the presumption of law's legitimacy, and the stronger the presumption that sovereignty is permeable, the more government must do to justify its infringement on separately held sources of value and thereby not be required to provide an exemption" (2012, 124).

39 To be sure, liberty-leaning theorists like Stokes Paulsen (2013) and Harrison (2020) do persist in their view of religion as a uniquely special phenomenon.

40 See Laborde 2015 for an elaborate description of three possible approaches in this regard.

non-religious beliefs and practices special is the fact that they stem from the human capacity for moral agency or ethical independence, and that religious freedom can be substituted by a broader notion like that of freedom of conscience.[41] However, theorists like Koppelman, as we saw in the previous section, instead choose hold on to the notion of religion, insisting that it can function as a proxy that also covers comparable non-religious phenomena. Yet others hold that - as Koppelman himself ultimately also concedes - the different aspects of religion (and similar non-religious phenomena) reflect a variety of underlying goods that can potentially be identified directly, thus making any proxy redundant, and any single substitution category overly exclusive.[42] Their respective merits aside, each of these strategies prompts its own further questions, about which substitutes are most adequate, about how religion as a proxy should be defined or formulated, and about which underlying goods should be protected by the law.

2.2.2 Procedures, binaries and boundaries: remaining disputes about competence

Similar to the debate about religion, agreeing on the exclusive sovereignty of the liberal democratic state does not bring an end to the debate about competence. As egalitarian authors are quick to acknowledge, this exclusive sovereignty does not mean that the state can act arbitrarily and unconstrained, given that it is internally limited by liberal principles.[43] These constraints can take the shape of more general ideas like the separation of power, but also of specific rights like freedom of religion and freedom of association.[44] The essentially liberal distinctions between the religious and the civil, and the earlier mentioned separation between the private and public domain, also serve to limit coercion by the state, and protect a certain sphere of religious competence. Within this

41 Laborde mentions Rawls (1971) and Dworkin (2011) as the paradigmatic examples of this approach.

42 As we will see later, Laborde herself prefers this approach (2015, 2017).

43 See Laborde 2017, 167-168. Or, as Cohen describes the pluralist objection: "This conception of democratic sovereignty is based on a series of confusions: of organ with state sovereignty, of law with command, and of democratic constituent power and popular sovereignty with a political theological corporate model of the people, embodied in a 'representative' ruler. The pluralist critique throws out the baby (the sovereign democratic constitutional state) with the bath water (organ sovereignty)" (2015, 200). Steven Smith seems to be suffering from such confusion when he argues that "it is the critics' [of church autonomy, LN] contention – namely, that churches are merely subordinate subjects of the uniquely sovereign state – that is in tension with the constitutional strategy of dividing authority" (2014, 18).

44 Laborde 2017, 170.

egalitarian framework, furthermore, (religious) associations are still relevant and protected by rights, even if those rights are ultimately derived from the individuals from which they are comprised.[45] In sum, at least some of the freedoms defended by liberty-leaning theorists can also be safeguarded in an egalitarian liberal framework, and do not need religious (meta-)sovereignty.[46]

What this means is that the remaining debate about the question of competence - given that the majority of theorists ultimately acknowledges the liberal-democratic state's exclusive sovereignty - largely revolves around procedural questions, or questions of boundary-setting. These are not mere details that are left to be settled, however, as there is still considerable disagreement about which procedure to follow, and where to draw the line between public and private, or between religious and non-religious.

One of the underlying reasons for this persistent disagreement is that the shared acknowledgement of the state as the ultimate holder of sovereignty does not automatically entail agreement about the *source* of this sovereignty. Liberty-leaning authors could still argue that it is not the *demos* but God that grants ultimate sovereignty to the state – even a distinctly liberal-democratic state.[47] These differences in opinion about sovereignty's source may find their way into debates about, among other things, the question who carries the burden of proof when it comes to assessing claims for (exceptional) legal protection. Egalitarian authors like Eisgruber and Sager depart from the assumption that laws, as a product of the democratic process, are presumed legitimate, which means the onus is on the religious believer to proof that an exemption is justified.[48] Liberty-leaning theorists, however, do not depart from the democratic procedure but rather from the protection of constitutional rights

45 Schragger and Schwartzman 2013, 921.

46 Lægaard 2015, 230. In the same vein, the egalitarian method of a hypothetical social contract (or original position) can be followed to produce the desired outcome of (some) institutional freedom(s) for religious organizations (See Rosen 2014, 771). Even Steven Smith, who declares himself skeptical about such methods, argues that "it seems improbable that the agents [involved in a social contract situation, LN] would agree to a regime in which the church is wholly subordinated to state power" (2014, 25).

47 See for example McConnell 1990, 1456, and Horwitz' (approving) description of the views of Kuyper and the British pluralists (See Horwitz 2009, 108.) Stokes Paulsen's theory, on the other hand, is an example of an account which identifies the state as an arbiter, but which nevertheless falls outside this consensus, as the state acts only on the basis of a supposed religious truth. As Koppelman notes, it is the very logic of religious liberty in Stokes Paulsen's theory that "makes inevitable a state role as the arbiter of religious truth" (2013b, 153-154).

48 Eisgruber and Sager 2007, 82, 202.

– and specifically that of religious liberty.[49] When the conversation turns to the liberal-democratic state, in other words, they emphasize the 'liberal' instead of the 'democratic'. Correspondingly, they argue that it is the state that carries the burden of proof to justify any (unintentional) imposition on religious liberty resulting from policy or law – even when those laws meet the aforementioned conditions set by egalitarian theories.[50] Here it is the state intervention that is the exception rather than the rule.[51]

Both views on the burden of proof, however, are situated within the confines of the egalitarian view that ascribes *Kompetenz-Kompetenz* exclusively to the state. After all, as much as views on burden of proof may rest on fundamental ideas regarding legitimacy and sources of sovereignty, the discussion ultimately does suppose a fair exchange of proofs and arguments taking place in some sort of public procedure; a procedure which does not take the shape of the 'negotiation' between two competing sovereigns that the liberty-based view on sovereignty tends to envision. A similar point can also be made about the related moral appraisal of the state, whether it is essentially a force for good or a potential threat. Liberty-leaning authors can continue to view the democratic state as such a threat, even though they recognize its ultimate sovereignty.[52] It is therefore not only the question of sovereignty's source, but also the related question of the moral appraisal of the state and religious communities' role that remains a live issue *within* the egalitarian consensus regarding the holder of ultimate sovereignty.

Another reason for internal discord within the egalitarian view of competence is the fact that the aforementioned liberal binaries and boundaries are not clear as to where the lines in question should be drawn; a point I will also come back to in the next chapter. The lively debate about these demarcations - what is religious, what is private or public? - reinforces the dominance of the egalitarian perspective, but at the same time shows that there still is a lot to disagree about within this view. When it comes to the public and private, for example, both liberty-leaning McConnell and egalitarian Eisgruber and Sager subscribe to this normative distinction,[53] but hold strongly contrasting views

49 Greene 2009, 986. See also Kuyper, who identifies Calvinism as the origin and guarantee of constitutional liberties (1931, 78).

50 Nussbaum 2008, 135-147, 173; Greene 2009, 991. Pluralist theorists like Galston also begin "with the intuition that free association yields important human goods and that the state bears a burden of proof whenever it seeks to intervene" (2002, 9).

51 Greene 2009, 989; Horwitz 2009, 112.

52 As Nussbaum observes, "majority thinking is usually not malevolent, but it is often obtuse, oblivious to the burden such rules impose on religious minorities" (2008, 116).

53 McConnell 2000a, 18; Eisgruber & Sager 1994, 1275.

when it comes to delineating these domains. Eisgruber and Sager emphasize the limits of the private sphere - arguing that associations are public as soon as they have certain purposes (such as commercial or political aims) -, while McConnell mainly points the limits of the public domain, arguing that the state infringes on this domain's neutrality when it enforces laws that affect 'private' views about contested matters like (homo)sexuality.[54] And then there are also those liberty-leaning authors that are looking to stretch the protected private sphere by introducing the notion of 'intermediate institutions'; associations like the church or voluntary associations in general that are situated between the private and public domain, but are nevertheless to be protected from state interference just like private sphere is.[55]

The debate about the binary of religious and non-religious - and the related discussion about the demarcation of religious competence - similarly shows that the prevailing egalitarian framework can harbor a wide array of different views and perspectives. On the one hand, there are liberty-leaning authors that interpret religion and religious competence in a broad way, where it is primarily religious organizations that are marked as competent judge of matters of religion,[56] and where even actions or beliefs that are seemingly motivated by secular concerns are interpreted or reformulated as (ultimately) inspired by religion.[57] Liberty-leaning authors like Steven Smith, however, seem to favor a narrower scope of religious competence, as he argues that this scope should encompass all employees of churches, but does not necessarily extend to other kinds of religious institutions or employers such as schools.[58] And on the other end of the spectrum, finally, there are the decidedly egalitarian stances that criticize the more expansive accounts of religion and religious competence, and

54 Eisgruber and Sager 1994, 1312; McConnell 2000a, 44. To complicate matters, however, McConnell also adds an important nuance by stressing that this protection also applies the individuals that are affected by religious (and other) associations – another sign of McConnell's willingness to embrace an egalitarian (and in this case specifically individualist) perspective (McConnell 1990, 1464; McConnell 2013, 803, 807).

55 See for example Horwitz (2009, 104-5), who also mentions authors like Peter Berger (1977).

56 As argued by authors such McConnell, Garnett and Smith (see Koppelman 2013b, 149). See also Stokes Paulsen 2013.

57 See for example Berg et al. (2011), who interpret a woman's dismissal based on her disability by religious school as a religious matter. Regarding the verdict of this case (the *Hosanna-Tabor* case (565 U.S. 171)), they remark that "theological and religious issues are almost impossible to avoid in cases involving employees with spiritual duties" (p. 189).

58 Smith 2011, 42.

argue for clearer, objective and more restrictive interpretations.[59] An example of a such a thorough and objective effort of line drawing is Zoë Robinson's attempt to define what precisely counts as a 'religious institution', distinguishing between first- and second-order religious institutions.[60] Such theorizing is more egalitarian in the sense that limits to religious institution's competence are drawn based less on the will or the creed of a religious community, but on generally accessible knowledge and arguments or generally a more objective or intersubjective perspective: Robinson speaks of the "third party recognition" that is needed to capture which religious institutions are of the first-order.

2.2.3 Primacy of the individual, but what about collective rights?

When it comes to the question of rights, the prevailing egalitarian consensus also harbors more than enough opportunity for internal dissensus. Equality of rights, protection of the individual: all these precepts are widely shared, but interpreted or operationalized in very different ways. Which 'equal' right prevails in case of conflict, and to which degree does the primacy of the individual also leave room for collective rights? It is particularly the latter issue that seems to be a cause for dispute amongst egalitarian authors, some of which explicitly identify religious groups as the object of religious freedom or ETRF's principle of equal treatment of similar cases. Eisgruber and Sager, for example, seem to emphasize equality between different (religious and non-religious) individuals as well as groups, with the latter generally viewed from a broader societal and historical perspective, and in terms of minority and majority groups.[61] Nussbaum, who elsewhere shows herself to be a more liberty-leaning theorist, similarly approaches (religious) exemption claims from this perspective, stating that a correct view of religious liberty "involv[es] not formally similar treatment but, rather, the removal or prevention of hierarchies. Sometimes making minorities fully equal requires treating them differently, giving them dispensations from laws and customs set up by the majority".[62] This is by no means the uncontested status quo, however, as other

59 Koppelman, for example, criticizes the Hosanna-Tabor ruling by stating that "everything every employee does could be construed as carrying out their [the organization's] mission" (Koppelman 2013b, 152), and argues for clearer criteria as to which entities are legally protected as a church, and who is subject to the internal church discipline.

60 Robinson 2014.

61 In Laborde's words, egalitarian theories such as Eisgruber and Sager "invite systemic comparisons between the terms of accommodation of majority and minority religions" (2014, 56).

62 Nussbaum 2008, 20.

theorists interpret this communal focus as an indefensible shift away from (what they see as) egalitarian principles. Discussing Eisgruber and Sager's group-based interpretation of their equal liberty principle, for example, Jean Cohen points out that such an interpretation can easily lead to the funding or protection of religious collectives that undermine the equal treatment - or the rights in general - of individuals.[63]

This continuing tension between the individual and the collective is also apparent in views on the right of exit. Although such rights are meant to defuse these tensions within an egalitarian perspective, they also raise questions about what precisely they entail, and how much relative weight is given to either the rights of the collective or that of the individual. Liberty-leaning authors like Muñiz-Fraticelli emphasize the former, and argue that many (religious) groups are unavoidably characterized by a degree of involuntariness – "either by excluding members who might want to be included in the group", the pluralist thinker notes, "or by refusing to acknowledge complete exit from the associations".[64] Moreover, others note that some members, like children, lack the capacity to act with volition,[65] which makes the criterium of voluntarism and the corresponding exit-rights a less straightforward solution than it might seem. Even for adults it can be hard enough to opt out, given that this can jeopardize one's identity and sense of belonging, and may be accompanied by high social costs.[66] Some therefore hold that the right to exit should therefore be interpreted not only to provide or make room for a variety of associations one can choose from ("the basic role"), but also to truly enable group members to escape oppression ("the protective role"), or even to force the association to change in order to safeguard individual rights internally ("the transformative role").[67] Within the equality-based consensus, then, liberty-leaning authors are inclined to employ a more basic interpretation of exit rights, while equality-leaning authors tend to emphasize the protective or transformative role.[68]

63 Cohen 2016, 136-141.

64 Muñiz-Fraticelli 2014, 88.

65 See for example (liberty-leaning) Greene 2009, 1007.

66 Bader 2007a, 212-3. See also example Skeje 2007, 477-8.

67 Reitman 2005, 189. See also the other contributions to this edited volume (Eisenberg & Spinner-Halev 2005) for various reflections on the meaning and application of the exit-right.

68 Cohen is an example of an equality-leaning author that tends towards the latter option, with her approach that she calls 'transformative accommodation' (2012).

2.2.4 Replacing thresholds with equality-as-proportionality and balancing

The debate about the question of interests shows a different pattern, as it is not only liberty-leaning theorists that end up abandoning or nuancing fixed and rigid thresholds like that of compelling state interests. The strict justificatory criteria of egalitarian 'hardliners' like Brian Barry and Ronald Dworkin also prove untenable - as they themselves also admit[69] - and seemingly uncompromising no-harm thresholds are often watered down as well: "de minimis harm to the public" turns out to be acceptable after all,[70] and only "significant costs" or "undue hardship"[71] on others must be avoided.[72] In the case of the previously discussed parity-based thresholds of harm, finally, equality-leaning authors considerably nuance these, or complement them with additional considerations and criteria, thus incorporating other relevant interests that are not captured in their desire to treat all the affected interests on a par. Leiter, for example, complements his no burden shifting principle with the notion of risks, and further employs a more general principle of no harm throughout his *Why Tolerate Religion?*[73] What is more, in some moments Leiter argues that burden-shifting is not categorically prohibited, but merely "prima facie objectionable"[74] – which suggests that some burden shifting is potentially allowed. Other parity-based thresholds, like Sirota's dignity- and rights-based criterion and Quong's opportunity-based criterion, are complemented with criteria that (respectively) reject exemptions that "compromise the pursuit by the state of policies it deems expedient or even necessary",[75] or which create

69 Barry also allows for pragmatic exceptions (the so-called stability argument; see Barry 2001, 50. See also Shorten 2010, 101, Caney 2002, 83 and Greenawalt 2006b, 1613), as well as more principled considerations (about occupational and educational opportunities; see Barry 2001, 62) that override his formal general stance. As for Dworkin, if a belief or practice concerns a "sacred duty", for example, a presumptive right to exemptions is merited (see Dworkin 2013, 136; Laborde 2014b, 1263).

70 Hamilton 2005, 275.

71 Schwartzman, Tebbe and Schragger 2017, 898 (regarding significant costs) and Tebbe, Schwartzman and Schragger 2017b, 219-233 (defending the "undue hardship" standard). Elsewhere, they similarly distinguish between costs "on particular or identifiable third parties" and the more tolerable costs "on the general public" (Schwartzman, Tebbe and Schragger 2017, 900).

72 Wintemute also considerably waters down his threshold when suggesting that harm is only unquestionably inflicted when it concerns "clear physical harm", and assigning all the other cases to a "middle category of controversial cases where the degree of harm is disputed" (Wintemute 2014, 230).

73 See for example Leiter 2013, 115.

74 Leiter 2013, 100.

75 Sirota 2013, 305.

"new inequalities or disadvantages".[76] Just like the liberty-leaning theorists discussed in the first part of this chapter, then, equality-leaning authors mostly end up distancing themselves somewhat from their single, fixed thresholds, and instead opt a more nuanced and qualified approach, where more consideration is given to the relative weight of harms and conflicting interests.

In this light, it is not surprising that egalitarian authors regularly rely on the more proportionality-based approach that we also saw liberty-leaning theorists embracing – an approach which, moreover, is also commonplace in the legal arena's where exemption cases are settled,[77] and enjoys broad support among constitutional rights scholars.[78] To be sure, in the case of equality-leaning theorists this endorsement goes hand in hand with a certain amount of hesitance, as the balancing approach is more often associated with the liberty-based view than the equality-based view.[79] Eisgruber and Sager are among the most hesitant in this regard, remaining skeptical of balancing as such, but also conceding that, compared a "threshold test", proportionality balancing is at least "remotely plausible".[80] Tebbe Schwartzman and Schragger do foray into

76 Quong 2006, 61. This broader focus on burdens and benefits also includes (exemptions from) paying tax and serving in the military, which would in turn not fall under Quong's original parity-based criterion of social opportunities that was mainly focused on employment and education. Quong's diverse criteria to assess the permissibility of an exemption bear much resemblance to those of Jon Mahoney. The latter also argues that exemptions should be "compatible with others' rights" (2011, 307) and that the "access to an essential resource" trumps a religious belief or practice (310). Furthermore, Mahoney also appears to expand his notion of impacted interests beyond that of opportunities when he states that "citizens cannot reasonably expect preferential treatment when such treatment would impose unfair burdens on others" (307). In each case, he does not give a clear definition of these burdens.

77 This balancing is commonplace in the United States (Greenawalt 2006a, 202 – see also Aleinikoff 1987 for an extensive account on the rise and development of balancing in US constitutional law) as well as in European courts (Nehushtan 2012, 34).

78 Billingham 2017, 5. Furthermore, in *The Global Model of Constitutional Rights*, Kai Möller identifies the doctrine of balancing and proportionality as one of the four main features of this global model: "Proportionality has become the central concept in contemporary constitutional rights law, and, in addition to the jurisdictions examined in this book, has been accepted by virtually every constitutional court in Central and Eastern Europe and is increasingly employed in Central and South American jurisdictions" (2012, 13).

79 Patten, for example, suggests that it is generally "[p]roponents of exemptions" that "tend to operate with a background conception of legal justification in which the burdens associated with legal restriction are balanced against the burdens that would be imposed on public interests if there were no restrictions" (2017a, 206). And White, as we will see later, incorrectly describes this as a "non-comparative approach" (2012, 117), which also suggests it is not essentially egalitarian.

80 Eisgruber and Sager 2007, 85.

balancing territory:[81] After they note that their no-harm principle cannot be absolute, they endorse the more nuanced standard that no "undue hardship" for third parties may result from exemptions. While their interpretation of this principle still suggests a strict standard - "in many cases, religious accommodations that shift burdens will be inappropriate"[82] - they also admit that "there will be other situations where burden-shifting is reasonable and where harms to others … are *disproportionately* small compared to the benefits to religious freedom from accommodations" (emphasis added).[83] Similarly, Peter Jones initially seems to employ a fixed threshold when he rules out 'significant' burden shifting, but then goes on to interpret this notion of (in)significance as a the result of a proportionality test: "'insignificant' indicates that [burdens] do not impair an employer's or a provider's ability to use proportionate means to pursue a legitimate aim, and where we judge the 'proportionality' of a means according to the aim it pursues."[84] And then, finally, there are also egalitarian authors that explicitly favor this proportionality approach, deeming concrete (case by case) judicial balancing acts unavoidable.[85]

Despite this general hesitance, and the common association with a liberty-based perspective, I argue that the proportionality approach is in fact distinctly egalitarian. The requirement that interests are seen or treated in proportion

81 Elsewhere, two of these authors, Schragger and Schwartzman, approvingly refer to what they call "the traditional approach to exemptions", which "involves weighing rights and interests" – with the 'traditional' adjective suggesting common ground between their egalitarian perspective and the traditional, liberty-based paradigm of the Sherbert test. It is clear they endorse this way of proportionality balancing, when they state: "if there are serious rights of conscience at stake (and there very well might be) and the government interest is not particularly strong, then an exemption may be warranted." (Schragger and Schwartzman 2013, 981).

82 In the undue hardship test, they note, anything more than "de minimis harm to third parties" as the result of an exemption is unjustifiable (2017). Elsewhere, however, they employ an arguably more permissive standard of "significant costs on others", which gets closer to a criteria like compelling state interests (Schwartzman, Tebbe and Schragger 2017b, 912.

83 Tebbe, Schwartzman & Schragger 2017, 13.

84 Jones 2016, 536.

85 Cass Sunstein (1999, 92) and Hege Skeje (2007, 479). Bardon also incorporates the principle of proportionality in her Barry-inspired no-exemption stance, where it plays a central role in determining whether a law is justified to begin with (2023).

to each other can only be seen as a typical egalitarian demand.[86] What makes it stand out from other previously discussed egalitarian approaches is that it reflects a different interpretation of equality. Again borrowing from Teresa Bejan's work, it is not the equality-as-unity of the competence debate or the equality-as-parity of the rights debate that is at work here, but rather equality-as-proportionality.[87]

Despite this compatibility with the egalitarian view, however, the equality-leaning theorists that endorse proportionality balancing do not fully embrace it: they are not willing to leave the adjudication of exemption claims to a fully open-ended weighing process. To avoid unwelcome outcomes of such balancing, they still formulate thresholds on both sides of the balance, like training wheels that keep a bicycle from swerving too far to either side. On the one side, for example, there is the common requirement that burdens on religiously motivated (or other similar) citizens should at (sufficiently) affect someone's conscience (or other interests) in order to generate a prima facie claim for exemption.[88] On the other side, barriers are being raised to prevent all too severe harms to be inflicted on other affected citizens – an example being Jones' 'significant burden-shifting' criterion, without which, in Jones' view at least, "there is nothing in the logic of balancing that precludes" shifting such significant burdens on others.[89] Even if proportionality balancing is identified as the only viable option, then, authors will still revert to thresholds to steer the weighing process in their desired direction.[90]

Another way in which egalitarian theorists try to reign in the unwelcome outcomes of open-ended proportionality balancing is by approaching the

86 Moreover, the precept of proportional balancing also implies an equality-based view on the question of *competence*, given that balancing approach assumes the (meta-)sovereignty of the state that is ultimately tasked with the balancing. Some liberty-leaning authors therefore persist in their categorical opposition of any act of balancing by the state. Point in case is Joel Harrison, who rejects the idea of "a sovereign will necessary for balancing individual rights and interests" (2020, 228) and "the determination of liberty of association based on individual contract or balancing interests" (2020, 229). Martien Ten Napel is similarly critical of the balancing approach (2022, 160).

87 Bejan speaks of "equality-as-balance", which she then defines as "proportion in delivering … equal things to equals" (2017, 9). See also Bejan 2022, 607; Bejan forthcoming.

88 As Paul Billingham describes, "[t]here must be some genuine religious practice, which is either obligatory or somewhat central to the claimant's faith, before claims for exemptions can get off the ground" (2017, 18).

89 Jones 2016, 527.

90 White 2012, 117. White, however, describes balancing as a "non-comparative approach", a label which is incorrect given the fact that interests in a proportionality balancing approach are still compared to each other (which also means that this approach is still distinctly egalitarian).

balancing process as some type of calculus. Similar to the parity-based thresholds, this approach reduces the conflicting interests at stake to a common denominator - burdens, benefits -, but then goes on to assume that these interests can be measured on a (quasi-)quantitative scale, and entered into a kind of cost-benefit analysis, where they are converted into an ideal outcome where burdens or harms are minimized. Claims for exemptions are thus assessed from the perspective of an overall scheme that fairly distributes burdens and benefits, and so this approach can be labeled as the distributive approach.[91]

To summarize, liberty- and equality-leaning theorists often end up endorsing some degree of proportional balancing, but especially the latter shy away from fully embracing a thoroughly open-ended version of this approach, and suggest or imply that some additional constraints and procedures are still necessary. The remainder of this section will sketch how prominent egalitarian theorists Cécile Laborde deals with these (and other) tensions in her especially nuanced and complex theory.

2.3 Laborde's theory as point of reference

On all the four questions of religious freedom, the status quo seems to be that the egalitarian perspective has the upper hand, but that there remains much to disagree on. Based on her seminal *Liberalism's Religion*, Cécile Laborde is arguably the best exponent of this nuanced consensus, as her theory - which is highly original and one of the (if not the) most sophisticated in its kind - is unapologetically egalitarian, but also incorporates many of the concerns that drive liberty-based theories of religious freedom. A brief exposition of this theory therefore aptly illustrates the nuanced egalitarian status quo, and simultaneously serves as a point of reference for the next, more critical chapter.

The foundation of Laborde's theory is what she calls her disaggregative approach to the question of religion. Criticizing the substitution- and proxy-approach for their sectarianism and unfair implications for non-believers, she chooses instead to distinguish between different dimensions of religion, and to identify their underlying normative goods that justify legal recognition (and possibly legal protection) of religious *and* non-religious beliefs and practices

91 Such (partially) distributive approaches can be found in the theories of Quong (2006), of Vallier (2016), of Mahoney (2011) and, as Peter Jones notes (2016, 529, note 23), of Bikhu Parekh. As we will see, Laborde also integrates this approach in her broader theory on how to resolve conflicts of interests.

alike. The dimensions of religion she identifies largely coincide with the various features of religion discussed in Chapter 1, such as religion as a conscientious moral obligation, as a key feature of identity, as a vulnerability class and as an inaccessible doctrine.[92] While this approach is thoroughly egalitarian, the fact that it does recognize the dimensions emphasized by Liberty-based Theories also makes it particularly nuanced. Moreover, Laborde seems to make a (minor) concession to the liberty-based perspective when she admits that there is one dimension of religion that still sets it apart, namely its theocratic dimension.[93] It is because of these theocratic aspirations that the very debate on competence and sovereignty is waged.

And when it comes to this question of competence, and *Kompetenz-Kompetenz*, Laborde unapologetically shows her egalitarian colors. She accords sovereignty to the liberal-democratic state alone, and argues that associations solely derive their rights from those of their members (which therefore requires these associations to be voluntary).[94] At the same time, she seeks to justify some degree of associational autonomy for religious collectives, arguing that these associations represent important interests and goods as identified in her disaggregative theory. She identifies specific collective interests, related to the ability of associations to live by their own standards ('coherence interests') and to interpret these ('competence interests'). Given the importance of these interests, Laborde among other things argues that associations - both religious and non-religious - should in principle be able to discriminate in their staff- and membership policies when their purpose and ethos demand it; not only on the grounds of religion,[95] but even on grounds such as gender, race or sexuality.[96] This suggests a very lenient stance, but Laborde's elaboration of the coherence interests also presents associations with several strict criteria to meet, which revolves around their voluntary nature, and the coherence or

92 Laborde 2015.

93 Laborde 2016. When it comes to under- and over inclusiveness, she acknowledges that "not all religions have equally theocratic tendencies", and most often they also do not "exhibit" these tendencies. At the same time, there are no real secular equivalents when it comes to this dimension; only totalitarian political ideologies like fascism are similar, but even these are often called "secular religions" (Laborde 2016, 428).

94 Laborde 2017, 171-196.

95 As Laborde states, "a religious association that is unable to insist on adherence to its own religious tenets as a condition of membership is not able to be a religious association" (2017, 179). She refers to Lund here, whom Koppelman elsewhere approvingly cites: "Organizations founded on shared religious principles cannot really exist unless they actually share religious principles" (Koppelman 2013b, 154).

96 Laborde 2017, 179-180.

alignment between purpose, structure, membership and public.[97] In general, she states that "[t]he closer the association's discriminatory policy is to the core of its internal spiritual practices, the stronger its claim to exemptions based on its distinctively religious associational purposes becomes".[98]

Exemplifying her equally nuanced view on the question of rights, Laborde's insistence on voluntariness also means she endorses notion of exit rights, meaning that "members must be able to leave the group at no excessive cost" – a requirement which she interprets in a more demanding manner, noting that it "is not easily met",[99] even though she does not elaborate on it much further. She does explore the tension between the individual and the group when it comes to applying the principle of equal treatment. Like Nussbaum and Eisgruber and Sager, she situates certain claims for exemptions in the context of majority and minority groups, albeit with the difference that the exemptions themselves only apply to individual members of this group. According to her, one of the possible justifications of such individual exemptions can be found in her criterion of majority bias, which is applicable when "[m]inority citizens are unable to combine the pursuit of a core societal opportunity with their IPC" - commitments that protect the individual's integrity - "whereas the equivalent opportunity set is institutionally available to the majority".[100] Borrowing a distinction from Yossi Nehushtan, we could say that here Laborde does not postulate a communal right in the strong sense - as a right that is held by the community as such - but as a communal right in the weak sense; that is, as a right that is held by individuals because they are part of a community.[101] Again, this is an illustration of how equality- and liberty- based considerations can be combined in a nuanced (but unmistakably egalitarian) theory of religious freedom.

As the above implied, Laborde's majority bias criterion is grounded in the good of integrity or, more specifically, in what she calls identity-IPC's: Integrity-

97 Laborde 2017, 178-190. Similar criteria are developed by Andrew Shorten (2015), who also shows why a lack of coherence can be the Achilles heel of many organizations claiming religious exemptions. As Shorten shows, it is very hard to achieve this fit, and justify an organization legitimately acting on behalf of a group or community.

98 Laborde 2017, 186. When it comes to competence interests, Laborde again brings forward restrictions and requirements, pointing to tests of sincerity that are common in legal practice - is the religious reason really the (only) reason for the decision in question? -, and more generally argues that different types of scrutiny are possible despite the state's deference (in principle) to associational competence (2017, 192-195).

99 Laborde 2017, 181.

100 Laborde 2017, 220.

101 Nehushtan 2013, 401. Shorten (2015) calls these "individually exercised group-differentiated rights" (p. 243).

Protecting Commitments that are "non-obligations-imposing commitments and practices" which nevertheless "comprehensively regulate the lives of the claimant".[102] She also discerns other, more ethically salient commitments, namely duties of conscience which are very hard (if not impossible) to ignore, and which therefore are characterized by their obligatory nature. These so-called obligation-IPC's are what ground Laborde's view on the question of interests, as they generate a claim for exemption when a law or a policy "makes it impossible for some citizens to fulfill an obligatory requirement of their faith or culture, yet they can be relieved of the burden without excessive cost".[103]

To assess whether a burden is indeed disproportionate, a "strict balancing test" needs to be performed, in which four criteria determine the overall balance.[104] On the side of the claimants of exemptions, relevant criteria are the *directness* of the burden - how much costs are incurred by avoiding subjection to a law or regulation? - and the *severity* of the burden – to which degree is a burden experienced as a violation of one's (obligation-based) commitments? On the side of the law and affected third parties, what matters, firstly, is the *aim of the law*. Here's where Laborde again shows her egalitarian colors, by positing that "the more tightly a law promotes a goal of egalitarian justice, and the more it requires universal and uniform compliance for its effectiveness, the less it will tolerate exemptions".[105] Part of this egalitarian justice, at least in Laborde's specific account, is the "robust protection" of the rights of women, children and sexual minorities.[106] This protection trumps any IPC which denies those rights, Laborde states, thereby establishing a sort of threshold within the balancing process. The fourth criterion, finally, is that of cost-shifting. This is where Laborde integrates the earlier discussed (egalitarian) distributive approach in her theory, interpreting said costs in a quantitative way (in terms of financial costs and hours of labor) and aiming for a fair distribution of burdens and benefits in cases where exemptions impact timetables and work schedules, or generate costs that the society as such has to shoulder.[107]

Proportionality balancing truly takes the center stage in Laborde's view on the question of interests, and the only thresholds she formulates still leave considerable room for this weighing. To qualify for a pro-tanto claim for exemptions, one merely needs to (sincerely) *experience* a law as a burden on one's

102 Laborde 2017, 216.
103 Laborde 2017, 9.
104 Laborde 2017, 220.
105 Laborde 2017, 225.
106 Laborde 2017, 227.
107 Laborde 2017, 227-8.

moral commitments.[108] On the other side of the balance, the only threshold that Laborde formulates is that of so-called morally abhorrent claims: "claims that are flatly incompatible with the basic rights of others",[109] regarding extremely problematic practices of which Laborde offers the example of infant sacrifice. The above-mentioned protection of women's, children's and sexual minorities' rights were not a condition for entering the balancing stage to begin with, and even within the balancing stage this 'red line' is nuanced by Laborde herself: She admits that hers is not the only reasonable liberal position, and that among the permissible liberal concepts are also more conservative ones in which the group (more often) prevails over the individual.[110] Such cases therefore fall into the category of so-called morally ambivalent claims, which could be validated after all.[111] Of course, this is not to say that these claims will indeed be validated, as this all depends on the process of balancing, which, as we will see, turns out to be rather unpredictable from a theoretical perspective.

2.4 Conclusion

How do conflicts and shifts between liberty- and equality-based views take shape in the theoretical debate about religious exemptions? Having previously explained the theoretical debate as a fundamental conflict between two opposing families of views, this chapter focused on ambivalences and shifts in the positions of individual authors. It showed that while theorists may often seem to occupy more unrelenting liberty- or equality-based stances, the dynamics of the debate compel them to nuance their views, to strike compromises, or even to abandon their position altogether.

Overall, the shifts that occurred pointed in the direction of the egalitarian perspective, resulting in a broad equality-based consensus. I showed that, when

108 In a later publication, Laborde further clarifies this threshold by stating that someone has an IPC when the frustration of one's commitments causes feelings of remorse, guilt or shame rather than mere regret (Laborde 2021a, 111-112).

109 Laborde 2017, 207-208.

110 Laborde elaborates on her view on permissible conceptions of liberal justice in 2017, 317 (note 57) (

111 These morally ambivalent cases revolve around the questions such as "whether public officials infringe the dignitarian rights of LGBTQ couples when they refuse (unbeknownst to the latter) to officiate LGBTQ marriages; whether freedom of speech protects refusals to bake cakes celebrating same-sex marriages; whether refusals to shake hands in certain social situations infringe on basic rights or on more negotiable, conventional norms of civility; and whether different forms of religious education infringe on children's right to equal educational opportunities" (2017, 227).

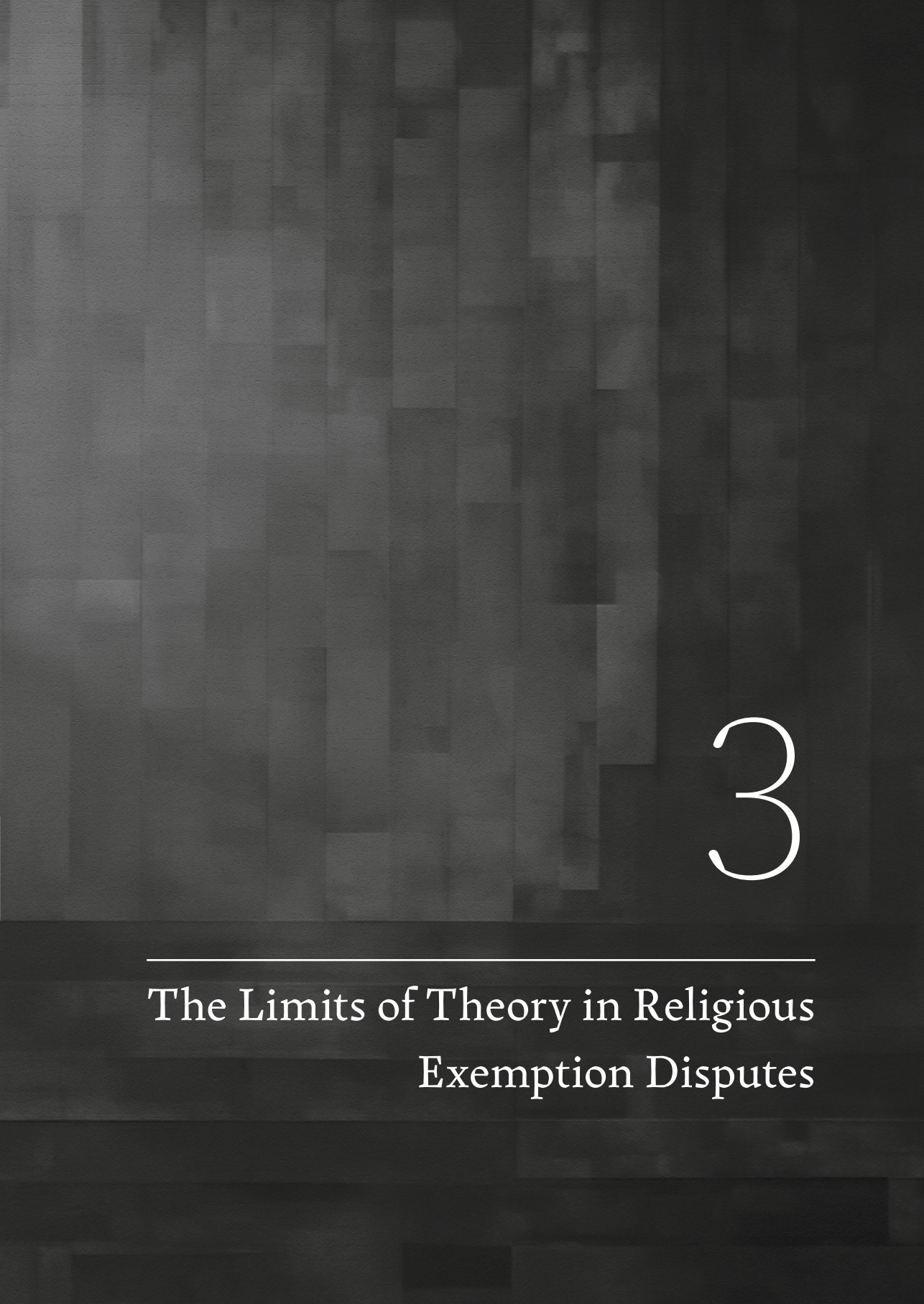
it comes to the question of religion, liberty-leaning authors acknowledge that its separate features to not sufficiently distinguish religion, or even admit that the one could do away with religion as a proxy if one could directly identify the underlying goods. And despite their often principled rhetoric, most liberty-leaning authors ultimately acknowledge the ultimate sovereignty (or *Kompetenz-Kompetenz*) of the liberal state, and its boundaries between the public and the private, between the religious and the non-religious. On the question of rights, they soften their uncompromising stance of non-interference or categorical priority of religious freedom, instead allowing for the mutual limitations of rights, and acknowledging some form of equality among these rights. On the question of interests, finally, they lower or even abandon their fixed, high thresholds for rejecting exemption claims, and instead embrace a perspective of balancing that turns out to be distinctively egalitarian.

This emerging egalitarian consensus does not signal an end to the debate, however, as it leaves more than enough room for disagreement. Liberty-leaning authors also seek to advance their cause *within* the egalitarian framework, advocating for more religious competence, more freedom and more moral weight accorded to religious interest in the act of balancing – thus further reinforcing the dominance of the equality-based view. And equality-leaning authors also nuance and soften their view in their attempts to do justice to the concerns that drive Liberty-based Theories, even if they stay squarely within egalitarian confines. It is the debate about interest in particular that exhibits a large degree of convergence, as both liberty- and equality-leaning authors abandon their thresholds and shake hands in their common endorsement of proportionality – of equality-as-proportionality, to be precise. This middle ground, as well as the other egalitarian nuances and internal disagreements, all serve to further refine the 'bare' conceptual framework developed in Chapter 1, and which will later contribute to a more fine-grained empirical analysis.

Speaking of fine-grained, this chapter also identified the theory of Cécile Laborde as a particularly thorough, detailed and complex example of the prevailing egalitarian view, making it a perfect point of reference for further analysis. Her disaggregated view on religion rejected religion as (relevantly) unique or distinct - or even necessary at all for a liberal theory of accommodation -, but also recognized certain features - its obligatoriness, its importance for one's identity - that LTRF consider to be especially important. Furthermore, Laborde acknowledges competence and coherence interests of religious (and non-religious) associations, even though these interests are ultimately derived from the rights and interests of the individual, and adjudicated by an exclusively sovereign liberal state. Regarding the question

of rights, Laborde's theory has an eye for the unequal treatment of religious minorities, even though her majority bias criterion only justifies individual exemptions. And central to her view on resolving conflicts of interests, finally, is the nuanced disproportionate burden criterion, which employs relatively low thresholds for justifying a pro-tanto claim for exemptions for religious (and non-religious) citizens – but which also identifies various principles and interests that outweigh such pro-tanto claims.

While Laborde's theory is one of the (if not the) most sophisticated exponents of the egalitarian status quo, the question is whether it brings us closer to resolving specific religious exemption disputes. Or, to approach the question from a slightly different angle: the remaining disagreement within the egalitarian consensus still seem quite stark and consequential, but to which degree do these different opinions really make a difference when push comes to shove? These questions will be addressed in the next chapter.



3

The Limits of Theory in Religious Exemption Disputes

With liberty-leaning theorists watering down their views, and most of the actual debate taking place on egalitarian terms, one may be tempted to assume a growing consensus on how to resolve specific exemption issues as well. The persistent disagreement within the egalitarian view already suggests otherwise, however, and compels us to ask a more fundamental question about the role of theory itself. In terms of the central research question: How can religious exemption disputes not only be described and explained, but also *resolved* through the perspectives of liberty- and equality-based views on religious freedom? Do the widely supported egalitarian tenets and principles, for example, provide any hint about how they should be interpreted and applied in specific cases?

The answer I will give to this question is a sobering one. To start with, the discussion about most of the four distinguished questions of religious freedom may be theoretically significant, but it is inconclusive when it comes to reaching actual verdicts. Whether religion is unique, or whether the state enjoys exclusive sovereignty, for example, does not in any way tell us whether a specific claim ought to be rejected or not. What is more, this chapter above all shows how theories of religious freedom - both liberty- and equality-based - are fundamentally indeterminate. Their basic notions, their main criteria and principles, are fatally vague about their own meaning and implications. What is more, I will argue that the most viable theoretical approach to the decisive question of interests is also the most openly and thoroughly indeterminate. Even the sophisticated theory of Laborde is more fundamentally indeterminate than she herself would perhaps concede. As I will proceed to show, it all starts with the shaky foundations of religion and reason(ableness).

3.1 The shaky foundations of religion and reason

It seems self-evident that any theoretical debate about religious freedom starts with a discussion of religion, and asks the question why religion should be considered as (uniquely) special to begin with. But as this thesis has shown, theorists struggle to identify such a distinctive feature of religion, or even to justify religion functioning as an adequate proxy for non-religious phenomena. What fundamentally complicates the search for such a standard is that the notion of religion as such is fundamentally indeterminate. Religion as such does not exist, has no essence or "ontological reality",[1] but is a label that came into

1 Koppelman 2014, 1079.

being during the establishment of the modern state.[2] If it has any (relatively) stable meaning, this is because it is consistently interpreted in a certain way in a specific setting or practice.[3] What counts as religion thus depends on the context, on the particular issue at stake,[4] and so in theory there are not many constraints to the many (potentially infinite) ways in which it can be interpreted. Criteria of common sense and reasonableness are brought forward to establish some kind of theoretical consistency,[5] but these are also standards that are extremely malleable, and similarly context dependent.

There are good reasons, therefore, not to focus on religion as such and its possible analogies with non-religious phenomena, and instead to depart from the various normatively relevant concerns reflected in both religious and non-religious beliefs and practices.[6] But this egalitarian approach does not solve the problem of indeterminacy and inconclusiveness either, as it only raises the question which values and goods should be identified as normatively relevant to begin with, and how much (relative) moral weight each of these carries. Laborde acknowledges this, given her previously mentioned assumption of reasonable disagreement about justice, about the good; disagreements which on her take are "wide, profound and intractable".[7] Once again, the only possible boundary to the dispute is that of reasonableness, a criterion which arguably raises more questions than it answers. Laborde does not do much to answer these questions, and resorts to a contextual approach in which consensus about the good emerges as the outcome of liberal-democratic procedures. Even her own theory should not be seen as the only acceptable version of justice, she argues, but rather as "a contribution to democratic political debate".[8]

Given that views on religion and the (reasonable) good are the foundations of theories of religious freedom, it is inevitable that their fundamental indeterminacy resonates in debates about the other questions as well. As we will see, Laborde's recourse to contextuality will become a familiar refrain, and her reliance on reasonableness will ultimately undermine her own criterion regarding the most decisive question of all, namely that of interests.

2 Laborde 2017, 164-5. See also Laborde 2015 for her observation that defining religion is "an elusive project at best" (582).
3 Koppelman 2014, 1079.
4 Greenawalt 2006a, 141-2; Tebbe 2011, 1137.
5 See for example Tebbe 2011, 1136.
6 Tebbe 2011, 1138.
7 Laborde 2017, 157-8.
8 Laborde 2017, 158.

3.2 Lines in the sand: indeterminate and inconclusive binaries and boundaries

At first glance, it is obvious that deciding who gets to draw the lines - is it the state or (also) the church? - does not at all determine *where* these lines are drawn. This indeterminacy is especially characteristic of Liberty-based Theories of Religious Freedom, who are inherently vague about the limits of religious sovereignty and the boundaries of a notion such as the church. To be fair, one cannot reasonably expect more of LTRF, given that the underlying notion of religion proved to be similarly indeterminate. Granting exclusive sovereignty to the state, on the other hand, does not provide much more clarity as to where jurisdictional boundaries should be drawn. In fact, it is precisely because citizens reasonably disagree about the boundaries of competing competences that they need a democratic state to solve their differences.[9] But at the very least, Equality-based Theories of Religious Freedom do attempt to draw rationally contestable boundaries - such as those between the public and the private, and between the religious or spiritual and non-religious or civic - and employ procedures like the allocation of the burden of proof.

The problem is that these boundaries and procedures are also highly indeterminate and inconclusive themselves. Allocating the burden of proof, for example, is not at all sufficient for reaching an ultimate verdict about an exemption. Urging one party to provide such proof does not mean that the other is completely acquitted of a similar responsibility. And the order in which the state and religious believers put their claims in the respective scales does not determine in whose favor the balance tips in the end.[10] While the allocation of the burden of proof is therefore of no help, the various liberal boundaries also do not get us much further either. Take the public-private distinction: by itself, this binary does not provide any specific guidance as to where the respective boundaries of these domains should be drawn, and in the end is not conclusive when it comes to what should be prohibited or regulated in the first place. And the latter is for good reasons; otherwise, the state would not be able to have any say in matters in cases of divorce, abuse, adoption, the raising of children, and

9 Laborde 2017, 163.

10 Abner Greene, for example, places the burden of proof on the state, but simultaneously claims that "the citizen should first make her case for how she is burdened, and then the state should respond with its purportedly compelling interest" (2012, 118). Ironically, what Greene (and other liberty-leaning authors) perhaps mean when they allocate the burden of proof with the state is that the interest brought forward by the state is ultimately decisive.

so forth.[11] Reversely, contested or controversial practices in the public sphere must not be necessarily curtailed either.[12] As Eisgruber and Sager put it: "The quality of public and private is nuanced to domain and demand".[13]

And a similar thing can be said about the binary of the spiritual and the civil, or the religious versus the non-religious. The fact that something is deemed religious does not by any means entail that it cannot be prohibited: No liberty-leaning theory or theorists would absolve a member of the clergy if their religious convictions inspired a (serious) violation of the rights or interests of others. And reversely, as Laborde comments about the *forum internum – forum externum* divide, the state does not regulate the latter just because it is an external manifestation of religious beliefs: "it is a necessary but not a sufficient condition".[14] What makes it even more difficult is that, just like in the case of the public-private divide, the distinction between the categories of religious and non-religious is often not easy to make. We already saw that the notion of religion itself is already notoriously indeterminate in theory, but in practice it is even harder to categorize specific functions and activities as either religious or non-religious. Determining whether a specific function is religious or not can often not be answered with a mere 'yes' or 'no': In Koppelman's words, the religious significance of a function is "a continuous variable, not a dichotomous one".[15] And given that the religious significance of a function or activity is a continuous variable - with most functions belonging to the grey area between janitor (non-religious) and priest (religious) -, the eventual line that will be drawn by a state or a court will unavoidably be a contingent one.[16]

What this criticism shows is that these jurisdictional lines drawn in the sand are ultimately inconsequential, and are easily washed away by the current, only to be redrawn according to how the wind blows in any given context. This criticism of indeterminate and inconclusive jurisdictional boundaries seems inevitable, and even applies to more sophisticated theories like that of Cécile Laborde. After all, we saw that Laborde also relies on the indeterminate notion of religion when she argues that religious associations should be free to discriminate on the basis of religious beliefs - in their (religious) employment

11 McConnell 2000a, 19; Eisgruber & Sager 1994, 1276.

12 In fact, as Schragger and Schwartzman state, "the liberal state's commitment to association and participation supports the *publicization* of religion" (2013, 944, italics in original).

13 Eisgruber and Sager 1994, 1276. As MacLure and Taylor note, the public-private distinction is simply "too general and indeterminate" (2011, 40).

14 Laborde 2017, 35.

15 Lund 2011, 64 (cited by Koppelman 2013b, 148).

16 See also Lund 2011, 65.

policy, for example - even if this results in discrimination on otherwise impermissible grounds like gender and sexuality.[17] To be fair, Laborde argues that such discrimination must be grounded in the doctrine and mission of these organizations, and that organization or individual's motivation has be to sincere. But even then Laborde's criterion seems potentially expansive, or at least significantly indeterminate. It still begs the question as to what motivations, missions or functions can be qualified as properly or sufficiently religious. Laborde herself also admits to this indeterminacy when it comes to exemptions for employment policies of religious schools; her theory, she admits, cannot provide "definite and conclusive guidelines" about "intermediary" cases "concerning teachers of non-religious subjects in private schools with a religious ethos" or "concerning not only religious but also gender and sexuality discrimination".[18] At best, she adds, her theory offers relevant criteria and a general procedure to approach such issues.

Laborde's views on the question of competence also suffer from indeterminacy in another way. Sune Lægaard points to an even more fundamental problem haunting her theory (and arguably any liberal theory) of the "meta-jurisdictional sovereignty" of the state.[19] Lægaard zooms in on Laborde's assertion that this sovereignty is a function of the state's liberal legitimacy; put differently, if the state enjoys this liberal legitimacy, it possesses *Kompetenz-Kompetenz*, or the ability to draw jurisdictional boundaries. But, he asks, what if this legitimacy in turn depends on *how* the state draws these lines, as seems to be the case in Laborde's theory? A regress problem looms, as "legitimacy depends on boundary-setting, which in turn depends on legitimacy".[20] In her response, Laborde attempts to put an end to this regress by stating that not all boundary drawing would be compatible with liberal legitimacy; boundary-drawing may not violate "core liberal rights", and sovereignty is "constrained by principles of freedom and equality" – principles that in turn, she concedes, are also indeterminate to a certain extent, and therefore must be interpreted and applied through democratic procedures.[21]

17 Laborde 2017, 179, 189.

18 Laborde 2019a, 734 (a reply to a critical review by Shorten (2019).

19 Lægaard 2020.

20 Lægaard 2020, 20. Paul Billingham directs a similar criticism al Laborde: "Recognising competence-competence does not make all of the state's actions legitimate by definition. If the state violates basic rights, or completely denies groups any self-determination, then it acts illegitimately. There is no legitimate sovereignty claim here" (2019,116).

21 Laborde 2020, 9. To Billingham, Laborde also replies that "My suggestion is not that a state can legitimately place the boundary where it wants", and that legitimate boundary drawing should always be the "outcome of inclusive democratic deliberation" (2019b, 158).

Once again, then, Laborde can only resort to contextuality when confronted with the problem of indeterminacy.

3.3 The 'where' of liberty, and the 'what' of equality

When it comes to delineating religious competence, or religious freedom as such, the language of rights is often invoked – see for example Laborde's reference to core liberal rights above. But it is highly doubtful whether this 'rights talk' can live up to these expectations. Of course, deciding whether religious freedom is distinctive or not was, by itself, never meant to settle any specific exemption issues, but even the seemingly more decisive stances on religious freedom as a presumptive, prioritized right, or rather as an equal and unavoidably limited right, are found wanting. To start with the liberty-based perspective, the fact that religious groups are 'organic' or derive their rights from an extra-human source is indeterminate as to the scope of these rights.[22] Furthermore, the view that religious freedom is a prioritized and presumptive right obviously begs the question in which (exceptional) cases it can actually be curtailed – especially given that liberty-leaning authors, as we saw in Chapter 2, admit that such limits can potentially be drawn from other rights and liberties.

While liberty-based views on rights are inherently unclear when it comes to delineating presumptive rights, equality-based views suffer from indeterminacy in even more ways, most of which can be summarized by the 'equality of what?' question. When we are looking at a fair scheme of equal rights, for example, which are those rights that can be considered as equals to begin with? The equality-based view on rights does not by itself tell us which rights count as such, as notions like basic or fundamental rights and liberties are inherently indeterminate.[23] When the egalitarian fair scheme of equal rights and liberties prescribes that a right like religious freedom can (only) be limited by other rights, this is basically an empty statement, which could easily lead one towards a form of circularity or tautology: Something can be considered a right if it is valuable enough to prevail over other rights, but these other rights are only

22 See Laborde 2017, 172 (referring to Hart and Dewey), and Lægaard 2015.

23 Nickel (1994), for example, shows how Rawls' list of basic liberties is arbitrary, incomplete and indeterminate.

rights because they are deemed sufficiently valuable to begin with.[24] It is as Peter Westen already noted in 1982: the principle of equality is essentially empty of content, and must incorporate external values to determine what (or who) and how to treat alike.[25] Relevant in the context of the empirical part of this thesis, for example, is the question whether the freedom from discrimination should be included in the list of basic rights. Egalitarians like Cohen clearly thinks so, labeling protection from discrimination as a "basic civil liberty",[26] but Rawls himself leaves this question aside.[27]

Where the absence of a convincing answer to the equality-of-what question is felt just as strongly is the application of the egalitarian guiding principle of equal treatment of similarly situated citizens. In the equality-based view on rights, the justification of exemptions is a comparative matter, but it is unclear exactly what needs to be compared – in other words, what is sufficiently worthy to be (equally) protected to begin with? An illustration of this problem can be found in one of the most influential and elaborate liberal-egalitarian accounts on exemptions, namely that of Eisgruber and Sager. One of the main criticisms levied against their theory is that it does not identify a clear basis for the comparison of different claims for exemptions. Instead of identifying and defining one specific criterion of what needs to be protected, their critics argue, Eisgruber and Sager instead shift between various (implicit) criteria to justify claims for exemptions – none of which is sufficient or convincing.[28]

The main lesson here is that one cannot simply rely on equality, on the comparative claim, to do the job here. This also applies to the arguments that focus on the relative standing of social groups. As Peter Jones forcefully argues, the majority – minority frame misses the point about claims for exemptions: often the laws in question, serving general goals concerning education, safety et cetera, can hardly be said to represent the interest of the majority per se. In

24 Steven Smith exposes this circularity in his discussion of no-harm principles that interpret harm in terms of (a violation of) rights – even though the aim was to determine what rights we have against government interference to begin with: "So it seems that we cannot know whether something counts as a "harm" unless we know what "rights" we have, but we cannot know what "rights" we have unless we know what will count as "harm"" (2010, 96).

25 Westen 1982. And "once these external values are found", Westen reasons, "the principle of equality is superfluous" (1982, 537).

26 Cohen 2015a, 208.

27 Nickel 1994, note 20 (at 767).

28 Laborde 2014a. This criticism of Eisgruber and Sager's theory is voiced by many others; see Laborde 2017, note 36 at 260 for an overview. One of these criticisms is made by McConnell and directed at an earlier version of Eisgruber and Sager's theory, in the shape of the 'equal regard-principle'. As McConnell states: "there is nothing in "equal regard" theory that guides the choice of comparisons" (2000, 33).

fact, minorities often support such laws, and would arguably also introduce such legislation (albeit including exemptions) if they were a majority. The true reason for claiming an exemption, Jones argues, is not the unequal treatment of societal groups, but rather the specific restraints the law imposes on certain religious beliefs and practices.[29] In other words, it will ultimately be the 'liberty' rather than the 'equality' that delivers the case for exemptions.[30]

There is one component of the equality-based view that does seem to be more decisive and determinate, at least at first glance, when it comes to resolving disputes about religious exemptions. The fact that the egalitarian perspective places the rights of the individual at the center suggests, after all, that the collective always loses out to the individual in the event of conflict. But even here such conclusions are not that self-evident. Collective rights do have their value in the egalitarian perspective, even if they are ultimately derived from individual rights, and the sum of these individual rights invested in the collective may indeed outweigh that of the individual with whom that collective has come into conflict.

Even more nuanced approaches like Laborde's fall prey to the various criticisms of indeterminacy and inconclusiveness directed at the equality-based view on rights. Her majority bias-justification of certain exemptions, first of all, begs the question what the majority in a certain country is, and whether or when one can refer to a majority bias to ground one's claims.[31] In this type of argument for exemptions, the majority is often described as Christian - at least in European countries -, but this is often not the case anymore.[32] Many countries are highly secular and plural nowadays, which makes it difficult to say who the majority is, and when a law is biased towards some group. The mere

29 Jones 2017, 174.

30 In Greenawalt's critique of 'equality approaches' like that of Eisgruber and Sager, he argues that while such approaches "do not call for direct comparisons of burden and government need", they "cannot be applied without some attention to those factors" (2006a, 230). See also Nehushtan 2013, who criticizes equality-based justifications of exemptions for similar reasons, arguing that an explanation of who is equally entitled to exemptions "cannot be given without assuming the validity or the strength of some values and the invalidity or the weakness of others" (412). Finally, Similarly, Stuart White argues that egalitarian considerations are neither sufficient nor necessary to make a claim for exemptions, and that exemptions are generally not an egalitarian demand (White 2012).

31 Seglow 2019, 6.

32 See also Jones 2020, Commenting on the case for Friday as a non-working day for Muslims (to offset the advantage of Christians, whose special day (Sunday) coincides with the official non-working days), Jones argues: "If the origins of Sunday as a non-working day lie with Christianity, does that suffice to make the traditional day of rest in post-Christian societies forever 'biased', even if, in the course of time, no-one remains a Christian?" (p. 106).

fact that some groups are more affected or burdened by a certain law than other groups seems insufficient to establish that they are suffering from majority bias. If religious groups are more burdened by a law than non-religious citizens, for example, that does not necessarily mean they suffer from a secular majority bias; in this case, practically all claims for exemptions for religious or cultural minorities should be accepted. As Laborde also notes, the religious group in question would need "a supplementary account of the particular patterns of structural oppression and subordination that characterizes majority-minority relations"[33] – and such an "independent measure of group disadvantage", she admits elsewhere, is hard to find.[34]

What complicates matters further is that claims for exemptions based on majority bias in turn also burden others; if Muslim school teachers were allowed to attend mosque services on Fridays to remedy a Christian (or secular) majority bias - which designates Sunday and not Friday as a resting day - this could also mean that other teachers are forced to work longer shifts.[35] Or to push it to the extreme; it is very unlikely that the majority bias criterion would sanction exemptions for religious believers whose commitments would lead them to physically harm others, for example, or restrict their rights. To be fair, Laborde herself admits that majority bias itself is insufficient reason for accommodation, and is a comparative claim that is "dependent on a prior account of whether the existing majority accommodation is itself permissible".[36] But this is not a minor detail; it means that brunt of the normative weight of the claim is borne by considerations of liberty, and depends on an account of the just limits of (presumptive) rights. It also suggests that the majority bias test itself has very limited applicability, which is a point that is raised by critics like Patten,[37] but is also a conclusion that Laborde herself ultimately draws. Responding to this criticism, she admits that majority bias "is not always the best or most appropriate framework to scrutinize the fairness of religious accommodation";[38] in fact, such accommodation is "often best defended from Disproportionate Burden rather than Majority Bias".[39] This former test is "rooted in the value of

33 Laborde 2019a, 732.

34 Laborde 2020, 134, in reply to Sabbagh (2020). And in response to Peter Jones (2020), she similarly concedes that "what counts as unfair background in religiously diverse, and mostly secularised societies is often difficult to tell" (2020, 133).

35 This example is offered by Peter Jones (2020, 105-7).

36 Laborde 2017, 231.

37 Patten 2021, 8, 9.

38 Laborde 2020, 135.

39 Laborde 2020, 134.

religious freedom, not one rooted in the value of equality",[40] and so Laborde comes to the same conclusion as White and Jones did before her, namely that it is liberty instead of equality that ultimately delivers the case for exemptions.

And with that, Laborde is faced with the same question that is troubling the liberty-based view on rights, namely when and to which degree can religious freedom be curtailed? And here another criticism of indeterminacy can be raised against Laborde's theory, similar to the one haunting her view on sovereignty. Along the same lines as Lægaard's criticism discussed previously, Paul Billingham argues that the way the liberal-democratic state draws the boundaries - in this case the boundaries around rights like freedom of religion - also determines whether the state is legitimate in its exercise of power.[41] But when is a (basic) right violated to such an excessive degree that the state's legitimacy is in jeopardy? Or, as Laborde puts it, "How can we tell if a disagreement concerns how best to interpret the scope of a right, as opposed to whether a right is violated outright?"[42] Just like in the discussion of sovereignty, the only way out for Laborde is the contextual route. She answers that the state cannot just legitimately place the boundary where it wants, but that there is also not one fixed criterion to judge legitimate boundary drawing: The only assurance that religious freedom is reasonably limited is when such limitations are the outcome of fair and inclusive democratic procedures.[43]

3.4 Can the decisive interest please stand up?

If there is one thing this chapter has shown, it is that issues of exemptions ultimately cannot be settled by views on religion, competence or rights. This compels us to look beyond and behind these notions, to identify what interests are at stake and how conflicts of such interest can be resolved in a fair way. Thresholds are often employed for this purpose, even though the previous chapter has also shown in many cases that such criteria are subsequently nuanced or complemented. This inconsistency is problematic enough, but also hints at a more fundamental problem with fixed thresholds, namely their indeterminacy.

When it comes to the most prominent threshold employed by egalitarian theories, the harm principle, liberty-leaning theorists are right to point out

40 Laborde 2020, 135.
41 Billingham 2019, 116-7.
42 Laborde 2019b, 158.
43 Laborde 2019b, 158.

that this principle as such does not constitute an adequate criterion.[44] Even though the no-harm principle squares with our intuitions on a very basic level, it is fatally indeterminate, and begs the question what amounts to harm in the first place. As a response, most equality-leaning authors choose to contextualize:[45] They argue that it is the majority that decides whether an exemption is (unjustifiably) harmful,[46] for example, and specifically point to the role of the parliament to fulfil this task.[47] Delegating the application of the harm principle in this way is, of course, ultimately unsatisfying for any theorist that aims to contribute to settling exemption issues, and moreover runs into (another) problem of inconsistency: depending on the whim of 'the public', an exemption can repeatedly granted and revoked. A similar problem confronts Barry's strict theory of exemptions - or better put: no exemptions - which pragmatically tolerates exemptions for the sake of *stability*; a notion which in turn was viewed from the perspective of majority-minority relations and the (possible) alienation of the latter. But of course, such relations are also subject to alterations, meaning that the basis for exemptions may disappear as soon as the relations between majorities and minorities improve[48] – an objection which, in a slightly different shape, was also levelled against Laborde's majority bias criterion for exemptions.

Some see the qualification or specification of the harm principle as a way out of the conundrum of indeterminacy, but this 'solution' also proves to be an illusory one. Allowing 'de minimis' harm, or ruling out 'significant costs' or 'undue hardship' - solutions described in the previous chapter - only prompts questions about the meaning or implications of these adjectives, thereby merely displacing the problem instead of solving it. Equally indeterminate as to their

44 See the criticism sketched in Chapter 1, section 1.4.1.

45 As Lund (2016) states, "Constitutional rights always involve some degree of harm to others. And our willingness to tolerate that harm depends heavily on context" (2016, 1384).

46 As Vallier states: "So long as the majority do not mind the burdens or harms imposed upon them, the case for the exemption remains intact" (2016, 16). And about the specific case of exemptions for the discriminatory denial of services, he argues: "If a denial of service counts as harmful in the eyes of the public, rather than a mere offence, then this could justify revoking the exemption" (2016, 17).

47 See Hamilton, a champion of the no-harm principle, who acknowledges that "there is no logical or hermeneutical principle that will finally determine actual harm" (Hamilton 2004, 1200). Therefore, she argues, an interpretation of the harm principle should therefore always be repealable.

48 Shorten 2010, 101, 121.

operationalization are specific parity-based thresholds revolving around notions of, dignity,[49] rights[50] and burdens.[51]

Although liberty-leaning authors are thus on the right track with their criticism of egalitarian thresholds like the harm principle, their own preferred thresholds do not fare much better. In fact, they fall prey to similar criticism. To start with, the notion of compelling state interest is basically as indeterminate as the harm principle. Ironically enough, this is also concluded by one of the most strongly liberty-leaning theorists, namely Stokes-Paulsen, who remarks that "[g]overnments tend to regard everything they do … as compelling".[52] Similar to the harm principle, the two available responses to this indeterminacy are contextualization and qualification. Nussbaum unsuccessfully explores the latter route,[53] but also proposes the former when she admits that "it would not be wise to try to offer an exhaustive *ex ante* list of such interests, given the changing functions of the modern state".[54]

The threshold on the other side of the 'liberty-based' Sherbert test, namely that of substantial burdens, seems at least equally vulnerable to accusations of indeterminacy and expansiveness. Like the notion of compelling state interests,

49 Smith 2010, 181-2. Again, what is to be considered an (unjustifiable) violation to dignity is to be determined in specific contexts (McCrudden 2008) Of related egalitarian notion of civic inclusiveness, Laborde notes that it is "singularly context-dependent" – even though she does not believe that this makes it "fatally indeterminate" (2017, 138). To be fair, she discusses this notion in the context of the non-establishment debate, but the criticism itself is also applicable to similar notions like equal standing in the debates about religious exemptions.

50 Waldron and Sirota are equally vague about what falls under their categories of rights or rights-based laws: Waldron merely offers the ban on homicide as an example of right-based laws, but Sirota lists examples ranging from the rights to security and association to rights (and thus laws) related to copyrights – examples which cannot all, at least not to an equal degree, justify a refusal of exemptions (Waldron 2002, 30; Sirota 2013, 301).

51 Generally understood, any type of impact can be labeled as a burden, and the same thing can be said about costs and costs-shifting (Sirota 2013, 303). Leiter, originator of the no-burden-shifting principle, includes a wide range of examples in his category of burdens, but does not significantly distinguish between their actual impact.

52 Stokes Paulsen 2013, 1207. Stokes Paulsen's alternative proposal, namely that that a religious yardstick is used to determine what counts as a compelling interest, is highly implausible too, as there is no reason to suspect that this religious yardstick is more determinative - let alone fairer or more legitimate for the overall population - than its liberal and secular counterpart for state interventions. Joel Harrison seems to follow a similar religion-based course for establishing criteria (or thresholds): he rejects the approach of balancing interests, and instead allows the state to intervene in the jurisdiction of a religious group when it is "acting at least clearly outside of the common good", and this common good in turn "unavoidably entails a religious end" (2020, 232-3).

53 See criticism by Greene (2009).

54 Nussbaum 2008, 139 (italics in original).

the adjective suggests a certain limitation - only those who bear substantial burdens are eligible for exemptions -, whose specification nevertheless remains hanging in the air. In Greenawalt's words: "We will discover no magical word or phrase for how the necessary magnitude of burden should be formulated."[55] Its potential for expansiveness is thus considerable, given that many burdens can be experienced as substantial, and given that the role of an indeterminate theological yardstick is much more self-evident here than with the operationalization of the notion of compelling state interests. Burdens are generally considered to be substantial, after all, if they are believed to be more 'central' or 'mandatory' by the religious citizen(s) in question.[56] As with the harm principle, a trade-off between determinacy and intuitive plausibility seems to occur when we try to operationalize the threshold of substantial burdens: Broader interpretations and more flexible or subjective operationalizations are better suited to capture intuitions about what counts as a substantial or significant burden, but are also more prone to be indeterminate and overly expansive.[57]

Open-ended proportionality balancing is immune to much of the criticism above, as it distinguishes between different kinds and degrees of impact (whether these are called 'burdens', 'harm', or anything else) but does not draw a single, absolute line at any of these. Stripped of substantive criteria to guide the resolution of conflicts of interests, however, proportionality balancing's procedural nature makes its indeterminacy all the more obvious. By way of decisive criterion, the only thing it has to offer is its maxim of proportionality: the weightier the interests on one side, the stronger the countervailing claim must be to overrule or outweigh them. But in order to determine whether a certain balance is proportional or not, the conflicting interests need to be comparable in the first place. This even goes beyond comparing the proverbial apple and pears, as these can still be measured on common scales like their actual weight.[58] As one United States Supreme Court Justice put it, the balancing process can often better be described as asking "whether a particular line is longer than a particular rock is heavy".[59]

So-called distributive balancing approaches do not offer any reliable help here. These approaches do in fact assume that competing interests can be filed

55 Greenawalt 2006a, 211.
56 Greenawalt 2006a, 202-214.
57 Stuart White makes this point about 'substantial burdens' (2012, 114 (especially note 33)).
58 Aleinikoff 1987, 972, (cited in Houdijker 2012, 127).
59 *Bendix Autolite Corp v Midwesco Enterprises Inc* 486 US 888 at 897 (1987), cited by Foster 2016, 387 (note 6).

under a common denominator, and reduced to (quasi-)quantifiable entities. As the problem or thesis of incommensurability teaches us, however, this is simply impossible.[60] It is difficult to envision, for example, how burdens of conscience can ever be recast in the same terms as interests regarding, for example, safety, opportunities or economic costs – let alone how they can be quantified on a shared scale.[61] Even when certain issues actually seem to revolve around quantifiable entities like work schedules or actual financial costs, some underlying irreducible value needs to be invoked to be able to determine which trade-off is indeed fair. It is therefore not surprising that distributive approaches fail to offer any guidance on how the calculus or algorithm should actually work.[62] If anything is 'explained' by distributive approaches, it is always the *outcome*, in hindsight, but never the actual "nuts and bolts" of the process.[63]

What further complicates the search for a fair overall distribution of burdens, benefits, costs - or whatever other common denominator is chosen -, is the so-called baseline problem.[64] The gist of this problem is that, when determining whether or to which degree something amounts to a burden, one necessarily departs from a certain baseline that can always be contested. When assessing the impact of a law or an exemption, the question is whether one departs from the situation before or after the law(s) in question;[65] in the former case, the impact of an exemption on others should not be seen as a burden on others, as it would merely entail going back to the point of departure, namely the situation before the law. It is clear to see how the baseline problem undermines the distributive approach, because for any distribution to be fair, one needs to know what counts as a (relative) burden to begin with. And as Tebbe, Schwartzman and Schragger conclude, there is indeed no "natural

60 Houdijker 2012, 126-160; Urbina 2014, 175.

61 Reducing the interests at stake to such quantifiable burdens is often overly contrived or simply misplaced. Greenawalt, for example, frames the issue of exemption from military service as a distributive issue where the interests on the side of the society and the state are reduced to hours of contribution to the common good, suggesting that *a longer term* of civilian service compensates for the higher risk of injury or death (2006a, 54 (note 22)). But it is highly questionable whether a difference of a few months truly makes up for this risk, and does justice to the potential harm that is suffered by draftees. Moreover, Greenawalt also overlooks other, related interests such as the stability or safety of the home country: more general and amorphous interests that are even less suitable for quantification.

62 Jones 2016, 530; Jones 2017, 173.

63 Brown 2015, 279.

64 See Schwartzman, Tebbe and Schragger 2017, 883 (note 6).

65 McConnell 2013, 805.

baseline for measuring benefits and burdens"[66] – just like there is no natural or logical answer to the 'equality of what' question discussed earlier. As in the case of the equality of what question, what we should primarily focus on is not the broader comparative picture encompassing all exemption cases, but rather the substantive values at play in *individual* conflicts between a claimant of an exemption and (other) affected parties.[67]

And this brings us back to the approach of case-by-case open-ended proportionality balancing, and its inherent and inevitable indeterminacy. The only possible guidance to steer this balancing process, and ensure a fair balance after all, an appeal is made to practical reason and moral intuition.[68] And it this is also why it is criticized; because the outcome of such balancing is a mere product of obscure intuitions,[69] or because unpredictability of this open-ended balancing allegedly undermines the ideal of the rule of law.[70] More fundamentally, Eisgruber and Sager criticize the balancing approach - even though they prefer it over the threshold approach - because it lacks "a coherent normative foundation".[71] And indeed, justice does not inform proportionality balancing, but is rather the outcome of this process.[72] Empty and procedural as it is, proportionality balancing needs to be 'filled' with values, goods and other considerations in order to produce a result that is deemed defensible and reasonable in a specific context.[73] But that is not to say that such outcomes are the result of obscure intuitions, or that they undermines the rule of law: it is precisely because balancing takes place within the context of the rule of law that at least a certain degree of predictability and stability is guaranteed,[74]

66 Tebbe, Schwartzman and Schragger 2017. Ironically, however, this criticism levied against egalitarian theories potentially also undermines the position of the critics in question. After all, according to the same logic the alleged burdens suffered by religious believers can also be relativized or conjured away by shifting the baseline.

67 Tebbe, Schwartzman and Schragger 2017, 11 ("In sum, burdens on third parties can be identified neither by assuming a naturalized state of nonintervention by the government, nor by assuming that government programs always set the proper point of reference for measuring burdens. Instead of either of these methods, we should measure burdens by referring to the substantive public commitments - including constitutional values - implicated in a particular case").

68 Möller 2012b, 710. See also Urbina 2014, 176-178; Eisgruber and Sager 1994, 1259.

69 Eisgruber and Sager 1994, 1259.

70 Urbina 2014, 180, 184.

71 Eisgruber and Sager 2007, 85.

72 Jones 2017, 168.

73 Balancing, Koppelman states, is essentially "a matter of context-specific judgment" (2006, 602). See also Greenawalt 2006a.

74 Stacey 2018, 137-143. The accumulated jurisprudence, furthermore, also guides the balancing process towards a more predictable outcome (see also Jones 2017, 168).

and it is precisely because of rule of law's transparent and fair procedures that obscure moral intuitions are exposed and can be reined in – especially if this is accompanied by a high quality of reasoning and deliberation.[75] What cannot be denied, however, is that proportionality balancing's indeterminacy once again forces us to rely on contextual decision-making, with - as it seems - little help from normative theory to define the best outcome in specific cases.

Even Laborde's sophisticated approach to the question of interests, described in the previous part of this chapter, cannot offer us any more guidance. In fact, it makes a smaller contribution than Laborde, who already is quite modest in this regard, suggests herself. Laborde leaves a lot of room for open-ended proportionality balancing, but even the few remaining thresholds or conditions that are supposed to guide this balancing are also not as rigid and firm as they may appear, or as Laborde intends them to be. To start with, the distributive approach regarding cost-shifting that Laborde incorporates in her theory, which she herself regards as "crucial" from a liberal egalitarian perspective,[76] is ultimately empty and redundant. After all, as we have seen earlier, the distributive approach is rightly criticized for its misguided assumption that it can reduce competing interests to a common denominator - like the 'burdens' and 'benefits' that Laborde refers to -, and insert such quantifiable entities into a calculus that ultimately produces the 'right' result. Illustrating and validating this criticism of distributive approaches, Laborde invokes specific examples to illustrate which instances of cost-shifting are reasonable or fair (and which are not), but does not actually explain *why* this is reasonable, and precisely what calculus of burdens and costs (the aforementioned 'nuts and bolts') led to this conclusion.[77] Most of her assessments seem to implicitly rely on substantive and non-quantifiable values or interests, but these can also be included in a proportional balancing process directly, without the detour of an over-promising distributive mechanism.

A more fundamental and general problem facing Laborde's theory, however, is that the 'principles of justice' and the notion of 'basic rights' that she refers to are largely question begging and, as such, and almost entail a kind of circular reasoning: to determine whether a burden (or an exemption) is just, Laborde refers to abstract notions of justice and basic rights which (possibly) ground

75 According to some, the 'art of deliberation' can effectively guide choices between interests that are assumed to be incommensurable – in fact, the cause of incommensurability may very well lie in a deficient deliberation process. Houdijker (2012) refers to Elijah Millgram, Charles Taylor and Donald Regan as examples of theorists holding such views (p. 226).

76 Laborde 2017, 227.

77 See Laborde 2017, 228.

the law in question; notions which in turn need to be interpreted in contextual deliberation about which burdens are justified, and so on. She accuses Taylor and Dworkin of making it too easy on themselves, by refraining to test their theories with hard cases,[78] but Laborde's own examples of violations of basic rights - mainly infant sacrifice, but she also includes child abuse more generally as well as "sexist and hetero-sexist discrimination"[79] - do not do much to clarify where precisely the limits should be drawn either. Furthermore, it remains unclear why it is precisely the laws that Laborde mentions - laws "forcing parents to provide their children with appropriate medical care", laws "against rape, abuse, and exploitation", and laws "setting out universal civic obligations such as the payment of taxes and compulsory education"[80] - are demanded by (egalitarian) justice, and why others are not.

Laborde herself seems to agree that she does not (and cannot) clearly establish what is demanded by justice, given that, as mentioned previously, she acknowledges the existence of a reasonable disagreement about such matters. But as I remarked in the context of the debate on the question of religion and underlying goods, the boundaries of what is to be considered as reasonable are themselves also unclear. According to Jonathan Seglow, even a view that does not allow any exemptions would qualify as reasonable in Laborde's view.[81] Laborde sometimes seems unsure about these boundaries herself, when she admits that the category of 'morally ambivalent' claims for exemptions - which spring from this reasonable disagreement - is "potentially very large".[82] It seems one can also reasonably disagree about what constitutes reasonable disagreement; apparently, it is reasonable disagreement all the way down.

This insistence on reasonable disagreement also has the effect of relativizing the few thresholds that do appear to be unambiguous in Laborde's own preferred conception of justice. After all, the 'robust' protection of the rights of women, children and sexual minorities she advocates does not seem that strong when it is immediately followed by a disclaimer that a lesser protection of these rights may be just as reasonable. What is more, Laborde does not only relativize but at times also contradict the prioritization of these rights. In the context of the freedom of association, for example, she does condone the curtailment of these rights, by justifying the discrimination of women and sexual minorities when the discriminating organizations in question meet the

78 Laborde 2017, 207-8.
79 Laborde 2017, 208-210, 227. See also Laborde 2021b.
80 Laborde 2017, 225.
81 Seglow 2019, 4.
82 Laborde 2017, 214.

demands of what she calls coherence interests and competence interests.[83] In sum, not only are the thresholds in her 'meta'-theory of justice considerably indeterminate - not in the least because of a notion of reasonableness which itself is also indeterminate and expansive -, but the red lines she herself draws in her own specific conception of liberal justice also prove to be particularly porous.

3.5 Conclusion: context, context, context

To which degree can religious exemptions disputes be resolved by liberty- and equality-based views on religious freedom? Based on the above, a sobering conclusion should be drawn: theories of religious freedom are mostly inconclusive, and highly indeterminate when it comes to assessing concrete claims of exemptions. It all starts with the views of religion and the good that ground these theories, with the former turning out to be inherently indeterminate and the latter begging the question which values or goods should (or can reasonably) be taken as point of departure. Moving on, the question of who gets to draw jurisdictional boundaries does not provide any guidance as to *where* these lines should be drawn. Liberal binaries of the public and the private, or the religious and non-religious, are indeterminate themselves, and are neither sufficient nor necessary for deciding whether or not an exemption should be granted. The various views on religious freedom as a right do not offer any relief either, as they ultimately rely on principles of liberty and equality that are inherently empty, and do not say up to where liberty should be protected, or what should be treated equally.

Even theoretical views on the most conclusive question, namely that of interests, are found wanting. Despite the proliferation of approaches, methods and criteria, these views are arguably the most glaringly indeterminate of all. Widely endorsed thresholds like the harm principle or the notions of compelling interests and substantial burdens simply provide no guidance whatsoever as to what counts as (sufficiently) harmful, compelling or substantial, and parity-based thresholds are similarly unforthcoming about what falls under their

83 To be fair, Laborde's disproportionate burden criterion is formulated in the context of individual exemption cases, and not the question of associational freedom. But theses contexts are not always easily distinguished or disentangled, such as in the case of a religiously inspired business that is mainly operated by one person. Moreover, she posits this threshold more generally, as characteristic of her interpretation of liberal justice as such.

denominator of rights, opportunities or burdens. Proportionality balancing turns out to be the most viable alternative, but is also the approach that is most openly empty and indeterminate. What counts as fair or just, as a 'sufficient' harm, a 'compelling' interest, or more modestly as a 'defensible' or 'reasonable' balance, is the *outcome* of the weighing process, and not dictated by principles of justice. It is telling that even complex and sophisticated theories like that of Laborde ultimately have to rely on a version of this open-ended balancing method to determine which interests prevail in concrete exemption cases. To be fair, Laborde admits to indeterminacy when it comes to answering all the four question, but in the case of conflicts of interests this indeterminacy runs deeper than she herself would care to admit.

The upshot of all this indeterminacy, as theorists often end up admitting either implicitly or explicitly, is that decisions about concrete exemption disputes can only be made in specific contexts. It is there where 'religion' has to be given a stable interpretation, where legitimacy of the state is earned, where the lines of the public and the private are drawn, where the limits of liberty and the 'what' of equality is determined. And, also given the broad egalitarian consensus on the question of competence, it is through liberal democratic procedures where interests must be balanced, and an adequate (read: proportionate) resolution of the conflict of interests must be found.

The sobering conclusion of this chapter, then, does not only limit itself to the insufficiency of the various specific theories and approaches that were discussed, but rather extends itself to theory or the theoretical debate as such. Any pretentions harbored by theorists regarding the resolution of real-life cases have to be considerably tempered, even though the various theoretical perspectives, principles and methods can offer a certain structure to these contextual assessment processes. The latter is true even in the case of 'empty' proportionality balancing, even if the theoretical literature itself has been mostly silent about it. Before moving on to the empirical part of this thesis, therefore, this gap in the literature is addressed by briefly elaborating the building blocks for this balancing - and for its contextual analysis - in the next chapter.

4

Getting a Grip on Balancing: A Moral Classification of Harms

The previous chapters left us in a bit of a bind: Proportionality balancing has turned out to be the most viable approach to the most decisive question regarding religious freedom - namely the question of interests - but is also the most openly and thoroughly indeterminate one. Basically, there is no way to determine in theory which balance between religious (or non-religious) burdens and third-party harms should be considered as proportional. What complicates things further is that not much is written about how to distinguish between different types of burdens and harms to begin with, and how to determine their severity. Addressing this issue would not only fill a theoretical gap, and offer a certain structure that can be used for contextual balancing processes; it also helps us to analyze such practices, and establish which balance between burdens and harms is deemed proportional in specific contexts – as will prove to be especially helpful in the second part of this thesis.

To be sure, when it comes to one scale of the balance, namely that of religious burdens, some work has been done that helps us to determine their weight; this literature will be summarized briefly in section 4.1. When we look at the opposite scale, however, there seems to be an even more pressing need to conceptualize the moral weight of the interests behind the law(s) in question, and the third-party harm that is inflicted as a result of legal exemptions. Normative theorists from all across the board - both liberty- and equality-leaning - have underlined the importance of taking these interests into account,[1] and the need for some theory of regulable or overriding harm.[2] Such an account has also been found lacking in legal practice, even in cases where courts invoke the notion or principle of harm to guide their verdicts.[3]

To develop this theory, however, one first has to reckon with the immense criticism directed at the harm principle – more specifically, with the accusations of its expansive and thus stifling potential. In section 4.2, I therefore propose an approach to the harm principle that overcomes this criticism: one which does not ask the principle to singly-handedly determine when religious freedom *must* be curtailed, but rather when it may *potentially* be regulated by the state. Departing from this perspective of harm, I develop a preliminary

1 Waldron 2002, 32; Shorten 2010, 102; Sirota 2013, 305; Quong 2006, 19.

2 Greene 2009, 999-1000 (As Greene also argues, what is needed involves "attributing weight, both to what we are protecting with our regulation and to what is being asserted as counterpoint" (2009, 997)). McConnell, writing in 2013, in the same vein argues that such questions about harms and their relative weight "will dominate free exercise litigation for the next decade or two" (McConnell 2013, 807).

3 See Keall (2020) about the use of harm in Canadian courts (pp. 208-211), and Foster (2016) for a similar observation about the lack of explicit reasoned restrictions of religious freedom by European courts (p. 388).

classification of the impact of exemptions on others (so-called 'third parties'), in which I distinguish between different categories of such harm and rank them according to their overall severity. This innovation not only shows how theory can in fact contribute to a more thoughtful and robust balancing process in practice, but will also prove to be useful for discerning the employment of these various harms in the case-study of this thesis. The importance of such contextual assessments (and their analysis) is also underlined in the final part of this chapter, where it concludes that it is ultimately contextual factors that determine the extent and even the nature of the harms at stake.

4.1 Weighing the burdens of the law

How to weigh burdens resulting from the law, that are often invoked to ground claims for exemptions? As the literature shows, this weight generally depends on two things; in Greenawalt words, they "turn on the importance of the burdened practice and the extent to which it is burdened".[4] Starting with the importance of the burden, there is a broad consensus that at least two aspects of religion (and/or similar non-religious phenomena) that make certain burdened practices important, which are their obligatory nature and their importance for the constitution of one's identity.[5] Laborde captures these aspects in her obligation-IPC's and identity-IPC's, and this distinction between identity-related and obligatory commitments already helps to accord relative weight to different types of exemption claims: after all, the latter are generally seen as more ethically salient than the former.[6] But it is mostly *within* these categories that the actual weighing occurs, depending on the level of importance of the restricted practice in the individual's beliefs. These can be more or less obligatory - examples being, for example, the obligation to attend

4 Greenawalt 2006a, 205. Billingham follows these two criteria, calling them two distinct *dimensions* of the weight of religious claims for exemptions (2017) – dimensions which also map neatly onto Laborde's criteria of the severity of the burden and the directness of a burden in her disproportionate burden test (2017, 221-5).

5 See Chapter 1 and 2 for the various ways in which theorists refer to these features of religion.

6 Laborde 2017, 222-3. Billingham also agrees that "the weightiest claims ... will indeed be ones based on a religious obligation", although "claims based on a practice that is central to an individual's faith can also be very weighty" (Billingham 2017, 7). He also notes that some theorists (like Bou-Habib) and some court rulings argue or imply that it is only the claims based on obligation are sufficiently weighty (2017, 6). Bardon, however, challenges the suggestion that deep obligatory commitments are more meaningful to people (and therefore more ethically salient) (2023).

certain religious services and the conscientious objector's commitment not to kill - or, in the case of identity-related commitments, more or less central to their beliefs. Think of the generally less central commitment to wearing a Christian purity ring versus the commitment to wearing the kara-bracelet, the latter being one of the five main proscribed identifiers of Sikhism.[7]

When determining precisely how central or obligatory a commitment is, the risk is that one trespasses on theological grounds, deciding what is 'objectively' important in the scriptures or philosophy on which the claim in question is based. The consensus is that such religious exegesis should be avoided, or at the very least cannot provide a final verdict.[8] What is more, such information does not shed light on the weight of the commitments behind each individual claim.[9] Determining this weight is ultimately a subjective affair: what matters is the degree in which a commitment is *perceived* or *felt* as obligatory or central,[10] and one of the few external assessment that can take place is that of the claimant's sincerity.[11] This has troubling consequences, however, as the resulting practice of individualized sincerity- or integrity-tests is difficult to administer, and makes it especially difficult to develop a consistent policy.[12] Fortunately, one does not only have to rely on this subjective assessment, as there is also a second, more objective dimension that determines the moral weight of a burden.

This second dimension concerns the costs of holding on to one's commitments under the legal restriction in question. In other words, what must one sacrifice, suffer, or give up on, if one accepts the legal restriction but nevertheless decides to hold on to one's commitments? Such costs depend on both the directness of the burden as well as the specific secular interests that are affected by the legal restrictions in question. Starting with the former,

7 Billingham 2017, 8-9. Laborde also refers to wearing certain symbols as possible examples of especially central identity-protecting commitments – one which even blurs the boundaries with obligation-IPC's (Laborde 2017, 223). Others point to the commitment of the Amish community to homeschool their children from the age of high school onwards, with the aim of preserving their common identity (Galston 1995, Shorten 2010, note 3 at 122), or the commitment to ministering to the sick as central to different religious traditions (Greenawalt 2006a, 415).

8 Greenawalt 2006a, 205; MacLure and Taylor 2011, 82-83; Billingham 2017, 10-11.

9 Greenawalt 2006a, 213.

10 MacLure & Taylor 2011, 81-84; Greenawalt 2006a, 206; Laborde 2017, 204; Laborde 2020, 158-9.

11 Laborde 2017, 205-7, 313 (note 38); Greenawalt 2006a, 211; Billingham 2017, 11.

12 Laborde 2020, 159-160; Billingham 2017, 20-22; Bardon 2023. Still, Greenawalt states, this "messiness at the edges" and "uneven application" may be regrettable, but it is only way of applying a legal standard "that is minimally responsive to the underlying values that matter" (Greenawalt 2006a, 214)

the most directly burdensome are typically those laws that apply universally in a certain contexts[13] - for example, universal laws mandating compulsory military service, regulations for those locked in closed institutions -, while other laws may 'only' apply in the public space, in a specific work context or, in the case of turban-wearing Sikhs with a passion for motorcycles, on roads and highways. More substantively, however, the costs of commitment depend on the specific good to which one's access is deprived or restricted. For example, the requirement to wear safety helmet would weigh heavier on a turban-wearing Sikh in the context of a construction site - as this would exclude him from an important employment opportunity - than in the context of traffic, given that riding a motorcycle could be labeled as a relatively trivial preference.[14] Even more substantial costs are suffered, however, by those who are prohibited from entering the public sphere to begin with, which can be the case for religious believers committed to wearing (potentially) prohibited ceremonial daggers, like the Sikhs do, or face-covering veils. And so our intuition suggests some kind of objective hierarchy of interests and costs, ranging from autonomy and the access to public life, via employment and educational opportunities, ending at the more trivial preferences like recreational activities such as motorcycle riding.

Where the subjective dimension left it to each individual's personal belief system to determine the precise severity of the burden within possible broader categories, in this objective dimension of costs of commitments it is the *context* that is involved in the more fine-grained weighing. An example of such contextual factors is the fact that Sikhs happen to be significantly dependent on the construction business for employment opportunities, which makes the costs of the commitment to wearing a turban much greater.[15] And in countries with a large public sector like France, the ban on headscarves in this sector is even more detrimental to employment opportunities than in other contexts.[16] Such contextual factors are arguably easier to administer than the subjective appraisals in the first dimension of burdens. Therefore, this second dimension may prove to be especially important in weighing the claims of those seeking

13 Laborde 2017, 221.

14 Billingham 2017, 16; See also Greenawalt 2006a, 415 about the weight of "major vocational options", and Wintemute 2014, 231 for the weight accorded to these opportunities in rulings of the ECtHR.

15 Billingham 2017, 16.

16 Garahan cites Eva Brems, who notes: "Hence the French exclude Muslim women who wear a headscarf (as well as Sikh men who wear a turban and Jewish men who wear a kippah) from more than 21% of all potential jobs that they might aspire to in France." (Garahan 2016, 356, note 33).

exemptions from general laws. They are also particularly relevant given their broad similarity with the potential costs on the other side of the equation, namely the costs incurred by third parties as the *result* of the (potential) exemption in question. As the remainder of this chapter will show, a similarly objective classification can be made of this harm arising from exemptions, where the harm is larger, more severe, when more basic interests are at stake, and where those interests are affected to a larger degree.

4.2 Weighing the harms of exemptions: a moral classification

If there is one notion that readily comes to mind when thinking about the limits of liberties, it is the harm principle. It was articulated at least as early as the seventeenth century, by John Locke,[17] and it has been a central feature - in spirit if not always in letter - during centuries of philosophical as well as religious thinking.[18] It has left a clear mark, moreover, on laws, politics and societal debates all over the world;[19] all thanks to its intuitive appeal, but also because of its inherent malleability. It is this malleability that makes the principle easily adaptable to various positions and theories, but which also provokes most of the criticism of the harm principle: as the previous chapter(s) have shown, critics rightly point out that it is fundamentally empty and indeterminate,[20] and that it can easily become a very expansive - (and thus very restrictive) criterion, especially when it is used unreflexively. And even if it is deliberately and purposely defined to function as a threshold in exemption cases, as we have seen earlier, these thresholds soon prove to be overly rigid, overly indeterminate, or both.

Discarding the harm principle altogether, I argue, would nevertheless amount to throwing out the baby with the bathwater. After all, despite the criticism, there is a broad consensus among both liberty- and equality-leaning authors that the prevention of some type of harm legitimizes legal restrictions on religious freedom. The problem, however, is that the harm principle is mostly used to draw a single boundary, unequivocally prescribing the precise curtailment of religious freedom. But that is not necessarily what

17 See Hamilton 2004, 1152-3. Of course, the version that nowadays is most widely known and invoked is that of nineteenth century philosopher John Stuart Mill.

18 Smith 2010,71; Hamilton 2004, 1178-1182.

19 Smith 2010, 70; Hamilton 2004, Epstein 1995.

20 Smith 2010, 72. See also Gray (1996), 139-40.

the harm-principle entails. As even critics of the principle note, it can also be used to tell us what kind of activities *may* be regulated, and not necessarily whether or where coercion *should* be used. In other words, it can also be seen as a necessary but not a sufficient condition for legal enforcement, above all designed to determine the scope of the state's jurisdiction.[21]

Adopting such a perspective on harm liberates us from the pressure of setting a single threshold and enables a more nuanced and productive approach to settling specific issues of legal enforcement and possible exemptions. It means biting the bullet in admitting that all forms and degrees of harms are in fact the state's business – even though this admission by itself is not so radical, given that the final decision on possible restrictions is relayed to the balancing procedure that weighs harms against burdens. In my view, then, the notion of harm should not be wielded as the sole adjudicating principle, but should rather be incorporated into a broader perspective of proportionality balancing.

That still leaves us with the problem of harm's inherent emptiness, and the question of how to actually distinguish and weigh different harms. The most promising way of approaching this is by departing from a 'Feinbergian' definition of harm as a setback of an interest,[22] and providing a theory that determines the relative value of different kinds of interests. In order for this theory to be objective or - assuming reasonable disagreement about liberal justice - as widely supported as possible, what is needed is a thin theory of the good;[23] a theory which makes some claims about which general interests are more important than others, but which is nevertheless based on moral intuitions that are widely shared despite the plurality of outlooks that characterize liberal-democratic societies.

Below, I employ the perspective of such a thin theory to develop a preliminary moral classification of the harm from exemptions – that is, the actual and potential harm to third parties that would otherwise be prevented by the law in question. By invoking liberal theories like that of Rawls, and more generally by appealing to widely shared moral intuitions, I establish a ranking of five types of tangible, material harms, in the following order (from severe to less severe harm): physical harm, safety harm, liberty harm, opportunity harm, and economic harm. As will become clear, these successive categories of harm and their underlying interests map pretty neatly onto the successive concentric circles of the individual's life, moving outward from

21 Smith 2010, 74; Harcourt 1999, 114.

22 Feinberg stated that a "harm" consists if a "thwarting, setting back, or defeating of an interest" (1987, 33-34).

23 See also Laborde 2017, 200.

the body (physical and safety harm), via intimate relations (liberty harm), the broader circles of work and study (opportunity harm) and ending at the more anonymous marketplace (economic harm). The notion of dignity harm is discussed separately, not because it is necessarily less weighty or important, but because it is a less tangible, more symbolical and often secondary or epiphenomenal harm, which makes it hard to rank and rate it among the other categories of third-party harms.

This classification is as comprehensive as possible, encompassing practically all types of exemptions, even if not all specific exemptions and detailed nuances can be discussed in this limited space. In each case, the classification covers both hypothetical and actual exemptions, of both judicial and legislative nature; exemptions from national laws, institutional or organizational regulations, focused on a specific activity or rather applicable to a broader domain or sphere in which these activities take place. The various categories of harm are mutually exclusive and hierarchical as such, but even so they unavoidably feature certain grey areas, and exhibit some degree of overlap when it comes to their moral weight. These nuances, together with the role of context in determining this weight, will be discussed in the conclusion.

4.2.1 Category 1 - Physical harm: direct violation of bodily integrity

In his elaboration of the harm principle, Mill argued that coercion is "justifiable only for the security of others".[24] Although he did not elaborate this criterion much further, it seems self-evident that in its barest form the harm principle is mainly meant to prevent harm in its literal meaning. Physical harm is the most tangible and severe type of harm, and the corresponding interest of bodily integrity is arguably the most basic and important a person has. Its neglect would most definitely assure that life is 'nasty, brutish and short', and is one of the main reasons why people organize politically to begin with. It is not for nothing that Rawls considers the duties "not to harm innocents" or "not to injure" as *natural* duties; pre-political duties that precede even those that arise from promises, contracts or any voluntary acts.[25] That physical harm constitutes the most severe category of harm is further reinforced by the fact that various theorists, following Locke, refer to religiously motivated infant

24 Mill 2015, 14.

25 Rawls 1999, 98. Rawls also included security rights in his list of basic liberties and rights, although he did not give it a separate place – something for which Nickel critiques Rawls (1994. 768-770).

sacrifice as the quintessential example of a practice that does not merit an exemption.[26]

Exemption claims for such practices are of course highly hypothetical, now even more so than in the times of Locke. But there are contemporary claims that aim to protect similarly harmful practices, with the difference that the physical harm in question is inflicted in a more passive way, by refusing to act when a life is on the line. Examples of cases that do amount to murder - or, to be more specific, to third degree murder or negligent homicide - are those that revolved around faith-healing practices, such as cases where parents (fatally) starve their children because they believe starvation purifies the body.[27] Medical doctors can also be found guilty of such negligent homicide when their religious or philosophical commitments keep them from providing adequate medical care.[28] Religiously-motivated negligence, finally, can also entail harm that stops short of actual homicide, but instead entails a high risk of death, a significant shortening of life or other severe types of physical harm or suffering. Parents have, for religious reasons, have wanted to keep their children from receiving chemotherapy promising a 40 percent chance of survival,[29] or refused blood transfusions for their offspring during or after heart surgery[30] or for treatment of severe Crohn´s disease.[31]

But even a 'clear-cut' category such as physical harm (as the direct violation of bodily integrity) unavoidably has its grey(er) areas. For example, male circumcision - and even some forms of female circumcision - are often considered to be less physically harmful then what is called full female circumcision or female genital mutilation. Another example of a grey(er) area is the practice of corporal punishment. Exemptions from the prohibition of school corporal punishment have been rejected because of the "distress, pain

26 Laborde 2017, 208 (infant sacrifice as typical example of a morally abhorrent practice which is precluded from meriting a pro-tanto exemption claim); Patten 2017b, 129; McClure 1990, 378-9 (citing Locke's *Letter concerning toleration* as the work where this case is discussed).

27 See for example *Commonwealth v. Cottam*, 616 A.2d 988,993 (Pa. Super. Ct. 1992), *Hermanson v. State*, 604 So. 2d 775, 775-76 (Fla. 1992); *Nicholson v. State*, 600 So. 2d 1101, 1102-03 (Fla. 1992).

28 See Greenawalt 2006a, 403, who also refers to various statutes and regulations that compel medical professionals to perform adequately, with failures of such performance amounting to negligence.

29 *Newmark v. Williams*, 588 A.2d 1108 (Del. 1991).

30 A Dutch court ruled that the state might (temporarily) remove parental authority from parents that refuse blood transfusion (Court Zeeland-West-Brabant, 30 November 2016, C/02/323759 / FA RK 16-6853)

31 *A.C.* v *Manitoba* [2009] 2 SCR 181 (in which the court ruled that neither child aged 14 years 10 months nor parents could refuse blood transfusion).

and other harmful effects",[32] but in some contexts such punishment is also condoned as a form of 'reasonable force' employed by parents and teachers.[33]

4.2.2 Category 2 - Safety harm: risk of disease, injury, or death

This category of safety harm can be seen, at least in part, as an extension of the previous category of physical harm. It covers exemptions that do not directly or immediately amount to violations of bodily integrity, but do expose others to the *risk* of harm to their health and safety. The interest at stake is therefore the notion of safety and security, which is often mentioned as compelling interests, but which is rarely elaborated any further.[34]

A variety of exemptions results in this type of harm. The refusal to vaccinate one's children is an obvious example, as it exposes the child in question to the risk of a larger or lesser degree of physical harm depending on the disease in question, and other contextual factors such as the overall vaccination rate. Similarly, exemptions from bans on public or private gatherings in the context of a contagious virus like Covid-19 - the example with which this thesis opens - also belongs to this category. Military draft exemptions are another prominent example, where the exemption heightens risks to the safety of others in various ways[35] – especially when there is a serious threat of war. Exemptions that protect a church's 'internal' affairs, regarding placement or hiring practices or tort liability, can also undermine the safety of others. A well-known example is the transfer of priests with a history of sexual abuse, but it also concerns a clergy member's duty report known or suspected child abuse or neglect.[36] In somewhat similar cases, exemptions from child labor also expose children to

32 The UK the House of Lords in 2005 dismissed the appeal to religious freedom of teachers and parents at some Christian schools that inflicting limited corporal punishment on pupils, banned in the UK since 1987, was central to their Christian beliefs (*Williamson v Secretary of State for Education* (2005) UKHL 15).

33 See for example Canada's Section 43 of the Criminal Code, R.S.C. 1985 c. C-46. Laborde also refers to "(mild) corporal punishment" as an example of a less harmful practice (2017, 210).

34 See for example Nussbaum's notion of "public order and safety" (2007, 50). The lack of elaboration of this notion is criticized by Greene (2009, 993-8).

35 For every person exempted from military service, another person needs to take his or her place, exposing them to the risk of injury or death (See for example Esbeck 2017, 376). At any rate, such exemptions raise the statistical probability of being drafted from the perspective of the larger group of qualified citizens (See McConnell 1985, 37; Schwartzman, Tebbe and Schragger 2017, 904, citing Gedicks & Van Tassell 2014). Finally, exemptions can also lead to a shortage of staff, resulting in a smaller army which may be more at risk than a larger one (Roumeas 2019, 149), and cannot adequately protect the population as a whole.

36 See Hamilton 2004, 1165-1170.

potentially unsafe contexts, such as Amish children working in sawmills and woodwork shops.[37]

In other cases, the risk of physical harm seems (yet) more indirect or remote, such as when people or organizations are exempted from general safety and health regulations. Think of exemptions for the ritual slaughter of animals, which, if such practices are inadequately monitored, could potentially pose a risk to others' health. Another example is the exemption from safety regulations in traffic, such as the requirement that all slow-moving vehicles display a red and orange reflective triangle, which some Amish objected against as "worldly displays".[38] In other cases of this (sub)category the link with threats to safety are more tenuous, such as exemption to face-covering clothes in public. For example, the ECtHR ruled that the French ban on clothing like the burqa was not supported by evidence of any impact of exemption on public safety.[39]

4.2.3 Category 3 - Liberty harm: undermining autonomy

It is safe to state that, following bodily integrity and safety, one's most valuable possessions are one's liberties. In Rawls' theory, the first (and most important) principle of justice proclaims that "[e]ach person has an equal right to a fully adequate scheme of equal liberties which is compatible with a similar scheme of liberties for all".[40] One of the main reasons why liberties like the freedom of association and speech, the liberty of the person and political liberty are so important is because they allow us, in Rawls' words, to "form, to revise, and rationally to pursue ... a conception of what we regard for us as a worthwhile human life".[41] The underlying interests can therefore be identified as autonomy, and the harm to this autonomy can take on many forms; coercion, suppression, or any other act that effectively prevents individuals from exercising their basic liberties.

37 As per 29 U.S.C. §213I(7), children are prohibited from operating or assisting the operation of these machines, but children's advocates still feel that children would inevitably get close to them. See also *New York Times*, 18 October 2003, Foes of Idle Hands, Amish Seek an Exemption from Child Labor Law. Retrieved from: https://www.nytimes.com/2003/10/18/us/foes-of-idle-hands-amish-seek-an-exemption-from-a-child-labor-law.html [Accessed on 8 June 2023].

38 This case is discussed by Brian Barry (2001, 182-7), and concerns a specific claim for exemptions by the Amish community – which was granted by the Minnesota court.

39 The court did, however, unanimously rule that the law as such was not in violation of the rights of the ECHR (*S.A.S. v France* (No 43835/11)).

40 Rawls 1993, 291.

41 Rawls 1981, 16.

What are the exemptions that cause such harm? What exemptions prevent others from exercising their liberties, and undermine their autonomy? First of all, liberty harms are often a byproduct or consequence of physical and safety harms. Exemptions that deny medical support when it comes to contraceptive services or abortions, for example, can not only result in physical harm but also undermine one's basic bodily autonomy.[42] And the physical harm of child abuse in religious institutions often goes hand in hand with emotional suffering and serious impairment of one's sexual autonomy in later life.[43] Other (hypothetical) exemptions that affect sexual autonomy are obviously those condoning female circumcision[44] and polygamy:[45] The latter is often not only accompanied by abuse and subordination of the women in question,[46] but also affects the autonomy of their offspring, who regularly suffer from grooming, oppressive discipline and neglect.[47]

As the examples above show, liberty harms usually play out on the level of intimate relationships; relationships with family or (close) friendships. Women are often its victims, but also children: Consider the case where a parent's custody is not revoked because it is her religious views that inform the harmful education of her child, who she prohibits from any contact with the outside world, including the child's father, resulting in psychological damage and an inadequate preparation for adult life.[48] Or take the example of a custodian

42 Koppelman 2013b, 158 (concerning provision of contraceptive services), and Smet 2016, 17 (stating that the refusal to perform abortions contravenes against the value of autonomy (or "the decisional privacy") of the woman). See also Koppelman 2012, where he draws parallels between unwanted pregnancy and slavery. For women, he argues, "loss over their reproductive capacities, and compulsion to bear children whether they wished or no, was part of the experience of being a slave" (2012, 1938).

43 Hamilton 2004, 1169.

44 Earp 2016.

45 Polygamy is sometimes condoned in Western liberal democracies, through the legal recognition of marriages with minors elsewhere, as happened with the marriage of a 21-year-old Syrian refugee and his 14-year-old wife in Germany. See Oberlandesgericht Bamberg, 16 June 2016, Zur Frage des Aufenthaltsbestimmungsrechts eines Vormunds bei einer im Ausland geschlossenen Ehe eines Minderjährigen [On the Question of the Right of a Guardian to Determine the Residence of a Minor in the Case of a Marriage Concluded Abroad (Press Release)], Retrieved from: https://www.infranken.de/lk/bamberg/kinderehe-deshalb-ist-sie-in-deutschland-erlaubt-art-1931818 [Accessed on 8 June 2023].

46 Shaiful Bahari et al. 2021, 2.

47 Joffe 2016, 343.

48 See *Quiner v. Quiner,*59 Cal.Rptr. 503 (1967), and Greenawalt's discussion of this case at 2006a, 423-8. See also the similar case of *Vojnity v. Hungary* (no. 29617/07), where the court ruled that holding unrealistic religiously motivated educational beliefs rendered a father unfit to provide his child with an adequate upbringing.

forcing a 9-year old child to sell religious tracts, contrary to child labor laws.[49] Other cases involve not only one's (nuclear) family but also the surrounding community. In religious communities like that of the Amish or the Jehovah witnesses, the penalty for serious religious offenses is expulsion and so-called shunning: the categorical avoidance of the (by now) former member. Expressions of this shunning, such as economic boycotts or the avoidance of spousal relations (or alienation of affections) can amount to civic wrongs, such as violations of the tort law,[50] infringe the liberties and autonomy of the shunned individual in general,[51] and may also specifically reduce the religious freedom of the person in question – given that the high social price of rejecting the church will compel or even force the person in question to remain faithful to the communal creed.[52]

4.2.4 Category 4 - Opportunity harm: obstacles to employment, education, housing

After violating basic liberties and undermining autonomy, the worst harm that can result from an exemption is the deprivation of opportunities to pursue one's own good. Rawls' first principle of justice that secures basic rights and liberties is closely followed by a second principle concerning socio-economic distribution. One of the latter principle's main aims is to ensure a fair equality of opportunities, meaning that there should be a set of institutions that assures fair chances of a career or education.[53] Access to social goods such as housing, schooling, and work is essential not only for attaining certain social positions but, it can be argued, to a certain extent even figures as a precondition for the exercise of basic rights such as political rights or the freedom of religion.[54] Harm can be inflicted to this interest if the access to these essential goods is in any way impaired or limited, either in an absolute or a relative sense.

49 *Prince v. Massachusetts*, 32I U.S. I58 (I944).

50 Greenawalt 2006a, 292-3.

51 In *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975), the Supreme Court of Pennsylvania argued that "the shunning may be an excessive interference within areas of 'paramount' state concern, i.e. the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship."

52 Greenawalt 2006a, 295.

53 Rawls 1999, 53. See also Quong, who identifies employment and education as two "basic civic opportunities" (2006, 62).

54 In Justice as Fairness, Rawls conceded that the first principle of justice "may be preceded by a lexically prior principle requiring that basic needs be met, at least insofar as their being met is a necessary condition for citizens to understand and to be able fruitfully to exercise the basic rights and liberties" (2001, note 7 at 44).

There seems to be an overlap here with the harms to autonomy described in the previous category, given that undermining this autonomy often goes hand in hand with the loss of certain basic civic opportunities. The difference, however, lies in the fact that harm to autonomy is interpreted here as the *internal* capacity to take (advantage of) such opportunities in general, while opportunity harm mainly consists in the (and often relative) deprivation of specific *external* opportunities like employment, education, and housing. The two types of harm also center on different relations and social contexts, with liberty harms revolving around intimate relations in the context of family and (close) friendships, and opportunity harms mainly occurring in a next concentric social circle, so to speak, of the work and school. In this context, it is not the person's personal emotional stability that is at stake, but rather its role or functioning as a citizen in the broader society.[55]

When does an exemption effectively deprive others of the opportunities in question? Starting with educational opportunities, one of the clearest cases would be a total exemption from compulsory education laws, enabling parents to keep their children from receiving education and thereby depriving them of this important social good.[56] In the Netherlands, for example, parents have had the right to exempt their children from compulsory education from their fifth year onwards, on the condition that no school can be found in the near vicinity whose worldview corresponds with their own.[57] And in the well-known *Wisconsin v. Yoder* case (1972) Amish parents were allowed to take their children out of school from the age of fourteen onwards; an deprival of opportunities in a more limited form compared with the previous example, but which can

55 See Galston (1995) for examples of how the preconditions of good or effective citizenship could be at stake in the context of diversity and (religious) accommodation.

56 Galston (1995) offers the hypothetical example in which "some group were to withdraw its children from public elementary school without providing any home-schooling alternative", as the result of which "the requirement of preparation for economic, social, and political citizenship would certainly be violated" (1995, note 29, at 528).

57 With regards to the content of such homeschooling, the only condition that the parents need to meet is the fulfilment of a very general duty to promote the development of their child – a condition that does not seem to guarantee a good education. This is also the reason why the Dutch State Secretary of Education has voiced his intention to annul this specific ground for exemption, after signaling an alarming increase in the number of children that were schooled at home. (*Kamerstukken II* 2015/16, 31135, nr. 58)

nevertheless affect the opportunities of the children in question in a significant way.[58]

Exemptions can also affect employment or career opportunities, for example those that are central to certain dismissal cases. These often entail a *relative* limitation of access to this good, and not a full-blown deprival of the opportunity in question, given that other employment options are still open to the individual in question. Various equal treatment acts, for example, have featured legislative exemptions that enable religious organizations to dismiss or refuse employees based on their religious views, their marital status or their sexual orientation.[59] And numerous court cases have revolved around cases where employees are dismissed for, amongst other things, their support for "polyamorous activities",[60] an extra-marital affair,[61] or their membership of a different religious community[62] – a type of exemptions which, if one considers these examples, can also cause a certain liberty-harms to the individuals in question, as it (relatively) limits them in their intimate relations or the exercise of their liberties.

This category of opportunity harm, finally, does not only cover the social goods of employment and education. Other opportunities that are arguably just as basic involve housing and civil status. Christian landlords, for example, may refuse to allow an unmarried couple to rent their flat, thereby limiting their housing opportunities.[63] And the refusal to officiate at the civil partnership ceremony of a same-sex couple may similarly deprive this couple - albeit in a relative and limited way - of the opportunity to enter into registered and legally recognized relationship.[64]

58 According to Raley, who argues that the Yoder ruling could and should be overturned, the exemption "permits Amish children to be stripped of their education and, in many cases, their future" (2011, 720). This would also be a retort to McConnell, who doubts whether the Yoder case involves ""harm" in the Millian sense" (2013, 804).

59 One prominent example is the sole fact construction, that is central to the case that is studied in detail in the second part of this thesis.

60 *Bunning v Centacare* [2015] FCCA 280 (11 February 2015).

61 *Obst v. Germany*, App no 425/03 (ECtHR, 23 September 2010).

62 *Siebenhaar v. Germany*, App no 18136/02 (ECtHR, 3 February 2011).

63 This exemption from the Australian Anti Discrimination Act was denied in *Burke v Tralaggan* [1986] EOC 92-161.

64 *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.

4.2.5 Category 5 - Economic harm: bypassing obligations, imposing costs, denying commercial services

In the hierarchy of goods and interests, the interests of basic civic opportunities are followed by the economic interests of citizens. Here we are entering the next concentric circle of social life, moving outwards from the school and workplace to the broader context of the shared economy or the marketplace. Harm to these economic interests of third parties can take on various forms, which also roughly imply different degrees of severity. There are exemptions that undermine the (pre)conditions and rules of a fair economy, exemptions that shift costs to employers and employees, exemptions that limit the provision of commercial services, and exemptions that impose costs on the society as a whole.

To start with, there are various ways in which citizens and their organizations are exempt from the rules of play of a fair economy. The legal recognition of the so-called Missionary Church of Kopimism in Sweden, for example, basically amounts to condoning the violation of ownership rights,[65] and exemptions to bankruptcy codes or laws enable debtors in bankruptcy to donate money to their church even when the trustee did not receive the money that the debtor was (otherwise) obliged to (re)pay.[66] And then there are many exemptions that affect fair labor standards.[67] Religious organizations may, based on the ministerial exception, be exempted from the legal demands to pay its employees a fair salary,[68] and some schools and religious commercial organizations seek similar liberties[69] – in case of the latter also resulting in competitive disadvantage for non-religious companies. Unfair competition may also result from exemptions to the tax law, finally, for example when a religious organization can still claim charitable status even though it (mainly) engages

65 *New York Times*, 12 January 2012, The First Church of Pirate Bay. Retrieved From: https://www.newyorker.com/culture/culture-desk/the-first-church-of-pirate-bay [Accessed on 8 June 2023].

66 See Greenawalt 2006a, note 13 at 205 for various exemptions of this kind.

67 Exemptions to anti-discrimination laws can also have this impact, for instance when they allow religious organizations to dismiss female employees that raise the issue unfair payment based on gender (See *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), discussed in Bagni 1979, 1534).

68 See letter FLSA2018-29 from the U.S. Department of Labor, which communicates this decision.

69 Regarding schools, see *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Regarding commercial organizations, see *Alamo Foundation v Secretary of Labor* 471 U.S. 290 (1985). See also Marshal 1991, 314-315 for a discussion of this case.

in secular commercial enterprises,[70] or when an employer seeks exemption from paying social security taxes[71] or pension plans.[72]

These last cases are also instances of another sort of economic harm, where costs are imposed on specific individuals and organizations. Exemptions around working schedules also fall under this category, as granting such exemptions to religious employees may relieve them of their burdens, allowing them to attend to their religious obligations, but in turn also imposes costs or (administrative) burdens on their employer or colleagues.[73] In the case of *Burwell v. Hobby Lobby Stores Inc*, (2014) on the other hand, the costs are shifted in the opposite direction, from (religious) employer to employees, with the latter having to pay for their own contraceptive measures after the company was relieved of the duty to cover these in their insurance.[74] Direct economic impact can also be felt by individual *customers*, finally, when exemptions allow for the denial of commercial services. Consider the refusal of a camping resort to accommodate a homosexual support group,[75] the refusal of a Christian pharmacy to sell certain contraceptive items,[76] the refusal to photograph the wedding of a lesbian couple,[77] or bake a wedding cake[78] or provide flowers[79] for such an occasion, et cetera:[80] Such cases have similarities with opportunity harms, except that they do not (relatively) deprive third parties of basic goods or opportunities, but rather limit the range of commercial products and providers – thus potentially also raising the economic costs to obtain these products.

A final category of economic harm concerns costs imposed on society as a whole. In the case of *Sherbert v. Verner*, for example, Adele Sherbert was granted unemployment compensation because her refusal to work on Saturdays was

70 *Federal Commissioner of Taxation v Word Investments* (2008) 236 CLR 204. See Forster 2016, 415-6 for a brief discussion of this case.

71 See *United States v. Lee*, 455 U.S. 252, 254 (1982).

72 See *Advocate Health Care Network v. Stapleton*, 581 U.S. (2017).

73 See *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703 (1985): "The employers' interests … prevailed because the government was prohibited … from shifting significant costs from religious employees to their employers" (Schwartzman, Tebbe & Schragger 2017, 897). See also various examples of ECtHR rulings (which tend to reject such exemption claims on the basis of the costs imposed on third parties) in Wintemute 2014, 229.

74 Koppelman 2013b, 162.

75 *Christian Youth Camps Ltd v Cobaw Community Health Services* Ltd (2014) 308 ALR 615. † BA, JD (Melb).

76 *Pichon and Sajous v. France* [2001] ECHR 898.

77 *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012).

78 *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. (2018).

79 *State of Washington v Arlene's Flowers Inc* and *Ingersoll and Freed v Arlene's Flowers Inc* 2015 WL (Wash Super Benton Cty) (Trial Order), Eckstrom J, February 2015, No 13-2-00871-5, 18.

80 See also Foster 2016 and Brems 2018 for more examples.

religiously motivated, and this compensation is paid for by all members of society.[81] And while the *Hobby Lobby* case seems to shift the costs of obtaining contraceptive services to the employees, the court itself assumed that the government - and thus the society as a whole - would ultimately reimburse these costs.[82] And then there are exemptions which, as a result of increasing risk of injury or death, generate costs that are paid for with money from insurance schemes, or tax money.[83]

4.2.6 Category 6 - Limits of harm: unease, discomfort or distress

A final type of impact deserves attention, despite (or perhaps precisely because of) the fact that it does not seem to entail harm as such or, in the worst case, constitutes the most minimal harm possible. This is the harm that can best be described as distress, unease or discomfort. The types of impact in this category that most resemble actual harm - and potentially may be labeled as such - are those that border on physical harm or safety risks. This includes concerns about the excessive noise made by church bells[84] or mosque loudspeakers, about the health risks posed by the smoke of an open-air Hindu cremation,[85] or about the safety risks for the neighborhood posed by a Catholic homeless shelter.[86] When the impact is limited to the unease or discomfort itself, however, the label of harm is not applicable. After all, these feelings have more to do with subjective preferences at best, or prejudice at worst, and do not concern objective interests. There is no doubt that such feelings can strongly affect someone, but recognizing them as such would open the gates to an extremely subjective an expansive view on what constitutes harm.[87]

81 *Sherbert v. Verner* 374 U.S. 398 (1963). See also *Frazee v. Illinois Department of Employment Security* 489 U.S. 829 (1989), and *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

82 Schwartzman, Tebbe & Schragger 2017, 911.

83 Hamilton, for example, refers to the societal costs of therapy and treatment of children abused in Catholic institutions, and the costs of prosecuting the perpetrators (Hamilton 2004, 1169-70). About the costs of exemptions for turban wearing Sikhs from safety laws in work and traffic, see Laborde 2017, 228.

84 *Schilder* v *Netherlands* (16 Oct. 2012), ECtHR (AD).

85 *R* v *Newcastle City Council, ex p Ghai* [2010] EWCA Civ 59.].

86 See Hamilton and Becker 2005, 100.

87 See also Brown 2015, 50.

A person's discomfort at being confronted - at work, or in public spaces - with a person wearing a headscarf,[88] a yarmulke[89] or a beard[90] therefore does not as such count as harm, neither does the unease caused by the mere awareness - without the actual health risks - that cremations are being conducted nearby on an open funeral pyre, the alarm one might experience when seeing someone wearing a kirpan on the streets, or the distress after being confronted with religious teachings that "women are inferior to men"[91] or a colleague's views on homosexuality.[92]

4.2.7 Dignity Harm: the expressive and symbolic dimension of harm

The various categories of harm discussed above all concerned some kind (and degree) of objective tangible or 'material' harm, with the final category of unease constituting the limits to harm precisely because it lacked such objectivity. This does not mean, however, that harm only occurs when there is a tangible impact, and that only material harm can be more or less objectively established. Exemptions can also be accompanied by a different kind or dimension of harm, namely expressive harm. The harm here is inflicted on one's dignity,[93] through the failure to recognize another's equal status as a citizen. This is no 'mere' emotional distress or unease, nor does it mean that this equal status is merely a matter of aesthetics:[94] the damage is done to the person as such, irrespective of individual preferences or personal interests.

It is difficult to rank this symbolic interest of equal standing among the categories discussed above, also because of its fundamentally different nature.

88 As Wintemute states, "a piece of cloth or silk is physically incapable of direct harm" (2014, 234). See also a similar take by Garahan in his assessment of *Ebrahimian v France* App no 64846/11 (ECtHR Fifth Section, 26 November 2015) (Garahan 2016, 354).

89 *Goldman v. Weinberger* 475 U.S. 503 (1986).

90 *Fraternal Order of Police Newark Lodge 12 v. City of Newark*, 170 F.3d 359, 367 (3d ,Cir. 1999) (Alito, J.), where the court suggested that the police department's refusal to allow beards was based on a purpose to "suppress manifestations of the religious diversity that the First Amendment safeguards").

91 In *Murphy v. I.S.K. Con. of New England* (409 Mass. 842, 851–52 (1991)), a woman claimed that she was caused distress by the Krishna Consciousness teachings that "women are inferior to men" and that "the female form is the form of evil" (See Greenawalt 2006a, 309 for a rejection of this claim).

92 See *Mbuyi v Newpark Childcare* (Shepherds Bush) Ltd,161.

93 Martha Nussbaum speaks of the equal standing of citizens in the public domain, which can be harmed by "dignitary affronts in the symbolic realm" (2008, 210), although she discusses such harm in the context of establishment issues and not specifically with regards to exemptions.

94 Waldron 2012, 85.

Nevertheless, it is generally considered to be highly important, also because it serves as a precondition for safeguarding other, more material interests. In Rawls' theory, the equal status of citizens is an important precondition for one's sense of self-respect,[95] which he in turn describes as "essential for the adequate development and exercise of the moral powers".[96] Psychological integrity, he states elsewhere, is necessary for guaranteeing the basic liberties and rights of the first principle of justice.[97] In a broader sense, harm to one's equal status can affect material interests because a lower status makes unspoken or unconscious discrimination in material matters more probable. In extreme cases, it can undermine one's autonomy,[98] or even one's very security, as acts of violence are more likely to occur in a climate of prejudice or hatred.[99]

Dignity harm often accompanies material harm, as the insult added to injury. This happens mostly in cases of discrimination.[100] All the previously discussed cases where a harm was directed at a specific status group, and where third parties were affected precisely because of their gender, sexuality or marital status, the harm in question is not only material but also symbolic. Dignity harm can also be inflicted in the absence of a substantial material impact, however. A refusal to provide a service may violate one's dignity even if, for example, there are sufficient other civil servants to register one's same-sex marriage,[101] other hotels that do lodge same-sex couples,[102] or other adoption agencies that cater to same-sex couples.[103] Moreover, not only those

95 According to Rawls, individuals' self-respect is "secured by the public affirmation of the status of equal citizenship for all" (1999, 478).

96 Rawls 2001, 114.

97 Rawls 2001, 113.

98 As Alexander brown says about hate speech, "it can inhibit an audience from deciding for itself what to think about certain groups of people, and it can compel its targets to react in ways that reflect the will of the speaker rather than their own will" (2015, 60), or "it can change the psychological traits and behavioral dispositions of members of targeted groups in such a way as to make them effectively surrender their own rights and powers by withdrawing from mainstream society" (2015, 80) – to a certain degree, the same could be said about dignity harm in general.

99 Brown 2015, 66.

100 As Greenawalt notes: "When it comes to antidiscrimination laws, exemptions can affect both the availability of services and the dignity of those who do not receive them" (2016, 313).

101 See Smet 2016, 8 for the example of Dutch 'weigerambtenaren". See also Laborde 2017, note 77 at 319.

102 BBC, 10 February 2012, Christian Hotel Owners Lose Gay Couple Appeal. Retrieved from: https://www.bbc.com/news/uk-england-15811223 [Accessed on 8 June 2023].

103 In *Catholic Care (Diocese of Leeds) v. Charity Commission for England and Wales* CA/ 2010/0007 26 April 2011 (Charity Tribunal), the denial of homosexual couples was considered by the court to be "particularly demeaning" (at 52).

that are directly affected may suffer this harm; others belonging to that same status group are affected as well. As the Saskatchewan Court of Appeal noted in a case about religious exemption for civil marriage commissioners, just the mere knowledge that a law authorizes religious individuals or organizations to discriminate others based on race "is itself an affront to the dignity and worth of homosexual individuals".[104]

4.3 Conclusion: building blocks for contextual balancing – and its analysis

Determining the proportionate balance between burdens and harms is a task that remains outside of theory's reach. But the theoretical distinctions described and elaborated in this chapter do make a significant contribution to attempts to finding such a balance in a reasoned way. The existing literature on how to weigh the different burdens of the law already provides some guidance, but the problems of subjectivity and administrability ultimately forces one to look at the other side of the balance. Putting all one's faith in the harm principle as a sole adjudicating principle would be just as misplaced, however, as its criterion is overly rigid while the underlying notion of harm is overly flexible.

The solution, I have argued, is a different approach to the notion of harm, where it is incorporated in a broader perspective of proportionality balancing and grounded in a thin moral theory of interests. This enables us to distinguish between different categories of material harms and rank them according to their overall severity, a ranking which starts with the most severe physical harm and finds its limits at mere unease and discomfort. What further reinforces the intuitive soundness of this hierarchy is the fact that the successive interests that are impacted also coincide with different concentric circles of the individual's life, moving outward from the body (physical and safety harm), via intimate family relations (liberty harm), the broader circles of work and study (opportunity harm) and ending at the more anonymous marketplace (economic harm).

Although the categories themselves are ordered in a clear hierarchy, are mutually exclusive, and cover the broadest possible range of exemptions, the elaboration of the classification also shed light on the inevitable nuances, grey areas and ambiguities. The resulting picture is perhaps less clear-cut, and more nuanced, than many a theorist would wish for. For one thing, one

104 *Marriage Commissioners Reference* 2011 SKCA 3 at [107].

of the consequences of relatively broad scope of the categories, which harbor different degrees of the type of harm in question, is that different categories of harm may sometimes overlap when it comes to their severity. The least severe instance of bodily harm, for example, might be as problematic (or even less so) than the most severe type of risk to health and safety, or coercion and suppression. This is not necessarily a problem for the classification itself – in fact, it once more points to the difficulty (or impossibility) of locating a fixed threshold in one specific type of harm to begin with. Another complicating fact(or) that has come to the surface is that an exemption can cause various types and degrees of harm; exemptions that increase the risk of child abuse or undermine the provision of contraceptives, for example, (potentially) cause safety harm, liberty-harm as well as economic harm.

But what is probably the biggest test for the theorist's tolerance for uncertainty is the large role played by contextual factors. The impact of an exemption may depend on how many people actually avail themselves of it, for example, or on other, broader societal circumstances. As we saw in the cases of conscientious objections against vaccinations and conscription, much hinges on the overall level of vaccination, or on the fact whether the country in question is at war. Other contextual factors are at play in the example of exemptions to safety-regulations in traffic, where the exemption from a law requiring slow-moving vehicles display a red and orange reflective triangle constitutes more or less danger depending on the amount of vehicles, and the traffic situation – rural areas versus cities, for example. And in many cases of opportunity and economic harms, finally, the severity of harm also depends on the availability of alternatives.

More generally, the context not only determines the degree but also the very nature of the inflicted harm. For example, whether or not a parent has children, and whether or not these children have other caretakers in case something happens to the parent, determines whether or not the refusal of medical services or safety helmets can result in a liberty harm, affecting the personal stability (and thus autonomy) of the children in question. Reversely, the availability of modern security technology (such as scanners) mitigates the safety harm of exemptions from clothing guidelines, just like in modern technological warfare the importance of the number of recruits is diminished, which in turn reduces the potential harm of conscientious objection to military draft. Finally, the broader societal (and historical) context has also proven to be decisive in determining *whose* harms are to be recognized to begin with; think of the increase in recognition of women's autonomy, of children's interests, or animal welfare.

And so contextual factors do not only determine the meaning of principles and precepts concerning religion, competence and rights, but also the nature and precise weight of burdens and harms. This will also be clearly illustrated in the case study of this thesis, where arguments in favor of exemptions will refer to both obligatory and identity-related aspects of religion, and where the opponents of such exemptions invoke almost all the categories of harm elaborated above.

5

From Theory to (Dutch) Context: History, Case, Method

One of the main conclusions from the preceding theoretical chapters is that normative theory cannot, on its own, resolve religious exemption disputes. The main precepts and principles of the theoretical debate are, if not inconclusive, then at least inherently indeterminate as to their meaning and implications. These meanings and implications are ultimately determined in concrete contexts, mostly - and, according to most theorists, preferably - through liberal-democratic procedures. And this brings us to the second part of the main research question: How do conflicts and shifts between competing views on religious freedom take shape in liberal democratic contexts?

Fortunately, the first half of this thesis has yielded a rich conceptual framework through which to analyze these conflicts and shifts. Most fundamentally, this framework helps us to distinguish between liberty- and equality-based views on different questions related to religious freedom, but it also identifies various nuances and disagreements within these families of views, especially on the egalitarian side. Many of these nuances concern the interpretation of equality as proportionality, where the existing literature on burdens and the newly developed moral classification of the harms of exemption allow us to understand precisely how and where the balance is struck between competing interests. Taken together, these conceptual tools enable a fine-grained analysis of conflicts and shifts between and within liberty- and equality-based views. Applying this framework, moreover, might also point to nuances and considerations that have so far been overlooked by theorists, which will help to inform future theorizing.

But the proof of the pudding is in the eating: can these theoretical constructs really help us to make sense of specific contextual processes? This chapter makes the move from theory to practice, and lays the foundation for the case study of this thesis: a detailed analysis of Dutch parliamentary debates about religious schools' selective (and potentially discriminating) staff policies. The first half of this chapter sketches the broad historical context of this case by taking the conceptual framework for a test drive, as it were, and analyzing the Dutch historical regime of religious freedom through the prism of Liberty- and Equality-based Theories of Religious Freedom (section 5.1). The picture that is painted, albeit in broad brushstrokes, also shows why the Dutch context is a particularly suitable setting for studying debates on religious freedom, as the national church-state relations have clearly reflected typical elements of both Liberty- and Equality-based Theories of Religious Freedom. Looking through the lens of LTRF and ETRF also enables us to discern the various ways in which, over the course of the last centuries, the latter egalitarian perspective grows ever more dominant.

The remainder of this chapter sets up the specific case study in this broader Dutch context. Throughout the history of the Dutch regime, the freedom of religious education has been one of the main divisive issues in the clash between liberty- and equality-based views. Section 5.2 elaborates the various reasons why parliamentary debates about this freedom - in the context of the development of the Dutch Equal Treatment Act - present such a good opportunity to study contemporary conflicts and shifts in a liberal-democratic context, starting with the broader theoretical significance of the issue and then gradually zooming in on the setting and specific characteristics of the debates in question. Section 5.3 then develops the methodological approach by which this analysis of these debates can be conducted. To make the theoretical framework applicable to the debates in question, it is translated to the parliamentary context by means of frame theory - I argue that liberty- and equality-based views can (and should) indeed be regarded as competing frames and not as fixed belief systems - and applied through the method of qualitative content analysis. The chapter ends with a conclusion and a brief outline of the subsequent empirical chapters.

5.1 Liberty and equality in the history of Dutch church and state relations

The Dutch church and state relations are traditionally characterized by notions such as freedom, tolerance, and pluralism;[1] notions which can easily be linked to a general liberty-based view on religious freedom. At the same time, since the 1960s the Netherlands came to be known for its unequaled secularization and its individualist culture, both suggesting a more equality-based view.[2] How and to which degree, then, have these historical church and state relations reflected the liberty- or the equality-based view on religious freedom, and have there been shifts in the predominance of these perspectives? Below, I describe this history in broad outlines, focusing on constitutional amendments, significant legal and institutional developments, political trends and cultural currents. Of course, this by no means does justice to all relevant nuances, and will unavoidably be incomplete to some degree. Nevertheless, approaching these historical development through the lens of the developed conceptual

1 See, for example, Monsma and Soper's influential characterization of the Dutch model of church and state relations as one of 'principled pluralism' (2009).

2 These developments will be described in more detail below.

framework, starting with a liberty-based lens and ending with the egalitarian perspective, does yield important insights. It shows how, indeed, historical Dutch church and state relations can be associated with a distinctive liberty-based view (5.1.1). At the same time, however, a strong egalitarian tradition has also been present from the start, and has only grown more influential (5.1.2). Distinguishing between questions of competence, rights and interests, I show how the principles of (respectively) equality-as-unity, equality-as-parity and equality-as-proportionality have increasingly left their mark.[3] The analysis thus not only illustrates why the Dutch context is especially apt for the study of conflicts and shifts between views on religious freedom, but also offers a new perspective, or a new lens, to study the interaction between various perspectives or ideologies within the historical Dutch regime - or even 'model' - of church and state.

5.1.1 Dutch church and state relations as embodiment of LTRF

The Dutch state has religious freedom ingrained in its DNA. The Union of Utrecht, the treaty of 1579 which is regarded as the foundation of the Dutch Republic, explicitly stated in Article 13 that "every particular person will be allowed to be free in his religion, and no-one may be searched or inquired for the sake of religion". The primary purpose of the treaty, and the subsequent Republic, was to defend religious toleration and to resist the threat of Roman-Catholic Spain. The fact that the Republic originated in this revolt against a (Spanish) centralizing administration contributed to its distinctive anti-absolutist character. The newly established state did not enjoy exclusive sovereignty, reflecting a clearly liberty-based view. Moreover, the Republic's rejection of the Inquisition also meant it refrained from establishing an official state church with mandatory membership[4] – even though the previously persecuted Reformed church was undoubtedly recognized and financed as the sole public church.[5] These aspects of the Republic made it an exception in early modern Europe.[6]

In the decades and centuries following the Union of Utrecht, the scope of this religious freedom was gradually expanded.[7] At first, it meant no more

3 As I already remarked in Chapter 1 and 2, the distinction between these interpretations of equality are borrowed from Bejan (2017, 2019, 2022, forthcoming).
4 Koolen 2012b, 88.
5 Harinck 2006, 107.
6 Van Rooden 1996, 21; Koolen 2012a, 70.
7 Post 2014, 112.

than 'no Inquisition' for religions other than Reformed Protestantism, but already in the early seventeenth century this freedom was extended to the private household, where families were allowed to "read, sing or admonish".[8] Eventually, the public profession of faith was explicitly protected in article 20 of the 1798 Constitution ('staatsregeling') of the Batavian Republic, and the 1848 Constitution of what by then would be the Dutch monarchy.[9] The next major revision of this constitution would only take place in 1983, where the profession of faith was protected not only individually but also explicitly "in community with others" (Article 6(1)).

This brings us to another aspect of the liberty-based view, namely its emphasis on religious community and collective religious practice. A similar emphasis on community has been apparent in the Netherlands, from its early history onwards. In the seventeenth and eighteenth century, religious participation steadily grew, until eventually everyone was expected to be a member of a church. Throughout the 18th century, society was essentially viewed as a community consisting of various religious groups. According to historian Peter van Rooden, this emphasis on the religious collective was the result of two processes.[10] First of all, in higher social spheres, it was the result of a cultural development, where church membership was increasingly seen as part of the lifestyle of a respected citizen. A (quantitatively) more important factor, however, was (local) governments' policy to allow religious groups to take care of their members, especially their poor. It became possible, also for faiths other than Reformed Protestantism, to open orphanages and provide education – even if under a certain degree of state surveillance.[11] This religious institutionalization continued into the 19th century, when the 'half-hearted suppression' that characterized William I's reign granted Catholics some freedom to establish their own organizations through, amongst other things, medically and socially oriented congregations and orders.[12]

As the above suggests, the development of collective (religious) institutions went hand in hand with a certain relaxation of restrictions and control from the state. In terms of the liberty-based view, the principle of non-interference gained more and more influence. Churches in the 17th and 18th century did not have much autonomy yet, as the government actively interfered in its governance as well as its creed, but this control gradually loosened up until

8 Van Rooden 2010, 61.
9 Koolen 2012b, 91.
10 Van Rooden 1996, 23.
11 See also Voogt 1992, 15.
12 Harinck 2006, 111. The notion of half-hearted suppression is used by Vugt (2004, 280-4).

the separation of church and state was introduced in the Constitution of 1798. This did not mean that the autonomy of religious communities was fully safeguarded, however.[13] Conflicts between the state and churches still took place, especially over the topic of education. When king William I closed Catholic schools for the sake of national unity in the 1820's - among other measures curtailing the religious freedom of Catholics[14] - the resistance that this provoked contributed to the eventual secession of the southern part of the Netherlands; provinces that would eventually form the state of Belgium in 1830, which was recognized by the Dutch king in 1839. It was only in 1848 that the state's control over religious churches and religious communities was formally relinquished through the new Constitution, giving religious minorities like the Catholics genuine opportunities to organize independently from the state. The Dutch separation of church and state was therefore not anti-clerical in the sense that it was primarily designed to control and curtail religion. In general, religious groups took it to mean that the state remained at a distance - reflecting, again, the liberty-based view's principle of non-interference - while they carved out space for themselves and their organizations in the public domain.[15]

In this process of carving out more (public) space, the domain of education would remain the most contested. The Constitution of 1848 also recognized the freedom of education, which gave religious groups the right to establish their own schools alongside those of the state. Actual freedom of education was still limited, however, as religious schools received no state funding, and the schools that did receive such aid imparted 'mainstream' Protestant Christian values that Catholics and orthodox Protestants found unsatisfying. The orthodox Protestants, led by theologian Abraham Kuyper, eventually went their own way; they established a new neo-Calvinist church and the Anti-Revolutionary Party, the latter of which is generally considered to be the first modern political party in the Netherlands.[16] They adopted religious education as their main issue, as they fought - alongside the Catholics - for the equal funding of faith-based schools in one of the major constitutional battles of Dutch history: the so-called 'School Struggle'.[17] Eventually, these struggles resulted in a historic

13 Harinck 2006, 110.
14 Koolen 2012b, 93-4.
15 Maussen 2014, 43-44.
16 Van Rooden 1996, 35.
17 Oomen & Rijke 2013, 371.

political agreement which, among other things, indeed granted equal funding for religious schools.[18]

This agreement, the so-called Pacification of 1917, formed the basis of a major societal overhaul which has since then become known as pillarization.[19] Pillarization is essentially the compartmentalization or segmentation of Dutch society according to political and religious lines, with Protestant, Catholic, socialist and liberal groups each establishing separate institutions which, besides churches and schools, also included newspapers, unions, sports clubs and broadcasting corporations.[20] These organizations operated largely free from government interference, and there was little contact between citizens across these religious and ideological divides.[21] Society had, as it was previously envisioned in the 18th century and earlier, indeed become the sum of distinct groups; collectives which had replaced the nation as highest moral communities,[22] and which, as professed by Kuyper, enjoyed a certain degree of sovereignty in their respective spheres. The philosophy which, as Chapter 1 has shown, counts several contemporary liberty-leaning theorists among its admirers, had actually found its expression in twentieth century Dutch society. More generally, we can see this pillarized system as the culmination of various principles that are strongly linked with the liberty-based view: (relative) sovereignty of religious groups, wariness of the absolutist tendencies of the state - an aspect that was especially pronounced in Kuyper's thinking[23] -, the prioritization of religious liberty and of religious duties above duties as a citizen and, last but not least, the recognition of non-interference as a main guiding principle.

In light of these historical developments, the Dutch approach of dealing with religious diversity is regularly characterized by references to pillarization, and related notions and principles that largely coincide with the liberty-based perspective on religious freedom. For example, the Dutch 'model'[24] of church

18 Franken & Vermeer 2019, 275. In fact, the agreement was broader than that, and also encompassed the issue of the voting system (replacing a district system with proportional representation) establishing general suffrage (including women's suffrage).

19 Oomen & Rijke 2013, 372; Schuh et al. 2012, 372.

20 Maussen 2015; Lijphart 1968.

21 Schuh et al. 2012, 364.

22 Van Rooden 1996, 37; 2010, 69.

23 Harinck 2006, 113-15.

24 I use this notion of a model loosely here, as generalized characterizations of a supposed national (and in this case Dutch) approach. This encompasses various perspectives on what constitutes such a model, varying from a set of (coherent) principles, an institutional logic or a policy type.

and state relations is often defined by principles of toleration and pragmatism.[25] Or it is seen as the embodiment of the principle of inclusive neutrality;[26] a neutrality which, amongst other things, leaves citizens free to express and organize themselves in the public sphere on a religious or cultural basis.[27] Most influentially, the Dutch model is labeled as one of "principled pluralism" by political scientists Monsma and Soper, who applaud this approach and refer to the substantial freedom of religious education as its defining feature.[28]

One thing these characterizations adequately capture is that the Dutch church-state relations have been profoundly shaped by the historical experience of pillarization. The Netherlands may even be called unique in this regard. To be sure, there were many European countries in which religious communities succeeded in claiming special arrangements and dominating modes of social organization.[29] But the singularity of the Dutch pillarization lies in the fact that the mobilizations against the unity of the Dutch protestant nation were largely successful, and managed to dispose of the notion of the nation as the highest moral community.[30] And this was not the first time the Netherlands stood out because of its liberty-based credentials: As was noted earlier, the Dutch Republic's anti-absolutist nature and lack of an established state church also set it apart from other European nations in the 16th and 17th centuries. And so the point might be made that if there is one quintessential LTRF-regime of church and state relations, it would probably be the Dutch. This liberty-based legacy, one could furthermore argue, is still clearly visible in the current Dutch Constitution. In fact, when developing the most recent version of this constitution, one of the goals was to establish the greatest possible freedom of religion.[31] And indeed, the protection of the religious domain in the Netherlands is quite extensive, which can be traced back to the period of pillarization.[32] What stands out, among other things, is the unique educational system protected by the constitutional freedom of education (Article 23), creating ample opportunities for religious schools to provide education according to their beliefs.[33]

25 Maussen & Vermeulen 2014, 88.
26 Van der Burg 2009.
27 Pierik & Van der Burg 2014, 499.
28 Monsma & Soper 2009.
29 Van Dam & Van Trigt 2015, 213.
30 Van Rooden 1996, 38.
31 Van Bijsterveld 2021, 45.
32 Vleugel 2019, 35.
33 Vleugel 2019; Guldenmund 2015, 36. The meaning and scope of this freedom of education is described in more detail in section 5.2.1.

But while such characterizations might capture major historical developments and constitutional facts, and may be attractive in their simplicity, they do not tell the whole story. In fact, there are good reasons to be skeptical about the one-sided portrayal of Dutch church and state relations as a model of tolerance, freedom and pluralism.[34] First of all, it is the use of national models in general that has been increasingly subjected to criticism, which is in turn is inextricably connected to the perils of modelling as such.[35] Models - or any generalized characterization, for that matter - make it possible for us to grasp complex realities, reducing this complexity by distilling certain defining or essential features from it, thus making it easier to explain and to compare certain phenomena. Such characterizations also run the risk of misrepresenting this reality, however, when relevant distinctions, factors, developments or important nuances are overlooked. Models of church and state relations are often illustrative of these pitfalls: for example, they regularly lump together various issues or policy domains with distinctive and sometimes conflicting dynamics,[36] and overlook the fact that actual policies often diverge from the legal norms that are taken to be exemplary of a certain model.[37] Furthermore, models are generally focused on *national* approaches, while transnational legal arrangements unmistakably exert their influence on laws and policies, and religious institutions such as the Catholic Church are also not confined to the borders of the state.[38] Last but not least, models insufficiently take the temporal dimension into account: they provide a static 'snapshot' that does not capture the radical or gradual changes that unavoidably take place.

In the Dutch case, these changes are hard to overlook. The most eye-catching of these - which I will discuss in the next section - is the process of secularization that has taken place the second half of the 20th century in the Netherlands. As a result of this process, it is argued, in the Netherlands the regime or model has shifted from one that is defined by principles of toleration, pluralism and freedom towards one that is increasingly marked by liberal-

34 As Maussen argues, Dutch curch and state relations "have been stamped by the experience of pillarisation" but should not be equated with it. Instead, it is marked by an ongoing debate between different ideologies, different perspectives on religious freedom (2009, 245). See also Nickolson 2012 for the increasing incongruence of this supposed pluralist model and contemporary local practices.

35 Maussen 2014; Bader 2007b.

36 Bowen 2007; Nieuwenhuis 2010; Van den Breemer & Maussen 2012; Bertossi & Duyvendak 2012.

37 Bader 2007a, 53. See also Nickolson 2012.

38 Van Dam & Van Trigt 2015, 232.

egalitarian principles of unity, equality and individualism.[39] Besides the liberty-based interpretation of the Dutch church and state relations, then, there is also another story to tell.

5.1.2 The ever-clearer reflection of ETRF in Dutch church and state relations

Although there is a clear streak of liberty-based thinking to be discerned in the development of Dutch church and state relations, one could say the same about its egalitarian counterpart. In fact, the equality-based view has also been present from the very beginning, and has only seemed to be gaining influence since then. We can reconstruct this historical development through distinguishing, as I have done in throughout this thesis, between the equality-based views on the distinct issues of competence, rights and interest, and between the respective interpretations of equality-as-unity, equality-as-parity and equality-as-proportionality. As I describe the growing impact of these different egalitarian precepts below, it becomes clear why it is a mistake to label the Dutch church and state relations as quintessentially liberty-based. This would not only fail to capture the important egalitarian streak that has been present for centuries, but would also overlook the various ways in which this perspective has gained the upper hand – especially in the last decades.

When we turn to the question of sovereignty and competence, to begin with, the presence of equality-based views can be traced back to the 16th century at the least. After all, the establishment of the Union of Utrecht in 1579, a treaty which in many ways can be seen as the epitome of liberty-based principles, also meant that the state asserted its authority - its competence - over the various religious groups in what was then called the Republic of the Seven United Provinces. Instead of giving these communities free reign when it came to religious issues, for example, the Dutch state from then on prohibited religious persecution.

But while the Union in Utrecht can still be explained in liberty-based terms, during the Batavian revolution (1795) and the resulting Batavian Republic (which lasted until 1806) the balance clearly tipped towards the egalitarian side. As Mart Rutjes shows in his *Under the Spell of Equality* (2012), the pressure of egalitarian thought led to a redefinition of the Dutch Republic as "a unitary state, as a representative democracy and as a state that could be viewed as

39 Maussen & Vermeulen 2014, Shuh et al. 2012, Van Dam & Van Trigt 2015, Ten Napel 1999.

a collective of citizens".[40] Several components of the equality-based view on competence were clearly visible here. First of all, the 'collective of citizens' was considered to be the only legitimate collective; only individuals were recognized by the state, and not the various religious groups.[41] What is more, these citizens were deemed the source of the state's sovereignty. Following a specific conception of popular sovereignty and social contract thinking - which we saw are also a central in ETRF's views on competence - the question of who enjoys (ultimate) sovereignty was unequivocally decided in favor of the state.[42] In fact, the first Dutch Constitution, established by the Batavian Republic, featured a preamble which made it clear that it was the people that had chosen the Constitution – popular sovereignty, in other words.[43]

The state, as the sole and ultimate representative of its citizens, was thus viewed in a positive light, as an actor that almost by definition furthered citizens' interests: The state coincided with society as a whole. It was therefore natural that the state was generally seen as responsible for a number of collective goods, and would assume a larger role in areas such as health care, public education and the economy.[44] This did not mean that the state's power was absolute, however. As we also saw equality-leaning authors argue more generally in Chapter 2, the establishment of the (Dutch) liberal state went hand in hand with the development of 'internal limits' such as a separation of powers and the introduction of a constitution.[45]

The Batavian republic was not just a historical outlier. The continuity of equality-based views of (popular) sovereignty is clear even in subsequent periods where liberty-based views are considered to be dominant. Take the period of pillarization: This segmentation of society indeed coincided with Kuyper's ideas about sovereign spheres, but even Kuyper himself acknowledged the state's important role as arbiter and guarantor of liberties within the spheres.[46] Furthermore, the notion of the fatherland as a moral community had also not disappeared during the time of pillarization; the fatherland was only seen as comprised by various groups, that served the national interest precisely by maintaining their own character. Similarly, religion was still located in the

40 Rutjes 2012, 264.
41 Van Rooden 1996, 28.
42 Rutjes 2012, 265.
43 De Vries 2022, 29. De Vries also shows how the call for a *religious* preamble for the Dutch Constitution never led to anything, and has only become weaker over the last decades.
44 Rutjes 2012, 264, 267.
45 Rutjes 2012, 266.
46 Kuyper 1931, 78-109. Among other things, Kuyper here defends the "sovereignty of the individual person" against - or rather besides - the sovereignty of the Church (107-109).

individual; it is just that these individuals were always considered to be part of a larger religious community.[47]

These equality-based views come more to the fore in the subsequent period of de-pillarization, when then the role of religious collectives as primary moral communities began to fade. The reason behind this is simply that these groups and communities gradually lost their influence over the lives of individual citizens. This can be gleaned from the overall church membership in the Netherlands, which had already started declining in the early twentieth century - with a rise of unaffiliated people between 1889 and 1930 from 1.5% to 14% - but really plummeted from the 1960s onwards: Whilst 24% did not consider themselves part of a church in 1958, this percentage grew to 36% in 1966 and 61% in 2006.[48] And from the 1960s onwards, this religious disaffiliation also coincided with the expansion of the welfare state, which meant that people became increasingly less dependent on confessional support structures.[49] And the same sixties, of course, saw the cultural revolution with its emphasis on individual self-fulfillment, which clashed with the "unreflexive and authoritarian character" of the pillarized Christian structures.[50] Converging with other factors - among which are the emergence of new media (television) and social mobility[51] - all these developments resulted in a clear decline in support for the segmentation of Dutch society, and made the idea of the Netherlands as a country consisting of various moral communities simply less credible.[52] "Within one generation the nation has again become the highest moral community of the Dutch",[53] Van Rooden states. And in this new push for national unity, moreover, the Christian view of the nation was gradually replaced by a secular one.[54]

The above shows how the equality-based view on competence and sovereignty has become firmly entrenched in contemporary Dutch society. The state is clearly the ultimate sovereign, as is generally seen as a beneficiary

47 Van Rooden 1996, 38.

48 Schuh et al. 2012, 365. *Sacred and Secular: Religion and Politics Worldwide* (2006) by Pippa Norris and Ronald Inglehart shows how the Netherlands is among the countries where church disengagement has advanced furthest (pp. 72, 86), and where the fall in faith in God (p. 89) and belief in life after death (p. 91) proved sharpest. It is also the only traditionally Protestant country that, in the years and decades leading up to the date of publication, showed a sharp decline in support for religious parties (p. 210).

49 Schuh et al. 2012, 364; Maussen 2014, 47.

50 Van Rooden 2010, 71.

51 Maussen 2014, 47; Kregting 2021.

52 Van Dam & Van Trigt 2015, 219-221.

53 Van Rooden 1996, 44.

54 Van Dam & Van Trigt 2015, 227-230.

force that is supposed to aid citizens to lead a comfortable and meaningful life. Moreover, the nation is primarily considered to be a collection of individuals to whom, in Van Rooden's words, it also functions as their primary moral community. Following the different interpretations of the principle of equality distinguished in Chapter 1 and 2, it is clear that the competence-related equality-as-unity - namely the equality of citizens as part of the unified whole represented by the state - has undoubtedly become prevalent.

A similar story can be told about the degree in which Dutch church and state relations reflect equality-based views on the question of rights, and the corresponding interpretation of equality-as-parity. To start with, the Union of Utrecht's ban on persecution should be seen as a first step towards the equal treatment of various convictions. Equality in the sense of being considered to be on the same level ('on a par') with others is also a driving principle in the establishment of the Batavian Republic, which was primarily concerned with ending the preferential treatment of reformed Protestantism.[55] It was for this reason that the first Dutch Constitution in 1798 established the freedom of religious community – at least in principle. In practice, the equal treatment of religions was quite flawed, and Catholics had to wait until the Constitution of 1848 for a formal recognition of 'all churches in the Kingdom' (and not only the 'existing' religions mentioned in the Constitution of 1814[56]), and even longer before significant opportunities for religious minorities to organize themselves would effectively be created.[57]

This equal treatment really took shape during the pillarization, providing yet another reason to reconsider the common view of this segmentation of the Dutch society as an exclusively liberty-based affair. After all, pillarization was the desired result of a prolonged quest for equal treatment undertaken by various (religious) communities such as orthodox Protestants and Catholics - especially in the area of education - which had started (at least) as early as the second half of the 19th century.[58] Moreover, pillarization, the culmination of this

55 Rutjes 2012, 241, Harinck 2006, 107. In practice, this meant, among other things, that church officials were prohibited to wear 'distinctive signs' in public places, that church services were not allowed to be held outside of the church itself, that the ringing of church bells was forbidden, and that taxes were abolished insofar as they were intended for the previously ruling church. And the intention was to phase out state funding for pensions and salaries of clergy (Koolen 2012b, 88).

56 Moreover, under the Constitution of 1814 also the reformed church had also received a much more favorable treatment in a financial sense (Koolen 2012b, 92).

57 Koolen 2012b, 96. See also Maussen 2014, 44. Moreover, certain political rights were withheld from women, children and people receiving poor relief (Rutjes 2012, 266-7).

58 Koolen 2012b, 99.

process, ensured equality-as-parity among religious *and* non-religious groups.[59] Eventually, this broader parity would also be codified in the Constitution of 1983, more specifically in its amended article of the right to religious freedom. While an earlier (and now rescinded) chapter equated religious organizations with churches or church bodies, the current Article 6 of the Constitution provides for a more open and subjective definition of what counts as a religion, and explicitly includes the protection of non-religious beliefs or (secular) "philosophies of life" (*levensovertuigingen*).

The new Constitution also included, for the first time, an article which proscribed equal treatment and prohibited discrimination (Article 1), and opened up the possibility that rights like these should not only apply to the (vertical) relation between the state and its citizens but also to relations between citizens – a move which ultimately resulted in the Dutch Equal Treatment Act in 1994, as one of the first of such horizontal anti-discrimination laws worldwide. In a way this represents the culmination of the move towards the equality-based view of rights, and its emphasis on religious freedom as part of a broader set of equal rights – rights which, by virtue of their parity, unavoidably limit each other. To be sure, as early as 1798 the Constitution already explicitly stated (in Article 4) that each citizen is free as long as the rights of others are not violated.[60] And the Constitution of 1848 included a specific clause that limited the free profession of religion to the extent that it violated criminal law.[61] But the newly recognized horizontal effect of such rights significantly increased the chances of competing claims and corresponding tensions, as it put rights like non-discrimination and religious freedom on a collision course. This emphasized even more strongly the non-absolute and therefore limited nature of rights like religious freedom, whose non-absolute nature is also underlined with the expansion of its limiting clauses compared to the previous Constitution of 1848: Instead of drawing the line at criminal law, the current Constitution refers to law in general ('formele wet') as a (potential) limit to religious freedom.[62] More

59 Harinck 2006, 115-6.

60 Post 2014, 112.

61 Voogt 1992, 18.

62 To be sure, the constitution preceding that of 1848, the Constitution of 1815, had also guaranteed religious freedom within the boundaries "of obedience to the laws of the state" (article 196) (Koolen 2012b, 92).

specifically, it identifies health, traffic and the prevention of disorder as reasons to curtail this age-old right.[63]

This brings us to the final question regarding religious freedom, namely that of interests and their relative weight. We can also interpret the historical development of Dutch church and state relations as a history in which religion is decreasingly seen as an all-important and widely shared public interest, and where other interest are increasingly seen as (at least) equally weighty[64] – a development, in other words, increasingly reflecting the principle of equality-as-proportionality. Regarding the changed valuation of religion, it is telling that the constitutional revision of 1972 confirmed (and added to) the diminished public interest ascribed to churches by abolishing the legal basis for the (direct) subsidizing of religion, which was followed by the withdrawing of the Church Building Subsidy Act of 1962 and an agreement about ending the state guarantee for salary and pensions for Church personnel in 1981.[65] And in the broader society, a more individualist, secular and progressive culture emerged which defined the new national moral imaginary; a culture which was increasingly at odds with religious collectives and their ways of life.[66] As a result, the beliefs and practices of those religious minorities who are perceived to be 'pervasively religious' (i.e. orthodox Protestants) or 'religiously different' (mainly Muslims, whose (relatively) recent presence, of course, another major

63 See also Koolen 2012b, 101. This is part of a broader development of a proliferation of clauses limiting freedom of religion, including the interests of public safety, health, morals, and rights of others. See also Van der Vyver 2005, for an overview of global limitations on religious freedom as a human right, which encompass inherent limitations of the human right of religious freedom itself, limitations by other rights and freedoms, and limitations in the general interests (including interests such as safety and public health).

64 Van Bijsterveld observes that, after the initial push to interpret the current article protecting religious freedom as broadly as possible, the final decade of the previous century heralded in a new age in which religious freedom was critically scrutinized above all, and the focus shifted to the curtailment of this right (2021, 45-46).

65 Van 't Hul 2022; Maussen 2014. To be sure, despite this phasing out of structural financial aid there is also a continuity when it comes to financial relations between government and religious organizations, which is obvious, among other things, in the government's recognition of religious organizations as contributing to the public interest (Van Sasse van Ysselt 2013, 85). But even this recognition, and its corresponding tax exemptions, have come under fire (Van Bijsterveld 2021).

66 Maussen & Vermeulen 2014; Schuh et al. 2012; Harinck 2006; Kennedy 2001; Van der Burg & De Been 2020; Rijke 2019, 23-27.

development impacting church and state relations) seem to be viewed with suspicion.[67]

While in some cases this suspicion indeed seems to drive the curtailment of religious freedom,[68] in many cases it is arguably more adequate to state that more and more interests are simply deemed weightier than those represented or embodied by religion: equality-as-proportionality, in other words. The culture that emerged was not primarily or necessarily anti-religious, but rather championed values and interests that unavoidably put it on this collision course. Duyvendak and others speak of a so-called 'culturalization' of citizenship, a process in which the idea of Dutch citizenship increasingly coincided with the adherence to specific progressive cultural norms and values, and especially regarding gender and sexuality.[69] While this is comparable to what happened in other European countries, the Dutch case can be said to be a "radical version" or a "quintessential example" of this process.[70] Progressive legislation that enshrined such individual-centered norms and values, and which was previously resisted successfully by religious parties, was passed om matter such as abortion (in 1984), euthanasia (in 2001) and same-sex marriage (also in 2001). More recently, the Reformed Political Party (SGP) has been forced to grant voting rights (including the right to stand for elections) to women within its party,[71] and an end has been put to the practice of conscientious objection by civil servants to same-sex marriages. Fierce debates, finally, have been waged over practices such as male circumcision - which has mainly been criticized as a violation of children's bodily integrity[72] - and repeated legislative proposals have been made to ban Islamic and Jewish non-stunned ritual slaughter.[73]

These last two cases underline that it is not just norms regarding gender and sexuality, but also values like bodily integrity and animal welfare that are weighed against religious interests. This is yet another example of the growing importance of equality-as-proportionality, as more and more values

67 Maussen & Bogers 2012. To be sure, controversies regarding the 'pervasively religious' are also the result of migration processes, as it is often Christian migrants that seem to practice their religion in a way that is different from the highly individualized and progressive Dutch majority (Sengers 2018).

68 Mariëtta van der Tol, for example, shows how appeals to social norms and a sense of insecurity have fueled every more restrictive interpretations of the notion of public order, wielded in attempts to specifically curtail the religious freedom of Muslim minorities (2021).

69 Duyvendak et al. 2016, 2. See also Wagenvoorde 2016.

70 Duyvendak et al. 2016, 2; Mepschen e.a. 2012, 1.

71 Oomen & Rijke 2013, 379.

72 Schuh et al. 2012, 377; Westerduin et al. 2014.

73 Mansvelt Beck 2015.

and interests are deemed to be inadequately (read: disproportionately) balanced against the religious practices that negatively affect them.[74]

5.1.3 Conclusion

From this historical overview a picture emerges of the Dutch church and state relations as the embodiment of both liberty- and equality-based views of religious freedom, with the latter egalitarian perspective increasingly gaining the upper hand. What makes the Dutch context special is that the embodiments of these perspectives ranged (and shifted) from one extreme to the other; what is striking, in other words, is the force and reach of the pendulum's swing.[75] In certain periods, mainly during the Dutch Republic and the pillarization, church and state relationships were unique in the radical segmentation they established, in the central role they accorded to the principle of non-interference. In yet other moments, such as during the Batavian Republic, these relations were a prime example of equality incarnate and, as was the case in the first decades of the 21st century, reflected an unequaled prevalence of the progressive, individualist values and norms over associational religious freedoms.

Loosely applying the theoretical framework developed in the theoretical chapters, this historical sketch traced how specific egalitarian views and principles increasingly took shape in Dutch legal arrangements and the society as a whole. The fundamental question of Kompetenz-Kompetenz was decided rather early, and the principle of equality-as-unity and its emphasis on the nation as a moral and democratic community was reflected ever more clearly in law and society. The same can be said for equality-as-parity, whose spirit was present ever since the ban on persecution but grew more visible with the

74 Another example that has not been mentioned is the increased scrutiny of the sanctity of the (Roman-Catholic) confessional, which in some cases, it is argued, has impeded the prevention of serious physical harm (See Van der Helm 2020, especially note 3).

75 The metaphor of a pendulum - whose force of its swings depends on the strength of the previous push in the opposite direction - seems especially apt given that scholars like Peter van Rooden claim that extreme degree of secularization in the Netherlands was a direct consequence of the important role that religious institutions and religious segmentation had played in previous eras. "In [a] climate of moral unity", he states in 1996, "the churches' earlier success turns against them. For a century, they had emphasized that religious was something which imposes great obligations and provided a special identity. Now people do not want this legitimacy anymore and therefore leave religion behind them. The decline in religious affiliation, the largest in Europe, is not the culmination of a centuries-old process of secularization, but result from the importance of religion in the Dutch society of the past century" (1996, 45, (my translation, LN)).

emergence of various (also non-religious) societal pillars, and culminated in the 1983 Constitution which also explicitly put secular philosophies of life on a par with religious convictions. And in the most recent decades, finally, equality-as-proportionality has (implicitly) become a guiding principle in the balancing of a variety of interests against the interests that were (previously) protected through the freedom of religion.

5.2 Case study: debates on religious schools' selective staff policy

After the preceding sketch of the broader Dutch historical context, this section zooms in on the domain and case that best lend themselves to a detailed study of conflicting and shifting views of religious freedom. The historical analysis already showed how religious education has been one of the main divisive issues in the clash between liberty- and equality-based views, and section 5.2.1 shows why and how this freedom is still a major bone of contention in contemporary Dutch political debates. The clashes between competing views on religious freedom are especially pronounced when the freedom of religious education conflicts with the principle of non-discrimination, which brings us to the selection of the specific case to be studied. Section 5.2.2 elaborates why, for reasons of content but also of form (setting, duration, etc.), parliamentary discussions about religious schools' selective staff policy are most suitable for a detailed study of contextual assessments of religious freedom, and of religious exemptions in particular.

5.2.1 The domain of education

The area of education is arguably where one of the last vestiges of the liberty-based view in the Netherlands can be found, where the legacy of pillarization remains relatively vital.[76] This is mainly so because of the protection provided by the freedom of education (Article 23) of the Dutch Constitution. This freedom protects the right of groups of religious (as well as certain non-religious) groups to establish a school according to their own religious principles, as well as the freedom of parents to choose a school for their children based on their religious, ideological or pedagogical preferences.[77] The content of the freedom itself is

76 Mulder 2017, 73; Celis et al. 2012.

77 Maussen & Vermeulen 2014, 88; Vermeulen 2006.

multi-faceted; it comprises the freedom to found a school (which is financed if the school represents an ethos that is considered socially relevant), the freedom of direction or religious conviction (which is the freedom to express the school's philosophy in aspects such as religious teaching, selecting staff and pupils and dress codes) and the freedom of 'internal organization' (which protects pedagogical and organizational autonomy).[78] Taken together, these freedoms encompass the full range of what could be called 'associational autonomy'.[79] In line with the liberty-based view, all these specific freedoms seem geared towards keeping the state from interfering with the internal affairs of religious collectives, and stretching the scope of religious schools' competence.

However, the freedom of education also has always been limited to some degree, and is increasingly contested.[80] When it comes to the designing curricula, for example, schools need to comply with educational standards and requirements of the Dutch government.[81] Moreover, the societal backdrop in which the freedom of education was formulated has changed considerably, which naturally also impacts the way this freedom is viewed. While most Dutch students are enrolled in faith-based schools, widespread religious disaffiliation means that these students are not very religious or do not even have a religious background to begin with.[82] And parents, in the contemporary secularized and globalized society and its competitive economy, are more focused on the performance and pedagogical approach of schools, and less so with their religious ethos.[83] This has also led to a clear decrease in the influence of religion in most Catholic and mainstream Protestant schools.[84] And in cases where the schools' ethos is still relatively pronounced - or to be more precise, more 'pervasively religious' or 'religiously different'[85] - the risk of this worldview clashing with the parents' (and children's) more progressive views automatically increases.

78 Maussen 2014, 50; Franken & Vermeer 2019, 275.

79 Bader 2007a, 141.

80 See, for example, the criticism that indoctrination takes place at religious schools (Merry & Maussen 2018; Merry 2018). See for a broader examination of the 'conundrum' of religious schools in a secularized European environment also Merry 2014. And the various arguments for and against the Dutch educational system - and Article 23 more specifically - are described in Nickolson 2008, 48-69.

81 A recent report of the council of education, for example, stresses that schools need to provide more systematic and thoughtful education on democratic citizenship and the democratic rule of law more generally (Onderwijsraad 2021).

82 Franken and Vermeer 2019, 277.

83 Maussen & Vermeulen 2014, 91.

84 Franken and Vermeer 2019, 277.

85 These terms are again borrowed from Maussen & Bogers 2012.

All these changes have resulted in more critical scrutiny of the freedom of education in its various aspects, often along the lines of a distinctive equality-based perspective.[86] When it comes to the fundamental question of who 'carries' the right of freedom of education - is it the religious group or the parents? - the Dutch Council of Education has suggested that a shift from the traditional focus on the interests of institutions towards an emphasis on the needs of the parents would be most suitable in the current context of secularization and individualization.[87] This proposed shift towards the perspective of the individual applicant also clearly means a shift towards a more equality-based view on religious freedom, with the importance that ETRF place on the individual as the primary subject of rights and - together with all other individual citizens - as the source of the state's sovereignty.

Another move in this egalitarian direction - and more specifically its interpretation of equality-as-parity - can be discerned when it comes to the specific (sub)freedom to found a school. It is argued that the interpretation of the notions of 'directions' and 'philosophies of life' on which this freedom is grounded reflects a bias in favor of (established) religious worldviews or (more comprehensive) secular worldviews like humanism. To be more responsive to the needs of contemporary parents - and create more parity between different "viable and socially articulated views" in the process - the Council of Education has advised a more "open" notion of the concept of direction,[88] and several politicians have pled for a corresponding expansion of the freedom of education along these lines.[89]

Finally, as we are slowly zooming in on the case study central to this thesis, a shift towards ETRF can also be discerned in the evolving conflict between freedom of education and the liberal principle of non-discrimination.[90] This conflict is played out in the ongoing debates about the proposal to introduce the so-called 'duty to enroll' (*acceptatieplicht*) - which would restrict religious

86 Ben Vermeulen describes the broader criticism directed to this freedom in Dutch society, discerning criticism that focuses on the alleged violation of the separation of church and state (and the neutrality of the latter), criticism that points to social and ideological segregation facilitated by this freedom, and criticism that argues that the freedom of education interferes with the autonomy of the child (2006).

87 Onderwijsraad 2012, 85.

88 Onderwijsraad 2012, 42-45.

89 Franken & Vermeer 2019, 279.

90 Maussen 2014, 53; Kamphuis & Bertram-Troost 2023, 7. In its latest report, the council of education stresses that the norms that limit the freedom of education include non-discrimination, the equality of all people, tolerance, and the absence of incitement to violence and of coercion between citizens (Onderwijsraad 2021).

schools' liberty to refuse pupils whose parents do not endorse their ethos[91] -, about the proposal to prescribe teaching about (tolerance for) sexual diversity in the so-called 'attainment targets' (*kerndoelen*) regarding pluralism that schools' curricula must comply with, and about the controversial freedom of religious schools to refuse or dismiss personnel on the basis of their sexuality.[92] And most recently, reports of discriminatory practices of a reformed school community towards its students[93] have led to the public prosecutor opening an investigation, and to various political parties call for a reform of the Article 23.[94] It is these conflicts between religious freedoms and non-discrimination where the clash between liberty- and equality-based views is most pronounced, and this brings us to the specific case study of this thesis.

5.2.2 Religious schools' (potentially) discriminatory staff policies

Of the previously mentioned controversies surrounding religious education, it is the religious schools' freedom to employ a discriminatory staff policy that is best suited for a detailed case study. There are many reasons why the parliamentary debates about this issue lend themselves so well to an analysis of how competing views on religious freedoms clash and shift. Moving gradually from theory to the specific practice, these reasons have to do, firstly, with the significance of the issue in the broader clash between liberty- and equality-based views, secondly with the advantages of the particular setting of the parliament and parliamentary debates, and thirdly and finally with the characteristics of these specific debates.

To start with, the significance of the case or issue at hand is reflected by the stakes involved for the opposite sides of the controversy. On the side of religious believers, there are still parents for whom, in their efforts to withstand the tide of secularization described earlier, the religious affiliation of their

91 A secular parliamentary majority has already pleaded for reforms that would make it impossible for religious schools to select students on the basis of (their parents') religion – the so-called duty of enrollment ('acceptatieplicht'). See for example the motion *Kamerstukken II* 2020/21, 32824, No. 309 (by the Socialist Party).

92 Maussen 2014, 53-56.

93 *NRC*, 2021 26 March, *School duwt kinderen ongevraagd uit de kast* [School uninvitedly pushes children out of the closet]. Retrieved from: https://www.nrc.nl/nieuws/2021/03/26/school-duwt-kinderen-ongevraagd-uit-de-kast-a4037387 [Accessed on 8 June 2023].

94 See the report of the inspection of education about the school in question (the Gomarus College) (Onderwijsinspectie 2021). Partially as a response to this issue, the council of education also addressed this issue in clear terms, emphasizing that schools have a pedagogical responsibility to make their students/pupils feel accepted (Onderwijsraad 2021, 40-41).

children's school is very important. In the Netherlands, this has mainly been documented in (orthodox) Protestant circles,[95] as the establishment of schools of other denominations, such as Islamic schools, has been a relatively recent or limited development. And for these religious schools, in turn, the selection of staff is considered to be of paramount importance for protecting their identity; often more important than the development of their curriculum or the selection of pupils.[96]

On the other side of the controversy, however, this specific associational freedom to shape a religiously inspired staff policy is seen as the main obstacle in the realization of the horizontal effect of the constitutional right to equal treatment. To put it more precisely, this freedom is controversial because it allows the specific discrimination of homosexual teachers; an issue that, as we will also see, occupies a central place in the parliamentary debates about the Dutch anti-discrimination law – and which is arguably the reason why the establishment of this law took such a long time.[97] The case seems to be situated directly on top of a central fault line in Dutch society, revolving around the issue of sexuality. In the words of Oomen and Rijke, "[i]f there is one topic on which the clash between mainstream secular Dutch public opinion and religious minorities is most vehement and visible, it would be homosexuality"[98] – which is easy to explain, keeping in mind the previously mentioned culturalization of Dutch citizenship, and considering the strongly entrenched conservative opinions about homosexuality in religious communities like the orthodox Protestants.[99] Although this tension is especially pronounced in Dutch society, it is not limited to the Netherlands, given that there is a growing number of cases where sexual orientation non-discrimination has clashed with religious freedom.[100]

The case of religious schools' controversial staff policies is thus emblematic of a clash - in the Netherlands, but also more generally - between two conflicting perspectives on religious freedom, one of which champions associational

95 Dijkstra and Miedema 2003, 71-74.

96 Maussen & Vermeulen 2015, 95.

97 This, in so many words, is also the assessment of the PvdA faction during the debate in which the Act would (eventually) be approved: "Only one ground for discrimination, namely homosexuality, in relation to one type of organization, namely special education, has delayed the creation of a general equal treatment act" (*Handelingen II* 1992/93, No. 46, p. 3463). See also Rijke 2019, 23-27 for an elaborate description of the increasing friction in the Netherlands between secular progressive majority and an orthodox Christian minority.

98 Oomen & Rijke 2013, 374.

99 Rijke & Oomen 2013, 374-77. See also Rijke 2019, 23-27.

100 Foster 2016, 426.

religious freedom and another which advances the cause of equal treatment and non-discrimination. In other words, it is an emblematic and central case - also in the eyes of those involved - in the wider conflicts and shifts between a liberty- and equality-based view on religious freedom.

Besides these more theoretical considerations, other reasons why this specific Dutch case is especially suitable for empirical analysis have to do with the specific setting in which the conflicts and shifts between liberty- and equality-based views take shape. The decision to establish horizontal effects of Article 1 of the Dutch Constitution through anti-discrimination legislation has delegated the task of balancing the competing fundamental rights to the legislator: the Dutch parliament, in other words. Very few cases about conflicts between these rights have been brought forward to the courts.[101] For the purposes of this thesis, there are several advantages to this central role of the parliament in the case at hand.

First of all, parliaments seem to be well positioned to balance competing rights and interests. For one thing, legal(-philosophical) authors often argue that this is the case,[102] and legal practice also shows how courts often defer to legislative judgement to strike balances.[103] And of course, it is the parliament which determines the boundaries within which courts have to perform their individual balancing acts to begin with. Parliaments, moreover, are inherently accountable to the public - and therefore have greater democratic legitimacy[104] -, are more consistent and prospective - and therefore preferable, some say, from a rule of law point of view[105] -, and are generally better positioned to judge the importance of its own laws, and thus the weight of the underlying interests.[106] Deliberations about such interests, and the harms that are inflicted upon them, are always tentative and revokable, and this also singles out the parliament as a particularly suitable object of study. After all, the parliament has the power to repeal the laws that it has found wanting or defective. In this way, Hamilton argues, "judgements about relative harm can be revisited and reweighed".[107] And this grants us the possibility to study any shifts in these judgements.

Secondly, parliaments are especially suitable contexts for studying conflicts and shifts between views on religious freedom because of the very nature of

101 Maussen & Vermeulen 2015, 96.
102 Houdijker 2012, 157, 226-7.
103 Greene 1993, 1627; Urbina 2014, 169.
104 Sirota 2013, 309; Barry 2001, 321.
105 Sirota 2013, 309.
106 McConnell 1985, 31; McConnell 1991, 711; Sirota 2013, 309; Hamilton 2004, 1197-8.
107 Hamilton 2004, 1200.

parliamentary debates; because, as I will elaborate in the final part of this chapter, of the type of discourse and meaning they produce. Politicians do not only develop and defend their own views during debates but also attack or otherwise comment on (or relate to) the views of others, parliaments are the ultimate arena to study conflicts between competing perspectives in the broader society.[108] This is especially true in proportional electoral systems such as that of the Netherlands, where political parties embody a large variety of distinct ideologies and views. Minority voices are therefore relatively well represented in this system, which (at least partly) compensates for, as some argue is the case, parliaments' lack of attentiveness to minority voices compared to courts.[109] Thirdly, studying parliamentary debates gives us a better insight in (current and future) shifts in the dominant views on religious freedom. It is parliaments who, in the end, shape legal regimes, but the parliamentary debates themselves consist of views and arguments that are yet to be solidified in laws and regulations. Studying parliamentary debates thus gives us insight into underlying views, currents and trends that are generally overlooked in purely legal analyses or attempts at theoretical modelling; trends which will eventually shape future church and state relations.

Besides these general advantages of parliaments as a setting, the characteristics of these specific Dutch parliamentary debates also makes them especially suitable for the empirical analysis at hand. First of all, these debates about the introduction and amendment of a Dutch general anti-discrimination law extend over a large period, from the 1980s to the 2010s, with the topic of religious schools' discriminatory staff policies consistently remaining the center of attention. These debates therefore lend themselves very well for documenting changes over time. Secondly, these debates mainly focus on the practices of (orthodox) Christian schools, as the emergence of Islamic religious schools is a fairly recent - and still relatively limited - phenomenon. This makes it possible to focus on the debate on religious freedom as such without also having to incorporate the debate about integration in all its distinct dynamics. Such a limitation to a controversial practices of the 'pervasively religious' - instead of (also) the 'differently religious' - makes for a more focused analysis, even if debates about the latter practices are unquestionably important in their impact on church and state relations and society in general, and their implications for theoretical debates on religious freedom. Thirdly and finally,

108 Mansvelt Beck 2015, 14.

109 This point about the specific advantages of courts is made by Greene (2012, 134) and McConnell (1992, 723), but this criticism is overcome, at least in part, by the nature of the Dutch parliamentary system.

besides their longevity and focus, it is also the specific contents of the debates which makes them an especially apt object for the study at hand. As will become clear, the debates are very principled, explicitly touching on religious freedom and other liberal principles and the conflict between them. As a Christian-democratic parliamentarian remarks during one of these debates: "Many questions arise. One soon touches upon many issues of constitutional nature, such as those concerning the range, hierarchy and the relations between various fundamental rights."[110]

All these considerations, from the theoretical significance to their parliamentary setting to their concrete characteristics, ultimately leave us with three debates as the object of study; three different occasions in which the parliament has held significant, prolonged debates about the Equal Treatment Act. Each of those debates marks a decisive moment in the process, where, as a first glance already shows us, fundamental rights and values are balanced in different ways every time. First, there is the *clash* in the debate of 1985, in which a first, uncompromising proposal for the Equal Treatment Act is eventually abandoned because of its implied infringement of the freedoms of religion and education. Then, there is the *compromise* reached in the debate of 1993, where the approval of a new version of the Equal Treatment Act means the principle of equal treatment finally prevails, but where a legal exemption still protects a certain (or, as would it turn out, uncertain) freedom to of religious schools to enforce a religiously inspired staff policy. And the debate of 2014, finally, can be said to represent the *culmination* of the principle of non-discrimination, as the amended Act all but dispenses with the abovementioned exemption.

Clash, compromise, culmination: This sequence already suggests that that there is a clear storyline, with the equality-based view gradually prevailing over the liberty-based view. But if this is indeed the case, how did this shift come about? How to explain these changes, for example, given that the opposition between parties who backed and those who criticized the anti-discrimination legislation remained largely the same throughout those years? And more importantly, what were the arguments defending the clash, the compromise and the culmination, and what do they say about the underlying views on religious freedom? As will become clear, one cannot simply equate one's opposition against the anti-discrimination law with a liberty-based view, as even the fiercest critics of the Equal Treatment Act may paradoxically resort to equality-based arguments in order to bolster their arguments. To explain away

110 *Handelingen II* 1985/86, p. 268.

the paradoxes behind such seemingly schizophrenic stances, and unearth the deeper shifts and conflicts, we turn to the method of qualitative frame analysis.

5.2.3 Conclusion

In the tug of war between LTRF and ETRF in the Netherlands, the domain of education has played an important role. Besides being a common thread throughout the history of Dutch church and state relations - and often seen as illustrative or characteristic of these relations - it is also the domain where contemporary conflicts and shifts between both views on religious freedom are most pronounced. And it is a specific case within this domain that especially catches the eye; the parliamentary debates about religious schools' freedom to refuse or dismiss personnel on the grounds of their sexual orientation. As laid out above, there are various reasons - concerning the stakes and theoretical significance, the parliamentary setting, and the concrete characteristics of the debates in question - why this case is perfectly suited for the analysis of conflicts and shifts between LTRF and ETRF. How to perform this analysis is the question I will delve into in the third and final part of this chapter.

5.3 Analyzing views on religious freedom through qualitative frame analysis

The conceptual framework has been developed, and a suitable case study has been identified: What else is needed to study how conflicts and shifts between competing views on religious freedom take shape in contemporary liberal democracies? The theoretical lens of LTRF and ETRF proves useful when analyzing broad historical developments, but deploying the conceptual framework in a detailed analysis of principled, argumentative parliamentary debates is a whole different matter. The first question one is faced with is how to translate the framework between contexts that seem so far removed from each other. How to bridge the apparent gap between 'cold' and rational philosophical inquiries and the heated political debate – and what is the nature and extent of this gap to begin with?

5.3.1 A matter of framing: liberty- and equality-based views as frames

Generally speaking, what sets parliamentary debate apart from philosophical discussion is its embeddedness in particular institutions and practices - in this

case the Dutch parliament - and their ultimate orientation on action instead of primarily on understanding. Parliament members are tasked with dealing with problematic situations, and so they need to mobilize consensus - by persuading and positioning other participants in the debate - to undertake certain courses of action. Moreover, in their struggle to convince each other of certain courses of action, these politicians do not necessarily share a common understanding of the situation itself but often hold different perceptions of what the problem is to begin with.[111] This is far removed from the philosophical or scientific debate, understood - at least in its ideal version - as an orderly exchange of clearly distinguishable and rationally verifiable ideas or arguments about a commonly understood problem. Instead, the reality of political debates is much messier, much more dynamic. Meaning is produced and structured during the interaction itself, and is not directly derived from (nor always maps neatly onto) fixed belief systems. Different than political theories, ideologies and 'belief systems', the ideas or concepts that are discussed are not necessarily coherent,[112] but rather fragmented and often full of contradictions.[113]

The above suggests that the proper focus of an analysis of views of religious freedom in political debates is not the supposed deeply held beliefs of the participants themselves, or their underlying strategies. Besides, these beliefs and strategies are often very difficult to uncover and ascertain, and are ultimately not what the debates revolve around. In line with the prevailing understanding of political or policy debates, the actual conflicts and shifts take place between 'ensembles' that are expressed by these actors, and shared among them – even among those that might disagree about the specific course of action. These ensembles do not include only arguments or worldviews, but also specific "metaphors, catchphrases, ... moral appeals and other symbolic devices".[114] In the literature, they go by different names, echoing the traditions in which they developed: They are called discourses,[115] interpretative repertoires,[116] policy paradigms,[117] or (policy) frames.[118] While these concepts are largely interchangeable, and all the different traditions will be drawn from in the elaboration below, the notion of *frames* is most suitable for present

111 Hajer 1995, 43.
112 Hajer 1995, 44.
113 Steinberg 1998, 854.
114 Gamson & Modigliani 1989, 2.
115 Hajer 1995, 44.
116 Wetherell & Potter 1988.
117 Hall 1993.
118 Steinberg 1998; Rein & Schön 1993, 1996; Entman 1993.

purposes, as it most adequately expresses the following three characteristics that are important for this study.

First of all, frames offer both a diagnosis and a prescription. In other words, they simultaneously tell us "what needs fixing and how it might be fixed".[119] Frames are able to make this leap from to ought because they are narrative devices. They contain storylines, which link causal accounts of how a problem came to be - and who or what is to blame - to proposals for action.[120] Such storylines are generally based on metaphors, analogies, historical references, clichés, and collective emotions such as guilt or fear.[121] Because of such powerful symbolic devices, storylines can be highly persuasive, even for those that have different perception of the situation at hand. By suggesting a common understanding between participants, they thus help to overcome fragmentation and bring about political change.[122] And to remain viable, finally, storylines have to be somewhat open-ended, so they can incorporate new events into their interpretative framework.[123]

These features of storylines touch on the second important characteristic of frames, namely their ambiguity. Although they are ultimately directed at action, frames often do not coincide with specific positions for or against a particular measure. A (policy) frame generally implies a range of positions, and is consistent with different courses of action.[124] And so there is not only conflict between frames, but also disagreement within them. This ambiguity, this commensurability, is not a defect of frames, but rather a virtue, as it facilitates consensus. As Hajer states, "the political power of a text is not derived from its consistency (although that may enhance its credibility) but comes from its multi-interpretability".[125] To come back to the storylines; it is precisely the narrative element that makes it possible to translate between frames, to make frames potentially commensurable.[126] And so coalitions make be formed around storylines, where even actors that may not have the same interests utter and further the same narrative.[127] However, whether we can speak of this commensurability and discourse-coalitions also largely depends

119 Rein & Schön 1996.
120 Rein & Schön 1993, 148. See also Hajer 1995, 56.
121 Hajer 1995, 63.
122 Hajer 1995, 62.
123 Gamson & Modigliani 1989, 4.
124 Gamson & Modigliani 1989, 3; Rein & Schön 1996, 90.
125 Hajer 1995, 61.
126 Rein & Schön 1996, 92.
127 Hajer 1995, 65.

on the level of analysis. Consensus may exist on the level of "master frames"[128] or "meta frames"[129] concerning abstract concepts and ideals like democracy or science, while heated conflicts between (sub)frames are fought out over the preferred meaning and implications of such notions. As mentioned earlier, even if a conflict between frames is resolved, disagreement within the prevalent frame may persist.

Although frames are inherently ambiguous and fluid, there are also limits to this flexibility, and clear consequences to adopting a certain frame. A third important characteristic of frames is that they are both enabling and constraining when it comes to lending legitimacy and influence to specific arguments and perspectives. Adopting a common frame ensures that one's potion and argument will in principle be deemed comprehensible, plausible and legitimate by others inhabiting that framework. On the other hand, this also means that the framework itself determines which perspectives, positions and arguments are valid - and which ones are not -, and makes it impossible to raise certain questions or topics.[130] In other words, frames "both allow fluidity in the ways in which ... [ideological] representations can be constructed and simultaneously bound the degree of variability within them".[131] Most frames "are defined by what they omit as well as include",[132] and the mere "name assigned to a problematic terrain focuses attention on certain elements and leads to the neglect of others".[133] The image that emerges here of the 'framing' politician (or political party) is not that of a completely free actor that may strategically use frames according to certain ultimate goals or deeper beliefs, but rather that of an actor that is "entangled in webs of meaning", who inevitably sees the world through the vantage point of the frame that is adopted.[134]

These webs are not merely confined to language, but also take a more robust institutional shape. Institutions and institutional arrangements are maintained by frames, which give them meaning and allow them to function. Struggles between frames, in turn, also does not take place in an institutional vacuum.[135] Taking the metaphor of frames as "webs of meaning", institutions can also be seen as the walls or ceilings a (spider's) web is attached to, considering that

128 Steinberg 1998.
129 Rein & Schön 1993.
130 Hajer 1995, 49.
131 Steinberg 1998, 855.
132 Entman 1993, 54
133 Rein & Schön 1993, 153.
134 Hajer 1995, 56.
135 Hajer 1995, 60; Rein & Schön 1993, 156.

(certain) institutions also have an existence outside specific debates or frames themselves. This non-discursive context also determines which positions are plausible and resilient, and how the issue terrain itself is identified.[136] Institutional arrangements can even be seen as pre-conditions of the process of frame formation, as it also determines the particular roles, channels and norms for discussion and debate.[137] There seem to be roughly two types of institutional contexts, then, which can be illustrated with the example of the case studied in this thesis. One the one hand, frames concerning religious freedom on the one hand find their expression in the institutional context through laws like the Equal Treatment Act, or even through the establishment of a separate institution like the Dutch Equal Treatment Commission. On the other hand, these frames could not be expressed, at least in their specific shape, outside the broader and fundamental institutional context of the (Dutch) parliament; a context which produces a type of debate (or 'discourse') which is primarily focused on conflicting views and values, and which therefore lends itself well for the present study.

After this elaboration of frames and their characteristics, we can see how frame theory can be used to translate the theoretical framework of liberty- and equality-based views to the context of the parliamentary debates studied in this thesis. Translating this framework means that these views are not treated as (relatively) fixed and unambiguous belief systems, but should rather be understood as more ambiguous, flexible and action-oriented frames. And based on the theoretical chapters, there is in fact much that facilitates this translation, making it rather easy to conceive LTRF and ETRF as two opposing frames. For one thing, the central principles of these theories can not only be used to establish a problem - diagnosing a lack of freedom or unjustified unequal treatment, for example -, but simultaneously imply a general course of action that should be taken to fix these problems – the protection or expansion of religious freedom, or the establishment of equal treatment. Furthermore, where frames possess an inherent ambiguity, the fundamental indeterminacy diagnosed in Chapter 3 allows for a similar degree of divergence and disagreement within the perspectives in question. Finally, despite their relative indeterminacy and openness, liberty- and equality-based views are also constraining in their perspective on what they deem essential, and thus limiting when it comes to which positions and arguments are deemed more or less valid. The liberty-based view, for example, focus more on the vertical

136 Maussen 2009, 25; Rein & Schön 1996, 95.
137 Hajer 1995, 60; Rein & Schön 1993, 156.

relation between (religious) citizens and the state, and departs from the view that (religious) groups are a necessary and beneficial feature of society, while the equality-based view mainly focuses on the horizontal relations between various (religious and non-religious) citizens and their comparative claims, and sees the liberal-democratic state as a force for good. As a result, arguments or views that focus on the opposite relationship or dimension, or focus on the detrimental impact of the championed actor in question, are automatically seen as less valid.

5.3.2 How to conceptualize conflicts and shifts between (and inside) frames?

After establishing the similarity between theories on religious freedom and the notion of frames, the question now is how to further operationalize the analytical framework in order to discern specific conflicts and shifts between frames. In other words, we need a more specific conceptual toolbox that helps us to discern such conflicts and shifts in the Dutch parliamentary debates about a general anti-discrimination law.

When conceptualizing conflicts and shifts, the best place to start is the level of the debate as a whole. Such debates characterize themselves by various degrees of fragmentation or "multivocality of meaning".[138] When there are many competing or conflicting frames the debate is more like a dialogue, but when one (meta)frame gains power this it can be converted into a kind of monologue. In the latter case, Hajer speaks of "discourse structuration" - or what in the present study would be called frame structuration - which happens if "the credibility of actors in a given domain requires them to draw on the ideas, concepts, and categories of a given discourse [or frame, LN]".[139] There is also frame institutionalization, which occurs when it "is translated into institutional arrangements" and "concrete policies".[140] If a frame structures the debate, and on top of that is also institutionalized, Hajer states, it can be said to be hegemonic.[141] The fact that a frame is hegemonic means that the frame is objectivized to a point that participants to a debate are unaware of this fact, and take the framework and its terminology and symbolic devices for granted.[142] In Steinberg's words, "a cornerstone of hegemony, is the capacity to construct

138 Steinberg 1998, 855.
139 Hajer 1995, 60-1.
140 Hajer 1995, 60-1.
141 Hajer 1995, 61.
142 Steinberg 1998, 856; Hall 1993, 279.

silences within common sense".[143] On the level of the debate (or discourse) as a whole, then, we can say that there are more conflicts if a discourse is more 'multivocal' or fragmented, and that shifts between frames take place when one frame increasingly structures the debate and/or is institutionalized. Hegemony would be the endpoint of this shift, which does not, to be clear, rule out persisting disagreements within the hegemonic frame.

If we take a closer look at the institutionalized frame, we can turn to Peter Hall (1993) for a further refinement of our understanding of conflicts and shifts. Hall distinguishes between three *levels* of change. There is first order change, where the overall goals and instrument of policy remain the same, but the instrument settings are changed in the light of experience and new knowledge. Second order change happens when the instruments themselves are altered, and third order change is when all the three components of policy change: not only the instruments or their settings, but also the (hierarchy of) goals behind the policy. The latter change is of a more radical nature, and therefore likened by Hall to a paradigm shift, although it could also be described as a sort of changing of the guard between one (hegemonic) frame and the other.

The elaboration up until now provides a solid basis to distinguish different types of conflicts and shifts in views on religious freedom. When it comes to conflicts, we can distinguish between conflicts between frames, and conflicts (or *disagreements*) within frames. The latter can take the shape of a conflict between so-called subframes; frames which endorse or adhere to the overarching frame, but which nevertheless represent a distinct perspective within its confines. In the debate on competence, for example, the equality-based frame would emphasize the role of the state as holder of *Kompetenz-Kompetenz*, and the state primarily as a force of good protecting the interests of its (individual) citizens, while liberty-based frame would focus on the importance a religious community's own independent sovereignty, and would be geared towards the protection of this sovereignty against a potentially intrusive state. Within the egalitarian frame, a conflict can take place between two sub-frames, for example between the frame that allocates the burden of proof with the state, and the frame which hold religious communities primarily responsible for justifying their claims for exemptions. Or there could be disagreements about, among other things, where liberal boundaries between the public and private should be drawn.

Correspondingly, we can speak of a shift between frames when one frame or subframe becomes, over time and/or in a certain sequence, more dominant

143 Steinberg 1998, 855.

compared to a competing frame. This can be gleaned from the extent to which struggle between frames abates and ultimately ceases altogether. A clear indicator of such a shift is that the dominant frame structures the debate to the extent that diverging views or arguments are simply not deemed legitimate or credible anymore. And the institutionalization of the frame in question would make this shift even clearer, more pronounced, as the frame becomes objectivized to the point that it is self-evident. Such a definite, institutionalized shift also coincides with what Hall would call a paradigm shift, or third-level change. From Hall's more institutional perspective, we can also add his second-level change (concerning the choice of instruments) and first-level change (regarding the settings of this instruments) to the possible shifts *within* frames. Correspondingly, on this institutional dimension there could also be second- or first level conflict, in the shape of disagreements about the preferred instruments and their configurations. As we will see in our case study, for example, the debate of 1985 features an extensive discussion on how the protection of discriminated citizens should take shape; either as adjustments in the criminal code or (also) through a general law.

Frame theory also provides ample clues on where to look for specific indicators of conflicts, shifts and dominance. When it comes to institutionalization, for example, an obvious strategy would be to analyze the content of the debated laws and policies. In the case of religious schools' freedom to discriminate, this would mainly be the Equal Treatment Act (or the lack thereof, as is still the case in 1985). Structuration can be inferred from the type of arguments which are used by the participants to the debate. Or, to the extent that the prevailing perspective is taken for granted and not made explicit, this dominance can be established more indirectly, by identifying implicit catchphrases, metaphors or specific terms that are associated with it. Furthermore, it is important to look at the remaining debate that is sparked by criticism from the opposition, which may confront the majority with what they are taking for granted, and may force them to defend the status quo. The content and vehemence of the opposition's protest itself may also be a sign of the dominance of a frame. When it comes to the content of their interventions, the dilemma of these oppositional factions is whether to argue in the terms of the dominant frame or insist on their own way framing the issue. In the latter case, their arguments lose credibility and (therefore) efficiency.[144] In the former case, however, the opposition risks being constrained and influenced by that frame's logic, up to a point that their stance is significantly watered down or

144 Hajer 1995, 57.

even (unintentionally) altered. In the case-study of this thesis, we will see that it is particularly the orthodox Protestant parties that wrestle with this dilemma.

It is also important to distinguish between the different ways or degrees in which the opposition can engage with the dominant frame. Oppositional parties may use so-called disclaimers, a more defensive device that is "designed to ward off potential obnoxious attributions",[145] often in the general form of 'I am no sexist, but…' or 'Of course, I am against discrimination, but…'. A more pro-active or constructive way of relating to the dominant frame is by 'hitching on' to it, by using its metaphors, principles and categories to argue for a certain of course of action, even if the faction's (original) goals are different than those of the other parties arguing from this frame.[146] However, as noted above, appropriating a different frame in this way also means that the faction in question is susceptible for different types of criticism from within that frame, and may even lead the faction to end up identifying with that perspective on reality. As we will see, for example, arguing that a ban on discrimination would entail unjustified unequal treatment of (certain) Christian organizations forces orthodox Protestant factions to spell out what this equality means, and how exactly this equality is violated. Furthermore, this hitching on to the equality-based frame may have been (part of) the reason why these parties ultimately showed themselves to be more sympathetic to the claims for unjustified unequal treatment (or, in other words, discrimination) of homosexual citizens.

By hitching on to the dominant frame, the opposition may also try to stretch that frame in order to accommodate its original objectives. From the perspective of the dominant frame, the question is how far it might be stretched as a result of the opposition's engagement; to which point, for example, can the unequal treatment of religious citizens be rejected without jeopardizing the equal treatment of homosexual citizens? But it is not only the (original) opponent of the dominant frame that seeks to stretch it. A question that clearly emerges from the 2014 debate, for example, is to which degree the supporters of the Equal Treatment Act can persist in their defense of the equality of rights if they also categorically prioritize non-discrimination over religious freedom. To which degree can this equality of rights be stretched to accommodate this prioritization?

In sum, frame theory provides ample conceptual tools to analyze the dynamics of conflicts and shifts in views on religious freedom parliamentary debates. The questions that remain now are of a more technical or

145 Wetherell & Potter 1988, 176.
146 Rein & Schön 1993, 151.

methodological nature, namely: how to perform the actual analysis itself? For this, we will turn to the method of qualitative content analysis.

5.3.3 Qualitative Content Analysis

Now that the conceptual framework is developed, and translated to a parliamentary setting by means of frame theory, a method is needed to apply this analytical lens to the debates in question. An ideal method to perform such analysis is generally known as Qualitative Content Analysis (QCA). QCA is a method for systematically describing the meaning of qualitative data - in this case, the meaning produced by competing frames on religious freedom - by interpreting the text through a classification process of coding.[147] Codes helps reducing the amount of data by focusing only on the aspects of meaning which relate to the research question. And they are sufficiently broad or abstract to enable insight into how various passages compare and relate to one another. When these codes are based on a pre-existing theory - which is called the directive or deductive approach to QCA -, patterns and common themes can be discerned and compared between different time periods, making it possible to test an assumption or a hypothesis.[148] In this case, the hypothesis would be that debates of Dutch equal treatment legislation reflect underlying conflicts between liberty- and equality-based views, and that a significant shifts towards the dominance or hegemony of the latter have taken place.

Qualitative Content Analysis can never be purely deductive, however, and this brings us to yet another reason why it is perfectly suited for the case study at hand. In the process of coding, one might very well run into new, relevant categories, and so directed QCA may also help to refine and extend the conceptual framework in question.[149] This makes the method exceptionally sensitive to both context and content, as the contextual information and specific formulations or phrasing of the views in question make their way into the coding scheme, which is essentially the analytical lens through which the data is studied. Such a fit with the empirical material is always important, of course, but especially so in the study of frames, where the context and latent or implicit information plays such a large role in the production of meaning.

Its adaptability also makes it a very challenging method, as there is no simple 'right' way or approach of doing it.[150] There is no pre-defined format,

147 Schreier 2012, 170; Hsieh & Shannen 2005, 1278.
148 Hsieh & Shannen 2005, 1282; Elo & Kyngäs 2008, 113.
149 Hsieh & Shannen 2005, 1283.
150 Elo & Kyngäs 2008.

and one cannot rely on self-evident quotes or quantitative results support one's conclusions: As its adjective suggests, Qualitative Content Analysis goes beyond "manifest content and frequency counts",[151] and is therefore not a "counting game".[152] In each individual case, researchers must judge which approach best suits the problem at hand and, without simple guidelines for analysis, have to create categories that are both conceptually and empirically grounded. But while QCA is flexible and content- and context-sensitive compared to quantitative content analysis, it is more systematic compared to other qualitative methods.[153] It requires the researcher to search the material in its entirety for information that is in any way relevant to the research question. And, irrespective of this research question and the material at hand, it requires a certain sequence of steps, including also checks based on criteria like validity and consistency. In Appendix 1 of this thesis, these steps are briefly described, along with the specific way in which these were taken for the current study.

In the end, however, the method can only take you so far, and it is the analysis itself, the presentation of the findings, that shows whether the researcher has deployed sufficient contextual sensitivity and theoretical rigor. The main means at the disposal of the researcher are quotes from the text, and he or she needs to find a balance between the presentation and the interpretation of these quotes. In other words, one needs to provide "sufficient description to allow the reader to understand the basis for an interpretation, and sufficient interpretation to allow the reader to understand the description".[154]

The proof of the metaphorical pudding, then, is in reading the following chapters. In these chapters, I show, mainly through quotations and their interpretations, how prevalent codes matching liberty- and equality-based frames are. It is up to the reader to decide whether these quotes indeed testify of a certain framing, and whether the whole of these quotes (or codes) speaks of a more or lesser degree of conflict or shifts. When the majority of parliamentary factions employ an equality-based framing, and even oppositional parties are forced to relate to this frame in order to gain credibility, it is safe to say that this frame structures the debate. And when this framing finds its way into the legislative proposals under discussion, or is present in the legal context more generally, it is safe to say that this frame is (being) institutionalized.

But as the analysis will also show, neither structuration nor institutionalization is a binary affair, despite what frame theory sometimes

151 Schreier 2012, 171.
152 Elo & Kryngäs 2008, 108.
153 Schreier 2012, 171.
154 Patton 2002, 503-504.

suggests. Instead, what we will see is that the adoption of the equality-based frame expands in a gradual matter, which is discernible, among other things, in the way in which the oppositional factions' initial defensive attitude towards the egalitarian perspective (through disclaimers, for example) slowly evolves into a more pro-active 'hitching on to' the dominant frame, or even blank endorsements of the egalitarian perspective. Likewise, the equality-based frame is not institutionalized from one moment to the next, but increasingly leaves its mark on the debated legislative proposals. I will therefore refrain from assessments in terms of hegemony - in the sense that a frame is either hegemonic or not -, but instead will monitor the increasing dominance of the equality-based frame (in terms of structuration and institutionalization) as precisely as possible.

5.3.4 Conclusion

This final part of Chapter 5 focused not on what to study, but rather how. It employed frame theory to translate the theoretical framework to the particular setting of the case - parliamentary debates about religious schools and non-discrimination -, conceiving liberty- and equality-based views not as well-defined unambiguous systems of belief but rather as ambiguous, action-oriented frames. Frame theory also provides the conceptual tools for the analysis of this case: it makes it possible to discern between various types (and levels) of conflict and shifts, and various degrees of dominance. It also sheds light on the various ways in which participants to the debate may relate to the opposing or dominant frame, from actively resisting it to taking it for granted, and from employing defensive disclaimers to pro-actively hitching on to the dominant frame – either inadvertently or consciously, in an attempt to stretch the confines of that frame. If the analysis of these dynamics is to be done right, various contextual factors must be considered as well, and this makes qualitative content analysis - employed both deductively and inductively - the best method to go about this.

5.4 Conclusion: the 'where', the 'what', and the 'how'

This chapter has bridged the gap between theory and (the analysis of) contextual practices in various ways, thus laying the groundwork for the case study that comprises the remaining half of this thesis. First of all, it established the 'where', by sketching the broader historical context of Dutch church and

state relations. This also provided a first opportunity to apply, albeit somewhat loosely, the theoretical framework to actual liberal-democratic contexts, and showed how analyzing the Dutch church and state relations through to prism of LTRF and ETRF yields new and interesting insights about the competing perspectives on religious freedom at play. Secondly, this chapter zoomed in from this broader where to arrive at the 'what' of the case study. As I have argued, there are several reasons why Dutch parliamentary debates about religious schools' selective staff policy lend themselves especially well for a more fine-grained analysis of conflicts and shifts, ranging from the broader theoretical significance to the specific characteristics of these debates. And when it comes to the question of how to conduct this study, thirdly and finally, the chapter developed a methodological approach that employs frame theory to translate the theoretical framework to a parliamentary setting, and uses qualitative content analysis to apply this framework and discern specific conflicts and shifts.

As we will see in the results of the subsequent analysis, these conflicts and shifts in the Dutch parliament roughly take on the same shape as they did in the theoretical debate, except in a much clearer and more varied way. The contrast between liberty- and equality-based views is more pronounced, with parliament members fiercely criticizing and explicitly rejecting the opposite perspectives. At the same time, ambivalences abound, ambiguities are exploited much more opportunistically, and the dominant frame is frequently stretched to its limits. Also recurring, finally, is the shift towards an equality-based consensus, although this time the shift is meticulously monitored, detailing how liberty-leaning factions are slowly but unmistakably dragged along by the egalitarian slipstream. The contours of the equality-based frame's dominance were already visible in the debate of 1985 (Chapter 6), even though it took until 1993 for that dominance to be cemented with the introduction of the Equal Treatment Act (Chapter 7). This Act still featured ample exemptions, however, and it was the annulment of this exemption in 2014 and the preceding debate (Chapter 8) that represented the culmination of egalitarian dominance.

6

1985: Contours of Egalitarian Dominance (but no law)

In the months and years leading up to the parliamentary debate in October 1985 about the introduction of a Dutch anti-discrimination law, expectations had been building up slowly but steadily.[1] The law had been part of the plans of the Cabinet of the Christian-democratic prime minister Ruud Lubbers (consisting of the Christian-democratic CDA and liberal-conservative VVD) and was long due to begin with, as various occasions and developments in the preceding decade had all pointed in this direction.[2] As early as 1974, Cabinet Den Uyl adopted an informal initiative by activist group Man-Vrouw-Maatschappij (MVM, 'Man-Woman-Society') calling for a broad legal ban of discrimination, including discrimination on the ground of sexual orientation.[3] The Emancipation Committee, a formal advisory body subsequently installed by the Cabinet as a continuation of MVM, finally published its official advice in 1977, which in turn led to a motion by Haas-Berger (Labour Party) in 1978 proposing the realization of such a law.[4] This motion was accepted by all save five parliament members[5], and a first preliminary draft ('voorontwerp') for a law was published three years later, in 1981, by Christian-democratic state secretary Kraaijeveld-Wouters. In the meantime, the desire to establish such legislation was also underlined during the development of an updated Dutch Constitution. In the eventual constitutional amendment of 1983, the right to equal treatment and non-discrimination was added as the constitution's first article. Moreover, the amendment prescribed the realization of so-called horizontal effects of rights such as this new Article 1 - making such rights applicable to the relationship between citizens, and not only between state and citizen - which in that case would entail a general discrimination ban.

But as expectations rose, resistance also grew. The preliminary draft of 1981 had attracted vehement criticism, mainly from orthodox Christian quarters. The Christian-democratic state secretary was inundated with more than 15.000 largely condemnatory letters from citizens, and Christian broadcasting and

1 An overview of the political parties participating in these various parliamentary debates can be found in appendix 2.

2 See especially Swiebel 2020 for a more extensive elaboration of the events leading to the development of a Dutch anti-discrimination law. Among other things, the Dutch government also signed related UN conventions such as the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the 1965 Convention on the Elimination of All Forms of Racial Discrimination.

3 See also Mulder 2017, 101-2 for a more elaborate account of the establishment of MVM in the context of the rise of the second feminist movement.

4 *Kamerstukken II* 1978/79, 14496, No. 22.

5 The CDA, whose state secretary Kraaijeveld-Wouters played a formative role in the development of plans for anti-discrimination legislation, also supported the motion. Only the Boerenpartij ('farmers party') and the orthodox Protestant SGP and GPV voted against.

educational institutions argued that the bill's ban on discrimination on grounds of sexuality violated the constitutional freedom of education.[6] Cabinet "Lubbers I" therefore agreed to develop a new proposal.

Two years after the Cabinet was installed, however the CDA party council accepted an extensive "Homophilia resolution" which would further complicate its plans. Although the resolution rejected discrimination based on sexuality, it also argued that the government, in the light of "a number of fundamental rights enshrined in the Constitution", lacked the competence to enforce a general ban on religious or similar private organizations.[7] This ambivalent stance is illustrative of the phase the Christian-democratic party found itself in. It was officially established only four years prior, as a merger between the catholic KVP and the protestant CHU and ARP, and spent its first decade reflecting and developing its political program.[8] Where its predecessors were united in their rejection of the French Revolution (hence the name Anti-Revolutionary Party (ARP)) and were skeptical of ideas of equality and popular sovereignty, the newly formed party increasingly embraced liberal views on parliamentary democracy, the separation of church and state and the market economy, and basically became more and more of a liberal conservative party.[9]

The fact that the CDA was grounded and held together by a (religiously inspired) political conviction rather than a specific religion or church[10] - added to the very fact that the party as such represented a collaboration between protestant and catholic parties - already set it apart from the remaining orthodox Christian parties: the Reformed Political Federation (RPF), the Reformed Political League (GPV) and, last but not least, the party that was traditionally most strict in its religious (and even theocratic) views: the Reformed Political Party (SGP). These orthodox Protestant parties were already at odds with Kuyper's ARP, despite their shared Calvinist heritage, as they rejected, amongst other things, Kuyper's insistence on the *indirect* connection between religion and the state (through the conscience of parliament members and officials), and instead argued that government and parliament should be directly bound by God's word.[11] ARP's collaboration with the Catholics was also strongly condemned by parties like the SGP. The CDA was the embodiment of all these condemned characteristics, and was now also headed by a (Catholic)

6 Swiebel 2020, 294.
7 *Jaarverslag CDA 1984*, p. 5. See http://dnpprepo.ub.rug.nl/780/1/CDA_jv_1984.pdf.
8 Harinck & Scherff 2010, 153-4; Voerman 2011.
9 Voerman 2011, 17; Kennedy & Ten Napel 2011.
10 Ten Napel 1992, 369.
11 Hippe 1989, 74; Van der Zwaag 2018, 73.

politician, Ruud Lubbers, who was determined to shift his party's focus from religion and culture towards economic reform.

But even with this less rigid and more pragmatic stance, imposing a ban on discrimination on religious organizations was still a bridge too far for Lubbers' cabinet. In his letter to the parliament, dated September 25th 1985, Lubbers shared that the Cabinet had not managed to resolve the tension between the constitutional rights of non-discrimination and freedom of education, and therefore had to postpone the introduction of a bill to the parliament.[12] The Cabinet did not want to write off the whole endeavor altogether, however, and seized on an advise of the Social and Economic Council of the Netherlands (SER) to investigate the possibility of a broader law, including more grounds of discrimination – an option favored by the liberal part of the coalition (VVD). And it also proposed other avenues to counter and punish discrimination, such as adjustments in the criminal code. All in all, it stated, more thorough reflection was needed.

This hesitance, and the long and tortured trajectory towards the development of an equal treatment act in general, suggests that the introduction of such legislature would be a very consequential decision. A view from the perspective of liberty- and equality-based frames of religious freedom suggests why. First and foremost, establishing such a law would, as the CDA party council suggested in 1984, imply that the issue of non-discrimination between citizens falls squarely within the competence of the state – an unmistakable shift towards the equality-based view on competence. A general ban on 'horizontal' discrimination would also amount to the institutionalization of the equality-based frame concerning the question of rights. It would emphasize the equality between rights of religious freedoms and the 'new' right of non-discrimination, with the horizontal effects of the latter putting these rights on a collision course – which in turn inevitably leads to the mutual curtailment of constitutional rights that is so characteristic of the egalitarian fair scheme. And these intra-constitutional frictions, finally, would also make the principle of equality-as-proportionality indispensable. As Lubbers implied in his letter, a general anti-discrimination law would have to reconcile conflicting rights, which can only be done by weighing their underlying interests against each other. This would entail an egalitarian perspective on the question of interests,

12 In the letter, the Cabinet justified its decision to refrain from introducing a bill by showing itself unable to reconcile its condemnation of "making distinctions on the ground of homosexual nature" with its approval of "demands concerning the (verbal and written) transfer of beliefs of denominational education" in a general anti-discrimination law (*Kamerstukken II* 1985/86, 19226-1, p.2).

which puts religious and non-religious interests roughly on a par, and which differs from the liberty-based frame's categorical elevation of religious interests that would make them untouchable save in the most extreme instances.

The stakes were high, then, and now that the Cabinet had dropped the ball the secular parliamentary factions were eager to take the initiative and pass the anti-discrimination law on their own. Chief among these secular parties was the Labour Party (PvdA) which was actually the largest faction occupying almost a third of the parliamentary seats, but was nevertheless sidelined in the process of forming a new government. Other secular factions like the liberal-democratic D66, the green progressive party GroenLinks, the pacifist PSP and the Communist CPN, each had a handful of seats at most, but the PvdA and the VVD factions together already comprised a parliamentary majority. Fearing the scenario of a parliamentary vote, however, the CDA blocked this avenue by holding the VVD to the coalition agreements.[13]

A debate would nevertheless take place about the Cabinet's decision to postpone, and would prove to be a heated affair. The secular parties, unsurprisingly, were not amused, while the three small orthodox Protestant factions mentioned earlier - the RPF, GPV and SGP - were opposed to any anti-discrimination bill to begin with, and lauded the Cabinet's decision to refrain from introducing a law. Although this situation seems to signal a political stalemate, analyzing the influence of competing frames of religious freedom in this debate provides more insight into the deeper currents underneath this impasse, and lays bare the more fundamental developments that ultimately shape institutional arrangements like the Dutch. For example, could the equality-based frame prove to be dominant despite the failure to introduce an anti-discrimination bill? And to which degree was the resistance against such a bill shaped by the liberty-based frame, and would this resistance prove to be effective? This brings us to the first of October 1985, when members of the parliament and the Cabinet gather to discuss Lubbers' letter.

6.1 Structuration of the debate along egalitarian lines

As the Chair of the parliament opens the plenary debate, liberal-democratic D66's Louise Groenman kicks off her opening speech by expressing her strong disappointment about the Cabinet's decision; a feeling that is shared by representatives of other (secular) opposition parties. It is clear that

13 Swiebel 2020, 295.

fingers are mainly pointed at the Christian-democratic CDA, with most of the criticism focusing on the political disagreement within the coalition. As Groenman states, "[o]ur conclusion is that political problems between coalition partners have prevented a law on gender discrimination, including the discrimination of homophilia". Her skepticism about the Cabinet's plans for 'further reflection' are clear, as she states that "the same problems occur with a broader anti-discrimination legislation. Delay therefore equals giving up. We deeply regret this".[14] Jeltje van Nieuwenhoven, representative of the Labour Party (PvdA), similarly complains that "the government has found a new escape route ['échappatoire', LN]: the expansion advocated by the VVD. … What is the argument for this, if the argument of delay is not applicable?"[15] Smaller secular factions also do not mince their words, as the PSP stresses that "[i]t is … now or never, or will the interests of women and homosexuals be subordinated to party-political interests?".[16] The CPN, finally, alludes to the use of the term 'homosexual nature' in the PM's letter when stating that "it is no doubt attributable to the *nature* of this cabinet that the Equal Treatment Act is such a long time coming" (emphasis added).[17]

In such criticisms, the contours emerge of a storyline that is central to the equality-based frame of religious freedom. As noted in the previous chapter, frames offer both a diagnosis and prescription, and it is storylines that tie the two together. This specific egalitarian storyline focuses on the plight of the discriminated individual, and is alluded to in statements such as the following from the Dutch Communist Party's Evelien Eshuis:

> "Still no effective legislation on the short term is in sight. And yet that is where women and all those people who do not want to hold back from expressing their sexual preference … have been waiting on for years."[18]

14 "Onze conclusie is dat politieke problemen tussen de coalitiepartners een wet op de seksediscriminatie, inclusief de discriminatie van homofilie, verhinderd hebben. Dezelfde problemen doen zich voor bij een bredere antidiscriminatiewetgeving. Uitstel is dus afstel. Wij betreuren dat ten zeerste" (*Handelingen II* 1985/86, p. 260).

15 "De regering heeft een nieuw échappatoire gevonden: de door de VVD-fractie voorgestane verbreding. Wat is het argument daarvoor, als het argument van vertraging hier niet geldt? (*Handelingen II* 1985/86, p. 263).

16 "Het is dan ook nu of nooit, of worden de belangen van vrouwen en homo 's ondergeschikt gemaakt aan de partijpolitieke belangen? (*Handelingen II* 1985/86, p. 270).

17 "Het is zonder twijfel te wijten aan de geaardheid van dit kabinet dat die Wet gelijke behandeling zo lang op zich laat wachten" (*Handelingen II* 1985/86, p. 269).

18 "Nog steeds is er geen zicht op een effectieve wetgeving op korte termijn. En dat is toch waar vrouwen en al die mensen die niet onder stoelen of banken willen steken dat hun seksuele voorkeur een andere is dan hetero, al jaren op wachten" (*Handelingen II* 1985/86, p. 269).

In more dramatic terms, VVD's Len Rempt-Halmmans de Jongh states:

> "The commitment … that a new equal treatment bill would be drawn has instilled hope in the hearts of people that for too long have found themselves to be hit the hardest - sometimes literally -, and who in the very core of their soul feel violated in their human dignity."[19]

The dominant storyline in this parliamentary debate can even be summarized in one sentence, like when Rempt-Halmmans de Jongh rebukes the co-governing CDA:

> "*Without an Equal Treatment Act the individual is practically left in the cold*. For the VVD this is a certainty, for her coalition partner … it is still a question" (emphasis added).[20]

This storyline touches on various tenets of the equality-based frame, concerning different questions of religious freedom. Its plea for regulation means that the state is considered as possessing competence as well as *Kompetenz-Kompetenz* –the very existence of the plea already suggests that the state itself decides about its boundaries of competence. Furthermore, it implies that the state is essentially a force for good that can actually help solve the problem of discrimination.

Regarding the question of rights, the storyline obviously endorses the egalitarian guiding principle of equal treatment of similarly situated individuals – with the emphasis on individuals, as the statements explicitly mention 'persons' and 'individuals' and not groups or organizations. As other statements testify, the belief in an egalitarian fair scheme of rights is also shared broadly. Not only do factions across the board subscribe to the equal status of rights - as will become clear further on, in section 6.3 -, but the unavoidable limitation of rights is explicitly emphasized by factions like the Christian Evangelical People's Party (EVP) and the secular Political Party of

19 "De toezegging in het regeerakkoord dat met een nieuw wetsvoorstel gelijke behandeling zou worden gekomen heeft hoop doen gloren in de harten van mensen die al tè lang vrijwel onbeschermd zitten in de hoek waar soms letterlijk de slagen vallen en die zich tot in het diepst van hun ziel aangetast voelen in hun menselijke waardigheid " (*Handelingen II* 1985/86, p. 267).

20 "Het individu zelf blijft zonder een Wet gelijke behandeling vrijwel in de kou staan. Voor de VVD is dat een weet, voor haar coalitiepartner … is het nog een vraag" (*Handelingen II* 1985/86, p. 266)

Radicals (PPR). The former rhetorically asks whether one "can talk of freedom when the enforcement of freedom for one person means that the freedom of the other needs to be sacrificed?",[21] and the latter argues that "the freedom of education can never be pitted against other constitutional rights. Constitutional rights such as the freedom of religion and the freedom of education are there to protect people. And not the other way around. … No constitutional right can be a license to oppress and discriminate people".[22]

By mentioning oppression, this final statement also points to another important component of this increasingly prominent storyline, one which matches with the egalitarian perspective on the question of interests. The previously quoted invocations of the storyline all emphasize the interests of discriminated citizens, but certain statements also specific the types of harms suffered by these individuals – harms that are considered sufficiently weighty to curtail rights like the freedom of religion. The harms that are referred are very severe indeed, and are conceptualized, following the distinctions of Chapter 4, as material as well as symbolic harms. Illustrative of this is the following statement of the Evelien Eshuis, an openly lesbian parliament member of the Dutch Communist Party (CPN) who speaks from her own experience:

> "For those who have any understanding of the nature and extent of discrimination and its consequences, it is clear that the issue is not about regulating anything about heterosexual or homosexual behavior; it is about protecting against *oppression*, *humiliation* and *disadvantage*. Not the gays, the blacks, the women are the problem but those who discriminate against them" (emphasis added).[23]

In the Communist faction's view, it is the discriminated citizens that are mainly (or most severely) affected in the clash between religious freedom and non-discrimination. It is they who can rightfully claim that they are oppressed

21 "Kan er van vrijheid gesproken worden wanneer voor de handhaving van de vrijheid van de één, de vrijheid van de ander moet worden opgeofferd?" (*Handelingen II* 1985/86, p. 271).

22 "Mijn fractie gaat ervan uit, dat de vrijheid van onderwijs nooit kan worden uitgespeeld tegen andere menselijke grondrechten. Grondrechten als de vrijheid van godsdienst en de vrijheid van onderwijs zijn er om mensen te beschermen. Het is niet omgekeerd. Mensen zijn er niet voor de vrijheid van onderwijs en geen enkel grondrecht kan een vrijbrief zijn om mensen te onderdrukken en te discrimineren" (*Handelingen II* 1985/86, p. 261).

23 "Voor wie enigszins inzicht heeft in de aard en omvang van discriminatie en de gevolgen ervan is het duidelijk dat het er niet om gaat iets te regelen over hetero- respectievelijk homoseksueel gedrag; het gaat om bescherming tegen onderdrukking, vernedering en achterstelling. Niet de homo' s, de zwarten, de vrouwen zijn het probleem maar zij die hen discrimineren" (*Handelingen II* 1985/86, p. 326).

and humiliated, Eshuis argues, with both terms suggesting an exclusively symbolic dimension of harm. Disadvantage, the third type of harm invoked, refers to a more material type of harm in the shape of deprived opportunities or exceptional economic costs – or, in the terminology of the moral classification developed in Chapter 4, opportunity harm and economic harm. The most severe type of harm, however, is alluded to by the liberal-conservative VVD faction in a passage quoted earlier, in the context of the egalitarian storyline. In that quote, VVD's Len Rempt-Halmmans de Jongh speaks about "people that for too long have found themselves to be hit the hardest – *sometimes literally* -, and who in the very core of their soul feel violated in their human dignity" (emphasis added).[24] In statements such as these, dignity harm and the category of physical harm - or rather the threat or risk of it; safety harm - are mentioned in one breath, as intimately connected harms; severe harms, moreover, that suggest a particularly uncompromising stance when it comes to the necessity of universal legislation in the fight against discrimination.

It is testament to the dominance of the equality-based frame that even the CDA, who has shown so much reluctance in their decision to stall the introduction of the anti-discrimination law, now expresses an almost unadulterated egalitarian view during the ensuing debate. The Christian-democratic faction do admit that they became "more hesitant"[25] after the harsh criticism provoked by the draft of 1981, but are also eager to point out that they played a formative role in the developments leading up to this bill. Moreover, it shows its egalitarian colors when CDA representative Jan Krajenbrink professes that discrimination is "an evil", and that the government also has "an important task" in the fight against it; "after all, discrimination leads to hurt, disadvantaged and misunderstood people and we cannot resign ourselves to this".[26]

Such statements already contain various elements of the equality-based frame of religious freedom. Through the enumeration of the various harms suffered by discriminated citizens, it recognizes the weightiness of the interests at stake: again, we see references to symbolic harm ('misunderstood'), categories of opportunity or economic harm ('disadvantaged'), and a more ambiguous conceptualization that could imply both physical and dignity harm

24 *Handelingen II* 1985/86, p. 267.

25 *Handelingen II* 1985/86, p. 268.

26 "Discriminatie, waaronder wij dus verstaan het maken van ongerechtvaardigd onderscheid, achten wij een kwaad bij de bestrijding waarvan ook de overheid een belangrijke taak heeft. Discriminatie leidt immers tot gekwetste, achtergestelde en miskende mensen en daarin mogen wij niet berusten" (*Handelingen II* 1985/86, p. 268).

('hurt'). Such statements also imply that the government is in fact competent to address this pressing societal issue. At the very least, it shows that CDA believes that it is the state itself that decides where its boundaries of competence lie.

In fact, it is CDA's prime minister Ruud Lubbers that arguably voices the clearest endorsement of the liberal-democratic state's *Kompetenz-Kompetenz*. This endorsement follows a pluralism-inspired critique by the representative of the orthodox Protestant RPF, whose representative Meindert Leerling argues against the threatening restriction of plurality of norms and values (including, in his case, Reformed-Protestant inspired values) by which behavior can be judged in a society. As a response, Lubbers shies away from taking a political stance, but matter-of-factly states that "we are here to set the limits to where the legislator should set rules and where it should not".[27] And in an exchange with Cathy Ubels-Veen of the Evangelical EVP, who, contrary to the RPF, presses the state to take an active role in the fight against discrimination, Lubbers assures that he does not want to "leave the whole matter to society".[28]

The focus on individual equal treatment is also present in various Christian-democratic statements, such as Lubbers' expression of support for a ban on discrimination that "protects the individual against unjustified distinctions on the ground of essential characteristics such as race, sex, sexual orientation and for example religion".[29] Such endorsement of the equality-based frame may lead one to wonder why the CDA did not support the introduction of an anti-discrimination law. The answer is that the endorsement of that frame does not necessarily tie one to a specific course of action. As Chapter 5 showed, frames are inherently ambiguous, also when it comes to the specific measures that they prescribe, which is precisely why they facilitate political consensus. Even self-confessed 'hesitant' parties like the CDA, who ultimately pulled the plug on the introduction of the bill, can partake in the same frame-coalition as the secular proponents of the law. The difference with those parties is that the Christian-democrats seeks other avenues, namely the extension of the criminal code, in order to "counter individual discrimination", as the CDA faction phrases

27 "Wij zijn ervoor om de grenzen te bepalen tot waar de wetgever regels moet stellen en waar niet" (*Handelingen II* 1985/86, p. 311).

28 "De geachte afgevaardigde mevrouw Ubels heeft mij verkeerd begrepen als zij zou denken dat ik de zaak helemaal aan de samenleving wilde overlaten" (*Handelingen II* 1985/86, p. 329).

29 "Het verbod van discriminatie beschermt een individu tegen ongerechtvaardigd onderscheid op grond van wezenskenmerken zoals ras, geslacht en seksuele geaardheid en bijvoorbeeld godsdienst" (*Handelingen II* 1985/86, p. 309).

it.[30] Another way of understanding what is happening is here is through Peter Hall's previously discussed distinction (see Chapter 5) between first, second and third order change: After having endorsed the underlying goals behind a policy (third order), the debate revolves around the question which instruments should be used to achieve these aims (second order).

It is in the discussion and critical scrutiny of these alternative approaches, however, where the *limits* of the equality-based frame's ambiguity are also clearly felt. The (secular) majority feels that only adjusting the criminal code ultimately falls short of achieving their common goal. and two ministers hailing from the VVD - Justice minister Korthals and minister of the Interior Rietkerk - elaborate why. Such adjustments, they say, establish an important norm but in the end do not sufficiently protect the individual against unfair equal treatment and all the accompanying harms. The criminal code only offers the possibility of a (limited) compensation for the victims, and does not actually prevent (or reverse) actual cases where individuals lose or miss out on a job because of discrimination.[31] As it turns out, the egalitarian prescription of individual non-discrimination is not *that* ambiguous, and eventually leaves the introduction of some type of general anti-discrimination law as the only feasible course of action for those who support this frame.

The final stage of the debate therefore sees both the CDA and prime minister Lubbers leaving open the possibility of additional (legislative) measures. The Christian-democratic faction softens their stance with the relatively feeble statement that "at this moment our direction is a little bit that *in each case* we want to sharpen the criminal code" (emphasis added).[32] And Lubbers, while trying to polish up the impact of the criminal law amendments (whose "significance could greater than what follows from pure legal analysis"), also explicitly denies that the Cabinet indefinitely refrains from additional, legislative measures. In part, he sees such legislation as a logical next step after the adoption of the right to equal treatment in the Constitution of 1983, and the broad social debate that accompanied this. According to Lubbers, this "[i]n itself … invites the question if there should not be further legislation to

30 "Is de regering van oordeel dat individuele discriminatie op een andere wijze in het Wetboek van Strafrecht kan worden tegengegaan, bijvoorbeeld via artikel 429 quater?" (*Handelingen II* 1985/86, p. 268).

31 *Handelingen II* 1985/86, p. 320.

32 "Wij zitten op dit moment een beetje op de toer dat wij in ieder geval het Wetboek van Strafrecht willen aanscherpen" (*Handelingen II* 1985/86, p. 319).

flesh out this constitutional article".[3334] Lubbers almost suggests here that a general anti-discrimination law is inevitable, as the logical outcome of preceding institutional developments – developments in which, as the CDA faction had stressed, the Christian-democrats had played a substantial role. It is therefore perhaps not surprising when Lubbers in his conclusive remarks argues that the inevitable is also desirable: "Given the importance of the issue, we do think it is important to continue [working on anti-discrimination legislation, LN]." – in fact, he states that "we also see ways to do this. This is just a provisional assessment".[35]

6.2 Orthodox opposition: resisting or adapting to the dominant frame?

While the overwhelming parliamentary majority shows its adherence to the dominant frame, and voices its support for an anti-discrimination law, the Dutch parliament also harbors a clearly identifiable pocket of resistance. This opposition consists of three orthodox Protestant factions, the Reformed Political Party (SGP), the Reformed Political Federation (RPF), and the Reformed Political League (GPV); all three of which are staunch critics of the law and its underlying philosophy, and together occupy only six out of 150 parliamentary seats. Although this means they do not pull a lot of weight in quantitative terms, analyzing these factions' statements is still very meaningful when studying conflicts and shifts between frames. For one thing, this will show that the equality-based frame is not the only perspective that is brought to the fore, and that one therefore cannot speak of an absolute or definite egalitarian dominance.

To be fair, the liberty-based frame is far from the prevailing perspective, and proponents of such a subordinate frame are generally faced with the dilemma described in the previous chapter: either the opposition resist the dominant frame by counterposing their own perspective, which means their

33 "Op zichzelf nodigt dit uit tot de vraag, of met nadere wetgeving geen invulling moet worden gegeven aan dit grondwetsartikel" (*Handelingen II* 1985/86, p. 312).

34 Minister Korthals goes even further: according to the VVD minister, the specific prohibition of discrimination - which constitutes the second article of the right to equal treatment - already demands a further legislative elaboration because of its very meaning (*Handelingen II* 1985/86, p. 329).

35 "Gezien het belang van de zaak, menen wij toch dat het noodzakelijk is voort te gaan. Nog sterker gezegd: wij zien hiertoe ook wegen. Nu is slechts een tussenstand opgemaakt" (*Handelingen II* 1985/86, p. 328).

views remain consistent but are also considered irrelevant or illegitimate by the dominant majority; or they adopt the frame, which may bring more legitimacy and influence, but which also entails the risk of undermining and even changing their original position or aims.

Initially, the orthodox Protestant factions mainly criticize the rise of the egalitarian perspective, offering clear endorsements to the competing liberty-based frame of religious freedom. This frame offers a very different storyline than that of its egalitarian counterpart, centering not on the situation of discriminated citizens but rather on the plight of (orthodox) Christian minorities. RPF's Meindert Leerling furthers this storyline when discussing the commotion caused by the pre-draft of 1981:

> "Citizens who - to speak with the apostle Paul - wanted to live 'a quiet and calm life', felt threated in their functioning in society. They saw crisp and clear that the pre-draft [of 1981, LN] was an ideological attack on the Christian mores and the Christian liberty. That hurts, especially when it concerns citizens that have been so deeply connected with the historical pattern of tolerance of the Dutch nation."[36]

The allusion to the uniquely special nature of religion is undeniable - in this case focusing on the unique mark it left on Dutch society and its tradition of tolerance -, and the statement clearly expresses the liberty-based assessment of the state as a potential threat to (religious) societal groups. The latter view is also intimately related to a distinctive liberty-based view on competence; a view which is also expressed by the orthodox factions in a few instances, with SGP's Henk van Rossum stressing that there are "limits to the possibilities" of addressing this "clearly political problem", and that these limits are imposed by "God's word" which provides "clear guidelines for personal as well as social life".[37] He concludes that the Cabinet has now experienced this for itself, which, in his eyes, is an important result in itself. RPF's Leerling professes to a similar

36 "Burgers die - om met de woorden van apostel Paulus te spreken - 'een stil en rustig leven' wilden leiden, voelden zich in hun maatschappelijk functioneren bedreigd. Zij voelden haarscherp aan dat het voorontwerp in elk geval ideologisch een aanval was op de christelijke zeden en de christelijke vrijheid. Dat doet pijn, zeker bij burgers die zich zo intens verbonden weten met het historische tolerantiepatroon van de Nederlandse natie" (*Handelingen II* 1985/86, p. 262).

37 "Het gaat hier om een duidelijk politiek probleem, waarbij het kabinet ook ervaren heeft dat er grenzen aan de mogelijkheden zijn. Ik denk dat het op zichzelf al een uitkomst is dat men dat ziet. Het gaat om een ethisch en een ethisch godsdienstig probleem en Gods woord geeft zowel voor het persoonlijke als voor het maatschappelijke leven duidelijke gedragsregels" (*Handelingen II* 1985/86, p. 326).

stance, and states that "not the rules of the European Community are decisive, but the bible, the authoritative word of God that provides the norms to assess human behavior".[38] In these statements, the Calvinism from which these Protestant factions originate clearly shines through.

Speaking of these origins: the Reformed Political Federation also refers to the protection of 'sphere sovereignty',[39] the neo-Calvinist principle employed by Abraham Kuyper. The notion itself already suggests a clear communal focus when it comes to the right of religious freedom. The liberty-based (and Calvinism-inspired) view on the question of rights can also be found in the few instances where the distinctive nature of religious freedom is implied, either because of the historical importance mentioned earlier or because of the weight of its obligations – SGP's Van Rossum peaks of a community for whom "the godly command is the highest norm of ethical reasoning and behavior".[40] Given this presumed distinctiveness, the orthodox factions push the limits of the abovementioned sovereign spheres, thus hoping to maximize the scope of the communal right to religious freedom. Not only schools should be protected, RPF's Leerling argues, "but also hospitals, centers for the elderly, broadcasting organizations, political parties et cetera".[41] Similarly, the SGP faction above all strives to protect Christian groups and their "own facilities like schools, elderly centers et cetera" against government coercion.[42]

This insistence on the maximization of (communal) religious freedom stems from a more fundamental disagreement with the equality-based frame on rights, about the desirability of establishing horizontal effects of rights like non-discrimination. As noted earlier, it is this horizontal effect which makes friction between constitutional rights more frequent and more pronounced, and drives home the egalitarian point that religious freedom is unavoidably limited by the rights of other citizens – a stance that is fundamentally at odds with the liberty-based frame's guiding principle of non-interference. It is in this light that the GPV refers to criticism that the pre-draft provoked in orthodox Christian communities, arguing that this draft did not adequately settle the ensuing conflicts between constitutional rights, and that *any*

38 "Niet de EG-bepalingen of de rechten van de mens zijn maatgevend, maar de bijbel, die ons als het gezaghebbende woord van God de normen aangeeft ter toetsing van het menselijke gedrag" (*Handelingen II* 1985/86, p. 261-2).

39 "Soevereiniteit in eigen kring zou je dat moeten noemen" (*Handelingen II* 1985/86, p. 262).

40 "Voor hen is het goddelijk gebod de hoogste norm voor ethisch denken en handelen" (*Handelingen II* 1985/86, p. 271).

41 "het gaat dan niet alleen om scholen, maar ook om ziekenhuizen, bejaardencentra, omroeporganisaties, politieke partijen enzovoorts" (*Handelingen II* 1985/86, p. 262).

42 *Handelingen II* 1985/86, p. 271.

attempt at a general anti-discrimination law would contain such fatal flaws.[43] And it is in this light that the RPF's Leerling proclaims that "in my faction's opinion, constitutional rights only include the rights of the citizens against the government".[44]

Instead of focusing on horizontal relations (between rights, between citizens), then, the orthodox Protestant parties emphasize the vertical relation between citizen and state. Here it becomes clear why these are truly two opposing frames, since each of them offers a fundamentally different lens - a 'vertical' or a 'horizontal' lens - through which one can look at the issue at hand, each of which shines a light on aspects that the other occults. It is this unavoidable bias that can explain how a faction like the GPV argues that a general anti-discrimination law is superfluous, with GPV's Gert Schutte posing the rhetorical question: "does the direct effect of article 1 of the Constitution together with similar international legal provisions not offer sufficient legal protection?"[45] If one, like the orthodox parties, does not see 'horizontally', there is only a 'vertical' matter of concern, namely the protection of the liberty of (religious) citizens vis-à-vis the state.

Employing this perspective also means that the ('horizontal') harm inflicted on others as a result of the ('vertical') protection of religious freedom is more easily overlooked, diminished or even denied. The latter happens in statements like that of SGP's Van Rossum, who completes the previously discussed statement that "the Godly command is the highest norm of ethical reasoning and behavior" with the assertion that "this godly command can never have a discriminating meaning".[46] The weight of religious obligations - as the highest ethical norm - is referred to here to categorically elevate religious interests above those affected by the behavior that flows from these obligations. Only in one instance, the GPV faction comes close to admitting that certain harms

43 *Handelingen II* 1985/86, p. 262.

44 "Naar de mening van mijn fractie omvatten grondrechten uitsluitend rechten van de burger tegenover de overheid" (*Handelingen II* 1985/86, p. 262).

45 "Biedt de rechtstreekse werking van artikel 1 van de Grondwet samen met vergelijkbare internationaal - rechtelijke bepalingen niet een voldoende rechtsbescherming?" (*Handelingen II* 1985/86, p. 263).

46 "Voor hen is het goddelijk gebod de hoogste norm voor ethisch denken en handelen en dat bijbelse gebod kan nimmer een discriminerende strekking hebben" (*Handelingen II* 1985/86, p. 271). Elsewhere, he similarly argues that "[if] people live want to live according to [God's word] then this can never be discriminating" – what is more, "[t]he bible also features passages about people with homophilic orientation" ["Indien mensen daar naar op grond van levensovertuiging willen leven is dat toch nimmer discriminerend. Ook over gedragingen van mensen met een homofiele gerichtheid komen passages in de Bijbel voor"] (1985.10.02., 326).

might indeed be sufficiently severe to override religious freedom, when GPV's Gert Schutte questions whether the discriminatory treatment of homosexuals amounts a breach of the criminal code's threshold of endangered public order and safety:

> "Might this be mainly a matter of expressive and symbolic importance? Are there really structural, harrowing forms of unequal treatment in this country that can only be remedied with government measures? I do not believe so."[47]

The interpretation of this threshold resembles the way the compelling state interest criterion is wielded in the liberty-based theories of religious freedom described in Chapter 1; theories in which religious freedom can never be curtailed save in the most extreme cases, which in turn are defined in a way that only structural and fundamental threats to (vaguely defined) safety and fundamental rights qualify.

At the same time, Schutte here dips his toes in egalitarian waters by at least identifying some type of situation - however remote - in which curtailment of religious freedom can be seen as proportionate. This is perhaps the reason why the statement, despite falling on deaf ears with the other factions, elicits a response from cabinet members during the next day of the debate. VVD-minister Korthals Altes, for example, responds to Schutte's claim saying that "I believe, yes, I am sure that there is much aggression against homosexuals. … So there have to be possibilities to counter the incitement of this [discrimination]".[48] By invoking the threat or risk of physical aggression - the category of safety harm discussed in Chapter 4 - the minister suggests that public order and safety are in fact at stake and that, as the GPV faction also seemed to imply, this is a sufficiently weighty reason to delimit religious freedom.

The Cabinet also discards the liberty-based storyline that underlies the orthodox factions' criticism of the looming anti-discrimination law as such. Reacting to the claims that such legislation is designed to oppress Christian minorities, minister of the interior Koos Rietkerk (VVD) explicitly reframes the rationale behind the law:

47 "Gaat het hier wellicht vooral om een zaak van expressieve en symbolische betekenis? Is er in het land echt sprake van structurele schrijnende vormen van ongelijke behandeling, die alleen met nieuwe overheidsmaatregelen aan te pakken zijn? Dat geloof ik niet" (*Handelingen II* 1985/86, p. 263).

48 "Ik geloof, ja ik weet wel zeker dat er veel agressie bestaat tegen homoseksuelen en tegen discriminerende gedragingen. Er moeten dus mogelijkheden komen om het aanwakkeren daarvan tegen te gaan" (*Handelingen II* 1985/86, p. 318).

> "[A]nti-discrimination regulations do not spring from intolerant views from the majority about certain deep-rooted religious or ideological convictions. ... No, these regulations instead focus on concrete and serious forms of discriminatory treatment in our society."[49]

This proves just how central the interests of discriminated citizens were in this debate – which is not surprising given that the (postponed) Equal Treatment Law was the formal impetus of the discussion to begin with. And so, with their attempts to impose their frame proven fruitless, the orthodox Protestant parties also try to grasp other opportunities to influence the political (dis)course. They do this by hitching on to the dominant frame – a strategy that also comes with its own risks. In the context of this discrimination debate, for example, factions like the SGP try to assure the parliament that they too oppose discrimination:

> "The legislator cannot tolerate real discrimination and therefore has to prohibit it. ... Let us prevent, however, that the actions of the legislator leads entire communities into oppression in the name of tolerance."[50]

It is obvious that the equality-based view is mainly invoked here as a disclaimer - 'of course I am against discrimination, but...' - which is primarily meant to lend credibility to the subsequent criticism of an anti-discrimination law. Significantly, this criticism itself is also packaged in an egalitarian-friendly way, invoking principles of tolerance that in turn suppose the state's competence as well as its benign intentions. At the same time, these principles are mainly invoked in order to point to a paradox - promoting tolerance leads to less tolerance -, with the 'real' intolerance primarily being caused, and not remedied, by the law. The GPV factions presents its own version of this argument, when it poses that "whoever wants to impose a very specific model of tolerance on society, actually puts that society under a dangerous strain. This

49 "Zulke anti-discriminatievoorschriften komen niet voort uit intolerante meerderheidsopvattingen jegens bepaalde diepgewortelde religieus-levensbeschouwelijke overtuigingen. ... Nee, die voorschriften richten zich dan op in onze samenleving bestaande en concrete ernstige vormen van discriminerende behandeling" (*Handelingen II* 1985/86, p. 315).

50 "De wetgever mag echte discriminatie niet dulden en dus moet hij die verbieden. Veel méér kan een wetgever ook niet doen. Laat ons echter tezamen verhoeden, dat het handelen van de wetgever ertoe leidt dat in naam van de tolerantie hele bevolkingsgroepen in de verdrukking komen" (*Handelingen II* 1985/86, p. 271).

has been shown to be the case".[51] Looking at arguments like these, one cannot help but notice the resemblance with what Albert Hirschman described as a typical conservative reaction to progressive initiatives, namely the perversity thesis: The argument that attempts to improve society in a certain way only exacerbate the condition one wishes to remedy.[52]

Viewed from the perspective of frames of religious freedom, we can see these statements as attempts to (re)interpret the meaning and implications of the equality-based frame. And these attempts are not only limited to principles such as tolerance, but also notions that are more central to the equality-based frame, such as discrimination. The adjective 'real' in the previously discussed SGP quote already hinted at the fact that the orthodox Protestant factions held a different interpretation of this notion than is common among the other parties. They find an ally in the RPF faction, which similarly suggests that a more limited interpretation of discrimination would be adequate. Could the prime minister indicate, Leerling asks "what precisely he means by the term 'discrimination', which in the opinion of my faction is not seldomly used in an inappropriate way".[53] The orthodox factions clearly seize on the ambiguity of the equality-based view - an inherent ambiguity that was already identified in the theoretical part of this thesis - in order to give their own spin on what counts as unjustified unequal treatment.

6.3 Egalitarian ambiguity: (which) equality of rights?

The inherent ambiguity of the equality-based frame most prominently comes to the fore when the various parliamentary factions speak out about the equality of rights; a discussion which illustrates not only the various strategies that can be employed by parties opposing the dominant frame, but also shows how also secular proponents of the law may have different assessments of this equality and its possible implications. To start with, on both sides of the ideological divide there are parties that advocate a categorical priority of their favored right. On the one hand there is SGP representative Van Rossum, stating

51 "Dat is de paradox van dit onderwerp. Wie een zeer specifiek tolerantiemodel aan de samenleving wil opleggen, die zet die samenleving juist onder een gevaarlijke spanning. Dat is wel gebleken" (*Handelingen II* 1985/86, p. 262).

52 Hirschman 1991, 11.

53 "Wil hij ook aangeven, wat hij precies verstaat onder het begrip 'discriminatie', dat naar de mening van mijn fractie niet zelden te pas en te onpas wordt gebruikt?" (*Handelingen II* 1985/86, p. 261).

that "our faction is of the opinion that, in case of conflict with Article 1, the traditional constitutional rights deserve a certain priority, and that these traditional rights, that were often secured after a hard struggle, can only be adjusted by the constituent power".[54] On the other hand, there is the Pacifist Socialist Party (PSP) whose representative Wilbert Willems complains that the Cabinet has not resolved "the issue of constitutional rights": "Does Article 1 have priority over rights such as the freedom of education or do they have equal status?".[55] In a similar rebuke, the Communist Party of the Netherlands states:

> "The Cabinet does not dare to choose between constitutional rights. I wonder why. It is surely very clear that there is only one Article 1. ... It is clear that, at the time, it was deliberately meant as the first article. You could almost say that it has a certain primacy. At the time, the minister of the Interior called it the crowning glory of the constitutional debate."[56]

This plea for Article 1's primacy draws an immediate response from the orthodox Protestant side, when GPV's Schutte objects that this presentation of the constitutional history is very selective: The minister of the Interior had indeed praised the establishment of Article 1 in a speech, he says, but before that "it was expressed many times that the place of Article 1 was not meant to determine a hierarchy among the constitutional rights".[57] It seems like the assertive stance of the Communist Party regarding the priority of non-discrimination compels the orthodox Protestant faction to invoke an undeniably egalitarian precept here - namely the equal status of rights - even though it is primarily meant to safeguard the freedom of religion and education.

54 "Inzake de grondrechten is onze fractie de mening toegedaan dat de traditionele grondrechten bij een conflictsituatie met artikel 1 van de nieuwe Grondwet een zekere voorrang toekomt en dat wijziging van die traditionele, menigmaal in noeste strijd verworven grondrechten èn hun interpretatie slechts door de grondwetgever kan gebeuren" (*Handelingen II* 1985/86, p. 326).

55 "Staat artikel 1 nu boven bijvoorbeeld de vrijheid van onderwijs of is er sprake van een nevenschikking?" (*Handelingen II* 1985/86, p. 270)

56 Het kabinet durft geen keuze te maken tussen grondrechten. Ik vraag mij af waarom niet. Het is toch heel duidelijk dat er maar één artikel 1 is. ... Het is duidelijk dat dit indertijd bewust als eerste artikel is bedoeld. Je zou haast kunnen zeggen dat dit een soort van primaat heeft. De minister van Binnenlandse Zaken noemde het indertijd de kroon op het werk in het grondwetsdebat" (*Handelingen II* 1985/86, p. 269).

57 "U citeert nu inderdaad de feestrede die de minister van Binnenlandse Zaken heeft gehouden aan het eind van de behandeling. Daarvoor is echter vele malen uitgesproken dat de plaats van artikel 1 niet bedoelt aan te geven een rangorde in de grondrechten" (*Handelingen II* 1985/86, p. 269).

And the GPV faction is not alone in this stance, and finds itself in rather good company. It is Interior minister Rietkerk (VVD) who, during the following day of debate, responds to various pleas and questions by succinctly stating that "[t]he history of the Constitution, in the event of a conflict between different fundamental rights, provides no basis for a hierarchy of fundamental rights." And regarding the specific pleas of the SGP and CPN factions, he remarks:

> "To Mrs. Eshuis [CPN, LN] and Mr. Van Rossum [SGP, LN] I would like to say that neither the place (whether at the front, in the middle or at the back of the chapter on fundamental rights), nor the age of the fundamental rights is a criterion for determining the relative value of these fundamental rights."[58]

This legal exegesis falls on deaf ears in the SGP faction, which persists in its plea for a "certain priority" for traditional rights like the freedom of religion.[59] The CPN, on the other side, now states that it agrees with the minister that the relative weight of fundamental right needs to be determined in specific cases. The faction still tries to get its way, however, by pointing to cases where the judge ruled in favor of the right of nondiscrimination and asking, rather rhetorically, whether the judge has ever ruled in favor of the freedom of religion.[60] But the most glaring attempt to stretch the boundaries of the equality of rights is made by the GPV's Schutte, who responds to Rietkerk by stating:

> "The minister of the Interior has rightly pointed to the absence of a hierarchy in the constitutional rights that could be derived from the constitutional history. At the most, we could ask the question whether the classical constitutional rights, that have traditionally been in force, deserve to occupy a certain position based on their old age."[61]

58 "Tegen mevrouw Eshuis en de heer Van Rossum wil ik zeggen dat noch de plaats (of die nu voor, in het midden of achter in het hoofdstuk over de grondrechten staat), noch de ouderdom van de grondrechten een criterium is voor de bepaling van de onderlinge waarde van die grondrechten" (*Handelingen II* 1985/86, pp. 316-317).

59 "... zekere voorrang ..." (*Handelingen II* 1985/86, p. 326).

60 *Handelingen II* 1985/86, p. 317.

61 "De minister van Binnenlandse Zaken heeft er terecht op gewezen dat er geen rangorde van grondrechten kan worden ontleend aan de geschiedenis van de behandeling van de grondwetsherziening. Hooguit zouden wij de vraag nog eens onder ogen kunnen zien of de klassieke grondrechten die van oudsher van kracht zijn op grond van hun ouderdom een bepaalde positie innemen" (*Handelingen II* 1985/86, p. 323).

Statements like these underline the ambiguity and the inner tensions of the equality-based frame on rights. Apparently, it is not considered to be a contradiction to uphold the equality of rights and simultaneously propagating a 'certain position' for one of these rights, just like it is perfectly obvious to the CPN that it can agree with letting the judge decide in concrete cases, while at the same time suggesting that each of these cases can and should only be settled in favor of the right of nondiscrimination. What this shows is that there is ample room for disagreement within the equality-based frame.

In fact, even the minister that is supposed to embody the constitutional tatus quo, the minister of the Interior Rietkerk, tends to favor a specific way of balancing the conflicting constitutional rights. While the minister repeatedly stresses the equality of rights - by stating, up until the end of the debate, that "all [constitutional] norms should apply" and that we therefore cannot say that "one [norm] is still a bit more important than the other, and should prevail over the other"[62] - he also clearly advocates a prevalence of nondiscrimination over religious freedom. Given its scope and purport, he says, anti-discrimination legislation is general, and this "should also not be detracted from by religious or philosophical institutions" – or, as he reformulates, "I believe that religious and philosophical institutions also should not be allowed to make unjustified distinctions".[63] He also argues this by alluding to the unavoidable limitations that constitutional rights mutually impose on each other. In his words: "I believe that civil society organizations, in rightfully exercising their freedom, should be aware of the limitation in relation to the rights of others."[64]And so, if any conflict ensues between constitutional rights, "it is up to the legislator to solve this problem".[65] His VVD colleague Korthals Altes largely argues in the

62 "Als wij met elkaar als grondwetgever tot de conclusie komen dat in de Grondwet een aantal essentiële normen verankerd moet worden, dan behoren alle normen te gelden. Niet gesteld mag worden dat de één toch een beetje belangrijker is dan de andere en boven de andere uitgaat" (*Handelingen II* 1985/86, p. 327).

63 "Ik wil niet in casuïstiek vervallen, maar het komt mij voor dat non-discriminatiewetgeving, gezien de strekking ervan, algemeen is. Daaraan mag ook door levensbeschouwelijke instellingen geen afbreuk worden gedaan. ... Ik heb het daarbij dan over discriminatie als daar is het maken van ongerechtvaardigd onderscheid. Ik vind dat ook levensbeschouwelijke instellingen een dergelijk onderscheid niet mogen maken" (*Handelingen II* 1985/86, p. 317).

64 "Ik vind dat maatschappelijke organisaties bij het terecht uitoefenen van hun vrijheid, zich bewust moeten zijn van de begrenzing ten opzichte van rechten van anderen" (*Handelingen II* 1985/86, p. 327).

65 "Voor zover deze spanning er echter wel is, is het aan de wetgever om die problematiek tot een oplossing te brengen" (*Handelingen II* 1985/86, p. 318).

same vein, but is ultimately less reluctant to acknowledge that, in specific cases, "a hierarchy [between fundamental rights ... can be expressed".[66]

6.4 An omen of things to come

Confronted with a dominant equality-based frame, the orthodox Protestant factions share a clear premonition of what is to come. According to them, the debate should be seen as a mere "matter of delay" (RPF),[67] a "first skirmish" and a "bad omen" for the future (SGP).[68] And indeed, the Christian-democratic prime minister himself has spoken of a "provisional assessment", and has voiced his support for the further development of an anti-discrimination law. Minister Rietkerk shared this assessment, we saw, and did not rule out that such a law would express a certain hierarchy of fundamental rights.

But it is not only the statements of these cabinet members - or those of any other proponent of an anti-discrimination law - that gives an indication of future dynamics between the liberty- and equality-based frame. Whether they would admit it or not, the orthodox factions themselves have also shown first signs of being lured into a more egalitarian perspective. First implicit allusions to the state's sovereignty have been made, and the advance of the right of non-discrimination has compelled the GPV faction to cast itself as a defender of the equal status of rights.

What is more, the fervent (albeit qualified) endorsement of the fight against discrimination forces factions like the SGP to follow up on their words and convert them into actions. After initial skepticism about any government measure against discrimination, the later stage of the debate sees Van Rossum stating the following:

> "Naturally we are also against all unauthorized distinction on grounds of objective norms. If the minister of Justice wants to do something about that, we can discuss this with the minister at the appropriate time."[69]

66 "[A]ls het gaat om het regelen van rangorden, [kan] dit in specifieke gevallen van wetgeving tot uiting ... komen" (*Handelingen II* 1985/86, p. 329).

67 "Het is een kwestie van een uitschuifoperatie" (*Handelingen II* 1985/86, p. 323).

68 "[V]oorpostengevecht", "[S]lecht voorteken" (*Handelingen II* 1985/86, p. 270).

69 "Uiteraard zijn ook wij tegen alle ongeoorloofd onderscheid op grond van objectieve normen. Als de minister van Justitie daaraan wat gaat doen, kunnen wij dat op het daarvoor geëigende moment met de minister bespreken" (*Handelingen II* 1985/86, p. 326).

This shows how hitching on to the dominant frame may (initially) work as an effective disclaimer, but is also accompanied by its own risks. In the end, SGP's constructive approach does seem to entail a shift in their position, with their disclaimer ("naturally we are also against…") this time followed up with a concrete proposal to talk about specific measures. This is also how it is interpreted by prime minister Lubbers in his summary of the debate, where he concludes that Van Rossum's "fundamentally positive attitude" towards a discussion about amendments to the criminal law constituted "a small victory in this debate".[70] Such concessions, little as they may be, are also an omen of things to come in the following debates.

6.5 Conclusion: the equality-based frame on the rise

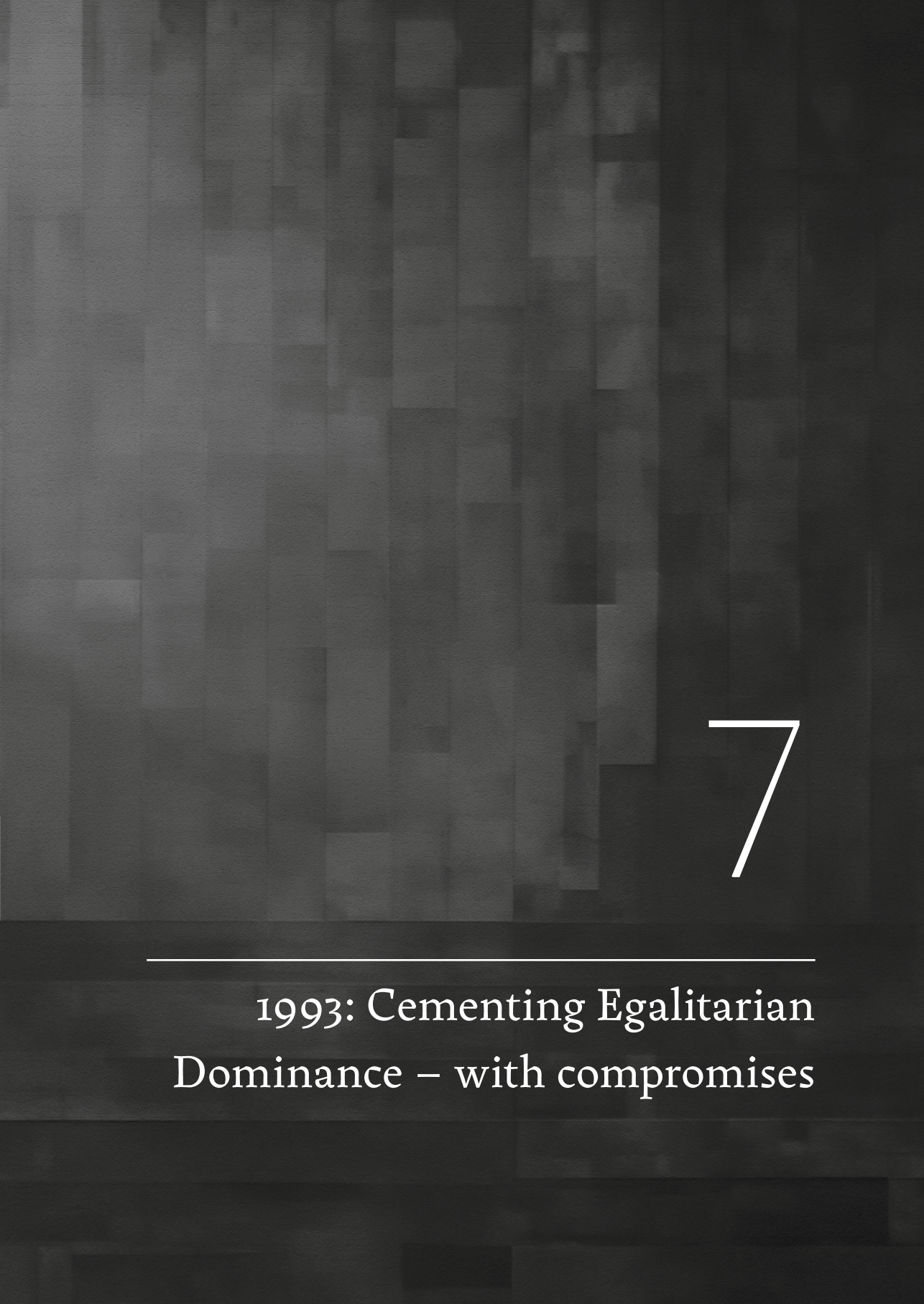
In spite of all the hesitance and trepidation that led to the postponement of the anti-discrimination bill, the underlying egalitarian perspective was as vital as ever during the debate of 1985. Confirming the growing dominance of this framing were the ubiquitous endorsements of multiple egalitarian tenets - from its assertion of state competence to the equality of rights and the prevention of a variety of disproportionate third-party harms (safety harm, opportunity harm, economic harm and dignity harm) -, all held together by a storyline in which the prolonged suffering of discriminated citizens calls for strong measures from the state. Even the hesitant CDA found this storyline to be irresistible, and showed itself as one of the most fervent supporters of anti-discrimination measures. The debate, therefore, was more about the way or degree in which the equality-based frame should take shape in the law, and less about the need for such measures as such.

Still, this also showed that the institutionalization of equality-based precepts like the equal treatment of individual citizens was not universally deemed self-evident or obvious. For one thing, the contributions of the orthodox Protestant factions showed that a distinctly liberty-based perspective alternative was still available. The ensuing conflict between the two frames underlined that the egalitarian dominance was far from absolute; what is more, this vocal liberty-based resistance - also expressed by the societal criticism of the 1981 pre-draft - was arguably what made the CDA stop in its tracks and

70 "Ik meende bij de geachte afgevaardigde de heer Van Rossum een positieve grondhouding te bespeuren tegenover een eventuele bespreking hier betreffende het Wetboek van Strafrecht. Dat is andermaal een klein stukje winst in dit debat" (*Handelingen II* 1985/86, p. 329).

prevent the introduction of an anti-discrimination bill. At the same time, the reasons for this hesitance were not only framed in liberty-based terms, as concerns about curtailing religious freedom as such, but often took the shape of egalitarian worries about the implications for the equal status of rights.

In the same way, the rise of the equality-based frame did not only provoke wariness and liberty-based criticism in the orthodox factions; they also felt compelled to phrase at least some of their criticism in egalitarian terms, which shows to which extent the equality-based frame had begun to structure the debate. Perhaps they also sensed that the Cabinet's decision was never meant to be indefinite, and merely amounted to postponing the evitable. As the rare instances in which the orthodox factions do venture into egalitarian territory show, however, the various components of the equality-based frame turned out to be potentially more malleable than expected, which suggests that the debate about the meaning and implications of this frame is all but over.



7

1993: Cementing Egalitarian Dominance – with compromises

Although in 1985 it had already seemed inevitable to all parties involved, it would still take almost a decade - and two more cabinets headed by CDA's Ruud Lubbers - until an anti-discrimination bill was finally sent to the parliament for approval. Since the 1985 debate, the period of 'Lubbers I' (1982-1986) had seen coalition partner VVD trying (and failing) to introduce a broader anti-discrimination law. After this, the CDA-VVD Cabinet 'Lubbers II' (1986-1989) as well as the Labour Party (PvdA) undertook similarly unsuccessful attempts in the later eighties.[1] Three times did prove to be a charm, however, as 'Lubbers III' (1989-1994) finally managed to get a bill to parliament, where it was debated and approved in February 1993.

At that time, the Christian Democrats had been riding high for over a decade under the leadership of Lubbers. For three successive elections, the party had managed to collect around one third of the votes, thus partially reversing the gradual decline that had affected its predecessors. For Lubbers' third cabinet, however, the CDA teamed up with a considerably stronger partner: Where the liberal-conservative VVD had only half of CDA's number of seats in the previous cabinet, the Labour Party (PvdA) now enjoyed an equal share of electoral success. Together, they controlled more than two-thirds of the parliament. And whether it is because of this more evenly balanced power or because of ideological shifts, the two governing parties managed to break the deadlock on the anti-discrimination bill. They did this by striking a compromise: The Christian-democrats overcame much of the hesitance they had displayed in 1985 regarding the government's competence in matters of (religiously inspired) discrimination, and the Labour Party allowed for what seemed like significant religious exemptions.

In short, the law entailed a so-called 'closed system', where unequal treatment ('making distinctions') on a broad array of grounds is in principle prohibited, but where exemptions where nevertheless allowed when 'objective justifications' applied.[2] The freedom of religion and the separation of church and state, for example, were invoked to justify a general exemption for core-religious institutions (like churches) and their clergy – or what is generally called the ministerial exemption. Furthermore, the bill allowed religious

1 The broad bill drafted by Cabinet Lubbers II was in fact submitted to the parliament (*Kamerstukken II* 1987/88, 20501, nr. 1-2) but was never debated in a plenary fashion, as it was swamped with criticism in a first preliminary discussion. PvdA's proposal for a narrower bill (*Kamerstukken II* 1986/87, 20065, nr. 1-2) got further, and was amended after receiving its official evaluation by the Council of State, but ultimately lacked the support of the governing CDA and VVD (Swiebel 2020, 297).

2 *Kamerstukken II* 1991/92, 22014, No. 3, p. 3.

organizations in general to make distinctions in their staff policies provided that these were necessary for the fulfilment of the function in question, and religious schools specifically if these distinctions were needed to realize the school's ethos – exemptions which were justified by referring to the freedom of religion and (specifically) the freedom of education.[3] But, as the law stated, such distinctions could not be merely based on the 'sole fact' of characteristics like gender and sexual orientation, but would only be justified if there are so-called 'additional circumstances' at play. This would become known as the 'sole fact construction'. What could be classified as either a sole fact or additional circumstances, however, was largely left unspecified; it was primary left to the so-called Equal Treaty Commission, established by the same Act, to give meaning to these criteria through official (but non-legally binding) rulings on specific cases.

The vagueness of the sole fact construction is arguably what enabled the compromise between the CDA and the PvdA, as its openness for various interpretations managed to conceal disagreements between the governing parties. But this ambiguity also made the construction a prominent target for the opposition's criticism. Especially the secular parties - the liberal-conservative VVD, liberal-democratic D66 and the recently established green progressive party GroenLinks (a merger of the PSP, EVP and PPR) - were critical of the sizeable room for discrimination that the sole fact construction seemingly allowed. The orthodox Protestant parties, on the other hand, saw their greatest fears take a concrete shape with this imminent law, and were staunch opponents of any such legislation to begin with. The new law therefore also marked a (further) separation of minds between on the one hand the principled orthodox parties - which at that moment were still like three peas in a pod, politically and ideologically speaking[4] - and on the other hand the more pragmatic Christian democrats, whose success was due more to their socio-economic policies which attracted an unprecedented share of secular voters.[5] The debate of 1985 had already seen the CDA voicing its relative support for anti-discrimination legislation, and so the 1993 debate largely followed the same patterns – at least at the surface. Again, the secular parties were pitted against the (orthodox) Christian parties, with CDA attempting to occupy a middle ground.

3 *Kamerstukken II* 1991/92, 22014, No. 3, p. 7.
4 Vollaard 2010, p. 182.
5 Voerman 2011, 13, 26, 27.

Underneath this surface, however, significant changes did take place. As this chapter reveals, the (imminent) establishment of the Dutch Equal Treatment Act was accompanied by a fundamental shift in Dutch politics when it comes to underlying views on religious freedom. In frame-theoretical terms, the new law would amount to the (further) institutionalization of the equality-based frame. Besides the fact that the law decreed the establishment of the Equal Treatment Commission - institutionalization in its most literal and obvious form -, it also reflected various egalitarian tenets on questions of competence, rights and interests (see Section 7.1). The latter would shape the boundaries and the course of the debate in such a way that the egalitarian perspective was even more dominant than in 1985. The question is, how would this affect the various factions; to which degree would the new situation meet their egalitarian ideals, and how would it embolden them to argue for further advances? And what would the reaction of the orthodox Protestant parties be – the only parties that voted against the new bill. Would they double down on their liberty-based criticism, or would they feel compelled to defend their position in mainly egalitarian terms? Would the equality-based frame be sufficiently ambiguous to also accommodate their critical Calvinism-inspired perspective on the Equal Treatment Act, or would the dominance of this frame settle the discussion once and for all?

7.1 Egalitarian dominance cemented: the significance of the Equal Treatment Act

What was it about the Equal Treatment Act that riled up its critics, but simultaneously managed to set the boundaries in which this critical debate was waged? If we look at the significance of the law from the perspective of liberty- and equality-based frames of religious freedom, it quickly becomes clear that it entailed, to a large degree, the institutionalization of the latter egalitarian perspective. Where egalitarian dominance had already been obvious in 1985 from the way the equality-based frame structured the debate, the fact that this frame in many aspects was now laid down in law meant that it achieved an even higher level of dominance. At the same time, this newly instituted egalitarian framework - and especially its religious exemptions - still bore some traces of the previous liberty-based reign.

This somewhat-ambivalent-yet-undoubtedly-egalitarian character of the law is discernable, among other things, in its take on the question of competence. To start with, the very existence of the law obviously underlines

the *Kompetenz-Kompetenz* of the state; it is this liberal-democratic state that draws the line by enforcing a general ban on discrimination. It also implies that this state deems itself competent when it comes to the specific matter of religiously inspired discrimination – thus overcoming its initial hesitance as displayed by the Christian democrats in the eighties. At the same time, the state is relatively modest in this regard, and seems to leave religious organizations with a significant scope of competence themselves. The internal spiritual matters of core religious organizations are left untouched, and religious organizations - especially religious schools - are given room for unequal treatment if they believe their religion demands this. The boundaries that are set here are still undoubtedly egalitarian, however. The bill employs the liberal distinction between public and private to delineate religious spheres of competence, by determining that the ministerial exemption ends when at the moment when "clergy participates in public life" ('maatschappelijk verkeer'),[6] and by generally stressing that the aim of the proposed ban on discrimination is to guarantee that persons "can move freely in public life".[7] And to come full circle, it is the religious organization that needs to provide the proof that certain additional circumstances "are not compatible with [its] ethos and purpose", after which the judge - in other words, the liberal state and its secular law - has the final say.[8]

In a similar way, the Equal Treatment Act also marked the institutionalization of the equality-based perspective on rights. First and foremost, because the ban on discrimination as such institutionalized the egalitarian guiding principle of equal treatment of similarly situated citizens. This realization of

6 "Het wetsvoorstel is evenwel onverkort van toepassing wanneer een genootschap of een geestelijk ambtsdrager op gelijke voet met anderen aan het maatschappelijk verkeer deelneemt" (*Kamerstukken II* 1990/91, 22014, No. 3, p. 7).

7 "In een democratische rechtsstaat brengt de daadwerkelijke erkenning van die waardigheid mee, dat een persoon vrijelijk zijn rechten en vrijheden moet kunnen uitoefenen en zich in het maatschappelijk leven moet kunnen bewegen, zonder dat hij wegens persoonlijke kenmerken en eigenschappen, bijvoorbeeld op grond van vooroordelen of gevoeligheden van anderen, wordt achtergesteld" (*Kamerstukken II* 1990/91, 22014, No. 3, p. 1). On the other hand, however, the bill explicitly recognizes the legitimacy of demands that (religious) employers may place on their employees given the "private character of the certain working relationship" (Art. 5, lid 3) – even though its explanatory memorandum emphasizes that these demands should honor and respect privacy ('persoonlijke levenssfeer') of the employee (*Kamerstukken II* 1990/91, 22014, No. 3, p. 19.).

8 "Overigens zal de instelling zonodig ten overstaan van de Commissie of de rechter moeten kunnen aantonen dat vorengenoemde omstandigheden zich niet verdragen met de grondslag en het doel van de instelling. Het is alsdan uiteindelijk aan de rechter om te beoordelen of in de concrete omstandigheden van het geval een juiste afweging is gemaakt" (*Kamerstukken II* 1990/91, 22014, No. 3, p. 19).

the so-called horizontal effects of the fundamental right of equal treatment also meant that clashes between fundamental rights like non-discrimination and religious freedom would be more frequent, which in turn underlined the inevitable (mutual) limitations of these rights that is so characteristic of the egalitarian fair scheme. In line with this, the Cabinet explicitly admitted that fundamental freedoms like the freedom of education are limited as the result of this law.[9] At the same time, it also admitted that religious freedoms in turn can also restrict non-discrimination's reach (which, again, was visible in the various exemptions incorporated in the law).[10] A similar nuance - or rather ambivalence - was reflected in the application of the egalitarian principle of parity, given that the law treated religious organizations on a par with similar non-religious organizations (and to a certain degree political organizations), but simultaneously granted special privileges to organizations (and even more so to schools) with a religion or a 'philosophy' – thus elevating these organizations above 'regular' employers.

The Cabinet justified the boundaries it had drawn between the competing rights by invoking yet another tenet of the equality-based frame, namely the equal status of rights. In the same vein as Lubbers I had argued in the debate of 1985, the Equal Treatment Act stressed that the "presumption ... has been ... that no ranking of fundamental rights can be derived from their order, wording or age".[11] The bill thus also implied that instituting this general ban on discrimination, at least in this nuanced shape, did not entail a breach of this fundamental equality of rights. These arguments, however, did not sway the Council of State, the constitutionally established advisory board that must be consulted by the Cabinet on any proposed legislation. The Council argued that, among other things, the new bill did not adequately protect and respect the constitutional freedom of education.[12] In its response to this and other reactions, however, the Cabinet recognized that the bill indeed entailed "renewed assessment of the relationship between fundamental rights" like non-

9 *Kamerstukken II* 1990/91, 22014, No. 3, p. 7.

10 *Kamerstukken II* 1990/91, 22014, No. 3, p. 6.

11 "Uitgangspunt daarbij is geweest het standpunt van de grondwetgever dat uit de volgorde, formulering of ouderdom geen onderlinge rangorde van grondrechten is af te leiden" (*Kamerstukken II* 1990/91, 22014, No. 3, p. 6).

12 *Kamerstukken II* 1990/91, 22014, B, pp. 5-7.

discrimination, freedom of religion and freedom of education, thus suggesting that it found this new balance to be appropriate.[13]

In such a recalibration of the relationships between fundamental rights, the question about the underlying interests and their relative weight also became more urgent. In its view on the question of interests, the bill could also be seen as a reflection of the equality-based perspective. Its accompanying explanatory memorandum kicked off with a principled proclamation about human dignity as the law's undisputable foundation: "The constitutional right to equal treatment and non-discrimination stems from the recognition of the personal dignity of every human being."[14] Such a (secular) view of equal human dignity, Chapter 1 and 4 also argued, are squarely egalitarian. The way it was forwarded by the Cabinet, moreover, suggested a line that cannot be crossed: an egalitarian threshold of sorts, albeit one that is immediately nuanced and qualified by specifying that this dignity has to be safeguarded primarily in the public realm – which in turn refers to the liberal-egalitarian view on competence and its private-public distinction. The explanatory memorandum also posits another, similarly fixed-yet-qualified threshold when it states that sexual orientation, which as such (the sole fact) can never be grounds for distinctions, also encompasses expressions and relations of love and sexuality.[15] Following the classification of Chapter 4, this falls squarely within the concentric circle of intimate relationships, and therefore suggests that (certain) liberty-harm outweighs the competing interests of (religious) schools and organizations. The distinction between sole fact and additional circumstances, however, also means that this threshold has a somewhat limited applicability.

Besides these fixed thresholds, the Cabinet elsewhere refers to a third type of interests as a ground for the ban on discrimination, namely the access to services or goods like housing, wellbeing, health care and education. Unequal

13 "De voorstellen van de Algemene wet gelijke behandeling en van de Wet tegen seksediscriminatie, alsmede de reacties en commentaren op deze voorstellen hebben aanleiding gegeven tot een hernieuwde beoordeling van de onderlinge verhouding van de grondrechten op non-discriminatie, vrijheid van godsdienst en levensovertuiging, de vrijheid van vereniging, het recht op eerbiediging van de persoonlijke levenssfeer en de vrijheid van onderwijs (resp. artikel 1, 6, 8, 10 en 23 van de Grondwet), voor zover van belang voor de terreinen die dit wetsvoorstel bestrijkt" (*Kamerstukken II* 1990/91, 22014, No. 3, p. 6).

14 "Het grondrecht op gelijke behandeling en non-discriminatie vloeit voort uit de erkenning van de persoonlijke waardigheid van ieder mens" (*Kamerstukken II* 1990/91, 22014, No. 3, p. 1).

15 "Seksuele gerichtheid ziet op de gerichtheid van een persoon in seksuele en liefdesgevoelens, –uitingen en relaties" (*Kamerstukken II* 1990/91, 22014, No. 3, p. 13).

treatment could result in deprivation of these goods and services: a harm that largely coincides with the category of opportunity harm elaborated in Chapter 4, and one which the Cabinet identifies as more urgent the scarcer the goods and services in question are.[16] This speaks of another egalitarian approach; one that is not based on a strict and (seemingly) straightforward line that cannot be crossed, but rather one, as described in Chapter 2, that involves the application of the principle of equality-as-proportionality. And it is this spirit of proportionality that is also present in the Cabinet's view more generally. Besides the interests underlying the ban on discrimination, the Cabinet in its explanatory memorandum also repeatedly stressed the freedom to put beliefs into practice; an integrity-based interest, in other words, focusing on the congruence between commitment and actions, which the Cabinet mainly applies to religious citizens - practicing religious beliefs in settings like a church or a religious center of the elderly - but which is also beholden to those with political and non-religious philosophical beliefs.

Overall, the bill that was submitted to the parliament was undoubtedly egalitarian, steering away from a perspective on religious freedom rooted in Calvinism and marked by strong Christian movements, from a time when denominational organizations were granted ample freedom to act as their religion dictated. The bill still contained traces of this bygone era, however, and the ensuing parliamentary debate would see some factions continuing to carry the liberty-based torch. At the same time, this small minority would notice all too soon that the new law elevated the egalitarian dominance to a yet higher level, and forced parliamentary factions to relate to this new reality. It would clearly affect the way arguments for and against the law were framed, and would find certain parties emboldened while others struggled to formulate a convincing answer to the changing tides. All of this comes into clear view when we shift our attention to the parliamentary proceedings of the 9th, 10th and 11th of February of the year 1993.

7.2 The surging egalitarian wave: certainty, privacy, liberty and dignity harm

The overwhelming majority of the MP's gathered in the House of Representatives on the 9th of February leave no doubt about it: they are happy - or relieved, rather - that a passable anti-discrimination law has finally arrived. What most

16 *Kamerstukken II* 1990/91, 22014, No. 3, p. 21.

factions also share, however, is a certain disappointment about the specific shape of the Cabinet's bill. For the secular parties, the sole fact construction in particular is a bone in their throat, and they spend most of the debate arguing for its annulment, or at least for an interpretation of this criterion that leaves the scope of this exemption as limited as possible. And as becomes clear, the law itself contains enough leads to strengthen their case. The Equal Treatment Act, as the institutionalization of the equality-based frame, introduces a kind of self-reinforcing logic that is naturally inclined towards further egalitarian advancements – at the detriment of the remaining religious competence and freedoms.

This all comes together in a fairly innocuous notion like that of 'legal certainty'. As frame theory teaches, dominant frames are those tend to be taken for granted. Their dominance can often not be gleaned from principled pleas, but rather from implicit and seemingly neutral catchphrases and terms, which are picked up and uttered repeatedly. In the 1993 debate, legal certainty is one of these terms. It is introduced by the Cabinet in its formal reply to written questions from the various parliamentary factions, where it repeatedly stresses that one of the main aims is precisely to create such legal certainty; certainty, more specifically, about the situation that the teachers (or other unequally treated persons) are in and, correspondingly, certainty about the relationship (or mutual limitation) of the rights that are at stake in this situation. At first glance, legal certainty is used as a rather neutral and technical term here, to address the situation that was created by the constitutional reform of 1983. As Lubbers and minister Korthals argued during the 1985 debate, the inclusion of article 1 in the amended constitution was accompanied with the desire to establish the 'horizontal effects' of rights like that of non-discrimination, which in turn led to constitutional friction with religious freedoms and thus generated the need of clarifying the relations between these rights - the creation of 'legal certainty' - through the establishment of an anti-discrimination law.

But despite its apparent neutral and technical air, the notion of legal certainty has clear normative implications. When the absence of laws or regulations is framed as a lack of legal certainty, implying - as people tend to believe - that creating certainty is a good thing, it tends to pull more and more issues into the jurisdiction of the state. The term itself thus enables a kind of 'competence creep' that is in line with the equality-based view of a competent liberal state and fundamentally legitimate democratic process. Furthermore, when law fails to provide sufficient certainty, which is clearly the case in the

ambiguous sole fact construction, it can be seized upon to criticize this law.[17] Consider, for example, the following plea by GroenLinks' Peter Lankhorst:

> "Today, we are … also talking about fundamental norms. In our opinion, these are norms that must be laid down in the law as sharp as possible, because the legislator has to provide a basis of legal certainty for citizens. If this does not happen, it will be all too easy for people to go to the court, and this can then take several years. Basically, we would not be doing our job properly."[18]

This statements already suggests an equality-based view in the sense that it compels the legitimate legislative power to address the problem of uncertainty, and show its true colors. What the quote does not show is that Lankhorst is speaking of the particular uncertainty faced by homosexual teachers here. This is not surprising, given the context of the anti-discrimination act, but is also illustrates how 'legal certainty' is ultimately interpreted according to such a context, and the 'true colors' of the participants to the conversation – in this case the secular parliamentary majority. While this majority generally takes their interpretation of legal certainty for granted, it is the factions outside this status quo that often have a nose for the hidden normative work done by such deceptively technical terms. It is striking, Van den Berg argues, that the government is so adamant about the need for the law from the perspective of legal certainty,[19] but "legal certainty for whom?", he exclaims; "[a]t least not for Christian organizations and institutions".[20] And Gert Schutte of the like-minded GPV attempts to disentangle the conflicting connotations of the term by stating that "there is only one situation in which the law offers certainty, namely when

17 See for example D66's Louise Groenman's criticism that "[t]he formulated text does not lead to clarity, but creates confusion and legal uncertainty" ["De geformuleerde wettekst leidt niet tot duidelijkheid, maar schept verwarring en rechtsonzekerheid"] (*Handelingen II* 1992/93, No. 46, p. 3420).

18 "Wij praten vandaag echter ook over fundamentele normen. Naar onze mening gaat het daarbij om normen die zo scherp mogelijk in deze wet moeten worden vastgelegd, omdat de wetgever moet zorgen voor een basis van rechtszekerheid voor de burger. Als dit niet gebeurt, gaan mensen al te gemakkelijk naar de rechter en dat kan dan weer enige jaren in beslag nemen. Dan doen wij in feite ons werk niet goed" (*Handelingen II* 1992/93, No 48, p. 3581).

19 For instance, PvdA ministers Ien Dales (*Handelingen II* 1992/93, No. 47, p. 3503, 3505, 3506) and Hedy D'Ancona (*Handelingen II* 1992/93, No. 47, p. 3530) repeatedly raise the issue of legal certainty.

20 "Opvallend was dat van regeringszijde zo werd gewezen op de noodzaak van deze wet, ook uit een oogpunt van rechtszekerheid. Maar rechtszekerheid voor wie? In elk geval niet voor christelijke organisaties en instellingen" (*Handelingen II* 1992/93, No. 48, p. 3578).

the prohibition of making distinctions applies in full. … This is certainty, but is it also legal certainty? For the latter more is needed than a line in the law. For example, also something like justice, reasonableness and fairness".[21] Despite these attempts, however, the orthodox Protestant factions do not manage to put these normative implications of creating legal certainty on the parliamentary agenda, and so are forced to watch the process continue on the same tracks.

In the meanwhile, the secular factions do not only urge the Cabinet to create more legal certainty for discriminated individuals, but also argue what such certainty should look like. They do so by pointing to another element of the bill, namely its references to the liberal private-public distinction, and by molding the malleable notions of 'sole fact' and 'additional circumstances' as they see fit. They criticize the Cabinet's refusal to clearly delineate a legally protected private sphere and, in the case of D66, propose alterations to the bill in order to clarify and emphasize that "the employee can be assured that behavior in the private sphere will be respected by the institution, and will not be subjected to detailed assessment".[22] They also draw the lines themselves, by repeatedly referring to the concrete yet metaphorical boundary of the 'front door'. VVD's Len Rempt-Halmmans, for example, states on the first day of the debate that personal privacy for liberals "definitely includes the way in which one shapes one's love life behind the front door".[23] To her disappointment, her amendment to that effect is eventually rejected, despite her assurances that she does not want to get into the thorny issue about precisely which behavior should be protected: "I am not looking for specific cases. I do not ask whether someone is allowed to wear a pink triangle or whether or not someone may

21 "Er is één situatie waarin de wet zekerheid biedt, namelijk als het verbod tot het maken van onderscheid onverkort geldt. Dan is zulk onderscheid, ongeacht de omstandigheden welke zich daarbij mochten voordoen, verboden. Zekerheid dus, maar ook rechtszekerheid? Voor dat laatste is meer nodig dan een regel in de wet. Bijvoorbeeld ook zoiets als rechtvaardigheid, redelijkheid en billijkheid" (*Handelingen II* 1992/93, No 46, p. 3431).

22 "De leraar Engels kan volstaan met respect voor de grondslag, terwijl van de godsdienst leraar gevraagd kan worden, de grondslag te onderschrijven en onderwijs te geven in de geest van de grondslag. Als dat respect betoond is, moet de werknemer erop kunnen rekenen dat gedragingen in de persoonlijke levenssfeer vervolgens door de instelling worden gerespecteerd en geen deel uitmaken van een nadere beoordeling" (*Handelingen II* 1992/93, No 46, p. 3420).

23 "Daaronder valt voor liberalen zeer beslist de wijze waarop men het persoonlijke liefdesleven achter de huisdeur inricht, voor zover het tenminste geen st rafbare feiten zoals incest betreft" (*Handelingen II* 1992/93, No. 46, p. 3425).

express his sexuality at a school. I only ask ... if it is guaranteed that behind one's own door one may do what one pleases."[24]

Elsewhere, however, the VVD faction does specify the behavior in question to some degree. Rempt-Halmmans refers to the definition the Cabinet has formulated in its explanatory memorandum, defining sexual orientation as encompassing "sexual and romantic feelings, expressions and relationships",[25] and argues that these should be protected completely. This still leaves considerable uncertainty as to what behavior - if any - is precisely protected. To be sure, tucked away in its written reply to the many questions from the parliament, the Cabinet does indeed speak of "*behavior* that is related to one's sexual orientation" as explicitly pertaining to the sole fact, but does not specify this behavior further.[26] Factions like the PvdA try to fill this gap, when Ella Kalsbeek explicitly mentioning "living together" as a (protected) extension of relationships.[27] But even leaving aside the question whether the protected behavior is specified sufficiently, what emerges from these attempts - and the Cabinet's definition as such - is a specific type of interest that should be protected through the anti-discrimination law. After all, sexual and romantic feelings, expressions and relationships all refer to the intimate and close social contacts; the level of intimate and sexual relationships which, as we saw in Chapter 5, are at stake in liberty harms; a serious harm that affects weighty interests.

Given this weight and seriousness, the pleas for the protection of this intimate behavior go hand in hand with arguments for a wider scope of protection. In other words, the 'what' ultimately determines the 'where', with secular factions like the PvdA, but also GroenLinks and D66 clearly going beyond the VVD's 'front door'-criterion – often very explicitly. As Kalsbeek (PvdA) states, "respect for the personal privacy goes beyond and offers more

24 "Ik zoek niet naar casuïstiek. Ik vraag niet of iemand een roze driehoek mag dragen of dat iemand zijn geaardheid al dan niet mag laten blijken op school. Ik vraag slechts van dit kabinet en ook van mevrouw Kalsbeek of wordt gegarandeerd dat men achter de eigen deur mag doen wat men wil" (*Handelingen II* 1992/93, No. 46, p. 3464).

25 *Handelingen II* 1992/93, No. 46, p. 3527.

26 "Die eisen mogen dus evenmin tot direct onderscheid op grond van het enkele feit van de aan die seksuele gerichtheid verbonden gedragingen, te weten het hebben van (homo– of heterojseksuele en liefdesgevoelens, –uitingen en relaties" (*Kamerstukken II* 1991/92, 22014, No. 5, p. 69).

27 "Dat is het complex van gedragingen dat hoort bij het homo– of heterosek– sueel zijn: seksuele gevoelens en liefdesgevoelens, uitingen en relaties, het samenwonen met je partner" (*Handelingen II* 1992/93, No. 48, p. 48, p. 3587).

protection than only behind the front door".[28] Groenman (D66) refers to the same behavior to move the boundary from the front door to another door, namely that of the school:

> "If the sole fact of sexual orientation applies to the orientation of a person in sexual and romantic feelings, expressions of love and relationships, this means that, without restrictions, a homosexual or lesbian teacher or student may be open about his or her sexuality inside any school, and may show his or her orientation in expressions and behavior *outside the school*, also if the latter in the eyes of the competent authority is not in line with the school's foundation and identity? For my faction, the answer to this question is crucial for its final judgement about this legislative proposal" (emphasis added).[29]

And so, even though the Cabinet refrains from drawing clear lines between the public and the private, its own definition of 'sole fact' and the behavior it encompasses - romantic and sexual feelings, expressions and relationships - is seized upon by secular parties to claim protection of a broad private sphere; the prevention of liberty harm can even be said to have fueled claims to stretch this protection even beyond what is normally considered as the private domain. And so, the law offers yet another opportunity for egalitarian-minded parties to go beyond the boundaries that the Cabinet has originally envisioned.

But that is not all. In his attempts to stretch the protection against discrimination, GroenLinks' Peter Lankhorst alludes to yet another interest that the Cabinet had championed: "The essence of human dignity", Lankhorst states, "is that you can be yourself, not only at home but also outside of the house".[30] It was not only the prevention of liberty harm that is mobilized to further the egalitarian cause, then, but also the prevention of dignity harm – a cause which is also cited by the Cabinet as the first and foremost rationale behind the

28 "De minister stelt volgens mij terecht, dat de eerbiediging van de persoonlijke levenssfeer verder gaat en meer bescherming biedt dan alleen maar achter die voordeur" (*Handelingen II* 1992/93, No. 48, p. 3589)

29 "Als het enkele feit van de seksuele gerichtheid ziet op de gerichtheid van de persoon in seksuele gevoelens, liefdesgevoelens, liefdesuitingen en –relaties, betekent dat dan onverkort dat een homoseksuele of lesbische leerkracht of leerling binnen elke school voor zijn of haar aard mag uitkomen en buiten de school in zijn of haar persoonlijke levenssfeer in uitingen en gedragingen van zijn of haar gerichtheid blijk mag geven, ook als dat laatste naar de opvatting van het bevoegd gezag niet in lijn is met de grondslag en identiteit van de school? Voor mijn fractie is het antwoord op deze vraag cruciaal voor haar eindoordeel over dit wetsvoorstel" (*Handelingen II* 1992/93, No. 48, p. 3570)

30 "De essentie van menselijke waardigheid is dat je jezelf mag zijn, niet alleen thuis maar ook buitenshuis" (*Handelingen II* 1992/93, No. 46, p. 3452).

Equal Treatment Act. The interest of human dignity is also eagerly invoked by various cabinet members during the debate, with Hirsch Ballin proclaiming that "[i]t is about human dignity when the constitution and treaties prohibit discrimination",[31] and PvdA-minister Ien Dales arguing that discrimination – she refers specifically to the refusal, based on the characteristic of race, to rent out a room - "touches on human dignity".[32]

By referring to this interest, and this corresponding harm, the Cabinet seems to be biting its own tail, as the protection of dignity is harder to confine to a delineated private sphere than the prevention of liberty harm. In fact, the Cabinet explicitly confirms that it is the participation in social life as such ("maatschappelijk leven") that is at stake here.[33] What is more, the various secular factions invoke dignity to argue against any distinction based on sexuality whatsoever – irrespective of whether this takes place in the private or the public domain. We will discuss these (and other) dignity-centered arguments in more detail later, however, as they are not always as straightforward as they appear to be.

7.3 Liberty-based resistance: swimming against the egalitarian current

Given this surging egalitarian wave, and the overwhelming parliamentary majority that will ultimately vote for the establishment of the Equal Treatment Act, what kind of real opposition remains? As it appears, in the midst of this egalitarian dominance, a small orthodox Protestant minority still holds out against the pressure – or at least makes a serious attempt to. In their contributions to the debate, Meindert Leerling (RPF), Gert Schutte (GPV), and Koos van den Berg (SGP) forward a similar unadulterated liberty-based as their factions voiced in 1985 – which is also not a surprise, given that Leerling and Schutte had also participated in that very same debate. The only difference is that, where these liberty-based claims were still relatively sparse in the eighties, the imminent adoption of the Equal Treatment Act truly opens the

31 "Het gaat dus om de menselijke waardigheid wanneer de Grondwet en verdragen discriminatie verbieden" (*Handelingen II* 1992/93, No. 47, pp. 3513-4)

32 "Natuurlijk kun je met een zekere afschuw denken aan mensen die in de privésfeer zonder goede redenen - je hoort daar wel eens uitlatingen over - andere mensen als mens diskwalificeren op binnen het wetsvoorstel vermelde gronden. Dat raakt de menselijke waardigheid" (*Handelingen II* 1992/93, No. 48, p. 3596).

33 *Kamerstukken II* 1991/92, 22014, No. 3, p. 1.

floodgates. Inspired by their Calvinist roots, the orthodox factions repeatedly rail against the prevailing frame of the beneficent and sovereign liberal state, criticize the egalitarian view on equal and mutually limiting rights, and take pains to emphasize the weightiness of the religious interests that at stake.

Holding the various liberty-based arguments and claims together is a storyline of which the contours had already emerged in 1985, but which is now forwarded with much more fervor, and in more detail. This storyline clearly contrasts with the egalitarian storyline that figured so prominently in the eighties, as it is not the (potentially) discriminated individuals but rather the religious communities that are under threat – and not because the state does nothing, but precisely *because* it acts. RPF's Leerling recounts:

> "In the previous century our ancestors fought for the freedom to educate their children according to their biblical views. … But to this day this hard-fought freedom is not left untouched. The attacks on the freedom of education have almost never ceased. … I again ask the Cabinet what is behind these continuing attacks. It seems living according to the Bible is viewed by many with such horror, that everything needs to be mobilized to eradicate it from our society for once and for all."[34]

Or, as SGP's Van den Berg laments:

> "The Netherlands could once be called a Christian state. This law can be regarded as a sad low point in a process, which sees the Christian norms and values in legislation and practice being torn down more and more. May God the Lord forbid that our government increasingly puts itself at the service of the anti-Christian powers with … this law."[35]

34 "In de vorige eeuw bevochten onze voorouders de vrijheid om hun kinderen naar Bijbelse opvattingen te onderwijzen. … Maar tot op de dag van vandaag wordt de bevochten vrijheid niet ongemoeid gelaten. De aanvallen op de vrijheid van onderwijs zijn vrijwel nooit van de lucht geweest. … Ik vraag het kabinet nogmaals wat er toch achter die voortdurende aanvallen zit. Het lijkt erop dat het leven naar de Bijbelse normen bij velen zo'n diepe afschuw oproept, dat alles moet worden gemobiliseerd om het eens en voor goed met wortel en tak in onze samenleving uit te roeien" (*Handelingen II* 1992/93, No. 46, p. 3455).

35 "Ooit mocht Nederland een christelijke staat worden genoemd. Deze wet is als een triest dieptepunt te beschouwen in een proces, waarbij de christelijke normen en waarden in wetgeving en praktijk steeds meer worden afgebroken. God de Heere moge verhoeden, dat onze overheid zich meer en meer onder andere door deze wet in dienst stelt van de anti-christelijke machten" (*Handelingen II* 1992/93, No. 46, p. 3449).

In the same vein, the orthodox parties criticize the "equality-idealism" that wants to "ban the slightest difference from the common social norms" (RPF),[36] the "process of suppression of Christian norms and values by a levelling state ethos" (GPV),[37] and the emergence of "an absolutist State which forcibly imposes its own ideology" (SGP).[38] The storyline of the liberty-based frame not only identifies the problem, and the victim, but also its cause, its culprit, namely the invasive (liberal-democratic) state. And it implies a clear solution: At the very least, the state must let religious communities - and specifically the orthodox Reformed community - profess and practice their religious beliefs without any interference.

Intimately connected to this critical perspective on the (liberal) state is a distinct liberty-based view of sovereignty and competence. In this view, it is not the state that decides where the boundaries of religious freedom and competence lie.[39] Or, when it does, this state should not be a liberal state but instead a 'Christian state' – a state whose demise the SGP lamented in the quote highlighted above. In any case, sovereignty here is not rooted in democratic procedures. The most explicit positive statement of this view of sovereignty comes RPF's Leerling:

> "The question is now who may set the boundaries of freedom and how these boundaries should be determined. I am fully convinced that the bible as infallible Word of God marks those limits for each human being and for each circumstance, also for public life. ... The government, and therefore also this cabinet, as the servant of God has the calling to order the society according to biblical norms."[40]

36 "Het gelijkheids–idealisme viert evenwel nog altijd zodanig hoogtij, dat het minste of geringste onderscheid dat niet met de gangbare maatschappelijke maatstaven ... spoort, moet worden uitgebannen" (*Handelingen II* 1992/93, No. 46, p. 3454).

37 "De totstandkoming van de Algemene wet gelijke behandeling zal een voorlopig dieptepunt vormen van een proces van verdringing van christelijke normen en waarden door een nivellerend staatsethos" (*Handelingen II* 1992/93, No. 48, p. 3573).

38 "De contouren van een absolutistische Staat die met dwang eigen ideologie oplegt, doemen hier op en dat is bepaald een afschrikwekkend perspectief" (*Handelingen II* 1992/93, No. 46, p. 3449)

39 As the RPF ruefully notes, "Henceforth, apparently, the government sets the norm" ["Voortaan bepaalt kennelijk de overheid de norm."] (*Handelingen II* 1992/93, No. 46, p. 3458).

40 "Ik ben er ten volle van overtuigd dat de Bijbel als het onfeilbaar Woord van God voor elk mens en voor elke levensomstandigheid - dus ook voor het publieke leven - die grens aangeeft ... De overheid, en dus ook dit kabinet, heeft als dienares van God de roeping, de maatschappij te ordenen naar Bijbelse normen" (*Handelingen II* 1992/93, No. 46, p. 3454).

In keeping with his party's Calvinist origins, moreover, Leerling goes on to criticize the pervasive spirit of the French revolution, and paraphrases a lamentation of the Calvinist founder of protestant-Christian politics in the Netherlands, Guillaume Groen van Prinsterer (1801-1876): "You are free, as long as you do what is acceptable by human and generally accepted standards." This is not real freedom, in Leerling's eyes, but rather "dancing to the tune of the human and … societal standard".[41] Regardless of the exact interpretation of this quote, Leerling's Calvinism-inspired view is a far cry from an endorsement of popular sovereignty. As Neo-Calvinist theologian Kuyper had succinctly put it a century earlier, "[a]uthority over men cannot arise from men".[42]

In line with this liberty-based view on competence and sovereignty, the orthodox Protestant factions explicitly reject one of the hallmarks of the egalitarian view on competence, namely the private-public distinction. It is again Leerling who states:

> "Without being accountable to the government or a judge, the competent authority in these institutions must have the right to demand of board- and staff-members that they submit themselves to the precepts such as God has given us in His infallible word, not only during working hours but also in their free time. As a devout Christian, you cannot separate this. Does the Cabinet think this is really too much to ask?"[43]

The RPF faction further elaborates this point by stating that "a religion, a worldview is surely not a hat you can put on and off" but rather "infuses your whole being"; it is not "a private matter, that takes place exclusively within the walls of one's own house and, at the most, the church". "Anyone who believes that", it Leerling continues, "has no sense of the essence of what the

41 "Met andere woorden: je bent vrij, zolang je maar doet wat naar menselijke en algemeen aanvaarde maatstaven acceptabel is. Je moet daarmee dansen naar de pijpen van de menselijke, zo men wil maatschappelijke maat" (*Handelingen II* 1992/93, No. 46, pp. 3454-5).

42 Kuyper 1931, 82.

43 "Zonder daarvoor verantwoording te hoeven af te leggen aan de overheid of aan de rechter moet het bevoegd gezag in die instellingen het recht hebben om van bestuurs– en personeelsleden te eisen, zich te onderwerpen aan de leefregels zoals God die ons in Zijn onfeilbaar woord heeft gegeven, niet alleen tijdens de werkuren, maar ook in de vrije tijd. Je kunt dat als overtuigd christen niet splitsen. Is dat volgens het kabinet nu allemaal echt te veel gevraagd?" (*Handelingen II* 1992/93, No. 46, p. 3455).

Christian faith and serving Christ means".[44] Again this shows his allegiance to the Calvinist creed which, as influential neo-Calvinist Kuyper set forth in his Stone lectures of 1898, abhors "a religion confined to the closet, the cell or the church": instead, "no sphere of human life is conceivable in which religion does not maintain its demands".[45] SGP's Van den Berg argues in this same Calvinist spirit when voicing his criticism of the bill:

> "Our fundamental objection ... is that the proposal not only contributes to but even forces a separation between word and deed, between creed and life. As it stands, the bill undeniably results in the unity of life being broken. A ... discrepancy to which the bill compels, is that between behavior within and outside the work environment, while the government can know that in this regard commitment to the unity of the complete revelation is needed."[46]

In these arguments, then, it is the unique character of a specific religion that grounds the rejection of the liberal public-private distinction. This uniqueness also reflected in the orthodox factions' view on the question of rights, albeit in a different guise. In these views, the distinctive nature of religious freedom is mainly grounded in the unique historical role it played in the Netherlands, and specifically in the establishment of the Dutch state. The SGP, for example, asserts that "the roots of the Dutch State lie in our ancestors' battle for religious freedom", and also puts forward an implicit epistemological argument for religious freedom's distinctiveness, namely concerning religion's truth: "For our ancestors it was - and it still is for us - about the freedom serve the living

44 "Een geloofsovertuiging, een levensbeschouwing is toch geen hoed, die je op en af kunt zetten? Dat doortrekt heel je doen en laten en voor hen die van je diensten afhankelijk zijn, is dat toch een essentiële zaak? Godsdienst is geen privézaak, die zich uitsluitend afspeelt binnen de muren van het eigen huis en hooguit de kerk. Wie dat meent, heeft geen besef van wat het christelijke geloof ten diepste en het dienen van Christus inhoudt" (*Handelingen II* 1992/93, No. 46, p. 3459).

45 Kuyper 1931, 53.

46 "Ons fundamentele bezwaar ... is dat het voorstel er niet alleen aan meewerkt maar dat het zelfs dwingt tot het aanbrengen van een scheiding tussen woord en daad, leer en leven. Het wetsvoorstel zoals het thans luidt, leidt er ontegenzeglijk toe dat de eenheid des levens verbroken wordt. ... Een ... discrepantie waartoe het wetsvoorstel dwingt, is die tussen gedragingen binnen en gedragingen buiten de werksfeer, terwijl de regering kan weten dat ook wat dit betreft gehecht moet worden aan de eenheid van de totale levensopenbaring" (*Handelingen II* 1992/93, No. 46, p. 3447).

God according to His Word."[47] The RPF faction, to the same effect, presents a more elaborate historical account about the origin story of the Netherlands, which culminates in the following argument:

> "It is, I believe, not saying too much that freedom of religion, or better yet the freedom of religion and belief, can be seen as a foundation for the other human rights. … The recognition of religious freedom … has, as it were, paved the way for the recognition of the other freedoms that have been applied to the relation between government and citizen in the shape of human rights."[48]

What is argued here is that religious freedom is a *sui generis* and paradigmatic right; an unmistakably liberty-based view, and one which again stems from a Calvinist outlook. As Groen van Prinsterer stated (and Kuyper echoed): "In Calvinism lies the origin and guarantee of our constitutional liberties."[49] Such a view, including the historical and epistemological arguments for religious freedom's distinctiveness, also emerges in the following statement of the GPV:

> "For this freedom, an intense battle was waged throughout the centuries, also in a time when no-one even thought about equal treatment. For the freedom to serve the God of heaven and earth, people have given their lives, as people around the world still do**.** Other freedoms stem from this freedom, [freedom] of speech, press, education, associating and assembly."[50]

Given this distinctive nature ascribed to religious freedom, it is also not surprising that the orthodox Protestant parties endorse the liberty-based frame's guiding principle of principle of non-interference. Such an endorsement

47 "De wortels van de Nederlandse Staat liggen in de strijd van onze voorouders voor de godsdienstvrijheid. Het ging onze voorouders en het gaat ons nog steeds om de vrijheid om de levende God naar Zijn Woord te dienen" (*Handelingen II* 1992/93, No. 48, p. 3578).

48 "Het is, denk ik, niet te veel gezegd dat de godsdienstvrijheid, of beter nog de vrijheid van godsdienst en levensovertuiging, als fundament kan worden gezien van de andere mensenrechten. … De erkenning van de godsdienstvrijheid … heeft als het ware de weg gebaand voor erkenning van de overige vrijheden die in het verkeer overheid-burger tot gelding zijn gekomen in de vorm van de mensenrechten" (*Handelingen II* 1992/93, No. 46, p. 3457).

49 Kuyper 1931, 78.

50 "Voor die vrijheid is de eeuwen door in ons land fel gestreden, ook in een tijd dat niemand dacht aan gelijke behandeling. Voor de vrijheid de God van hemel en aarde te dienen hebben mensen hun leven gegeven en geven sommigen op de wereld dit nog. Uit die vrijheid vloeien andere vrijheden voort, van meningsuiting, drukpers, onderwijs, vereniging en vergadering" (*Handelingen II* 1992/93, No. 46, p. 3432).

of non-interference is implied, first of all, in the various vehement objections against the infringement of these rights. The orthodox factions hold, for example, that the proposed infringement through the Equal Treatment Act "affects the roots of our rule of law" (SGP), "strikes at the heart of [the] freedom [of religion]" (SGP), ensures "that the freedom of religion in our land is seriously affected" (RPF), and realizes an "encroachment of the freedom of religion" that constitutes a "low point in the Dutch rule of law" (RPF).[51] The RPF sees the new anti-discrimination law as part of a development which ultimately raises the question "[w]hat remains of the freedom of religion, the freedom of speech, the freedom of education? More than an empty shell?"[52]

This last question in turn raises another question: how far should the scope of these freedoms reach to be more than an empty shell? Put differently, when factions view certain limitations of rights like the freedom of religion as serious, worrying and unjustified encroachments, this suggests something about what they feel the scope of such rights should be. The RPF, for example, suggests that *any* limitation is too much when it laments that "to this day, the freedom that was fought for is not left untouched".[53] Or when it states that "the various interventions in Article 23 [the freedom of education, LN] … can be regretted in retrospect", and raises the question whether "these are in accordance with article 23" to begin with.[54] A similar stance can be found in the GPV faction, which disapproves of the situation where "citizens may exercise their rights of

51 In this order: "een wetsvoorstel dat de wortels van onze rechtsstaat raakt" (*Handelingen II* 1992/93, No. 46, p. 3442); "De AWGB treft die vrijheid in het hart" (No. 48, p. 3578); "Er ontstaan grote problemen vanwege het feit, dat de godsdienstvrijheid in ons land in ernstige mate wordt aangetast" (No. 47, p. 3513); "Dit is … een aantasting van de godsdienstvrijheid, zoals wij die door de eeuwen heen in ons land hebben gehad? … Het is een dieptepunt in de Nederlandse rechtsstaat!" (No. 47, p. 3510).

52 "Wat blijft er dan over van de vrijheid van godsdienst, de vrijheid van meningsuiting, de vrijheid van onderwijs? Meer dan een lege huls?" (*Handelingen II* 1992/93, No. 48, p. 3582). The same is argued by this RPF faction when it states that when the new law is implemented: "Article 23 could just as well be jettisoned and there would bring an end to freedom of education in this country" ["Als dat zo zou zijn, kan artikel 23 wel overboord worden gezet en is er een einde aan de vrijheid van onderwijs in dit land"] (*Handelingen II* 1992/93, No. 47, p. 3460).

53 "Maar tot op de dag van vandaag wordt de bevochten vrijheid niet ongemoeid gelaten" (*Handelingen II* 1992/93, No. 46, p. 3455).

54 "Nu kan op zich niet worden ontkend dat al verscheidene beperkingen op artikel 23 zijn doorgevoerd. Zij kunnen achteraf worden betreurd en de vraag kan rijzen of deze beperkingen wel in overeenstemming zijn met artikel 23" (*Handelingen II* 1992/93, No. 47, p. 3460).

freedom only insofar as the law has permitted them to do so".[55] Such statements also square with GPV's insistence elsewhere that "the freedom of religion remains *fully* intact",[56] and the objection made by the RPF that Christians and their organizations are no longer "afforded the *optimal* freedom to live and act on Biblical grounds" (emphases added).[57] And contributions in which the orthodox factions argue that religious freedom should also extend to cover actions in 'social life' or 'society', finally, are yet another way of arguing the same thing: the view, unquestionably situated within the liberty-based frame, that religious freedom should be maximized – what is more, some of these statements basically declare religious freedom to be absolute.

Such a view on religious freedom's scope naturally also carries implications for this right's status vis-à-vis other rights. The orthodox Protestant factions generally believe that religious freedom, in cases of conflict, should prevail over other rights like that of non-discrimination. This view is already implicitly present in the repeated complaints that the imminent Equal Treatment Act means that "freedom of religion and belief has to make way for the principle of equality",[58] and that this liberty is "relegate[d] … to second place" (RPF).[59] Or, formulated in a more active fashion by the GPV: "In a free society the free exercise of liberties should be the priority".[60] And so, from all these statements

55 "Zeker als het gaat om verhoudingen tussen burgers onderling, is een goede regel dat de eigen verantwoordelijkheid en keuzen van de burgers gerespecteerd worden binnen grenzen die de wet aangeeft en niet dat burgers van hun vrijheidsrechten slechts gebruik mogen maken voor zover de wet hun dat vergund heeft" (*Handelingen II* 1992/93, No. 46, p. 3423).

56 "Veel belangrijker is het dat de vrijheid van onderwijs volledig overeind blijft" (*Handelingen II* 1992/93, No. 46, p. 3434).

57 "Blijkbaar wordt met name christenen zelfs in door hen opgerichte organisaties niet langer de optimale vrijheid gegund om op grond van Bijbelse principes te leven en te handelen" (*Handelingen II* 1992/93, No. 46, p. 3454).

58 "Het is bedroevend te moeten constateren dat desalniettemin nu juist de vrijheid van godsdienst en levensovertuiging in principe moet wijken voor het gelijkheidsbeginsel" (*Handelingen II* 1992/93, No. 46, p. 3457).

59 "Juist die uitzonderingssituatie maakt duidelijk dat de bewindslieden, als het erop aankomt, de andere vrijheidsrechten blijkbaar op het tweede plan zetten" (*Handelingen II* 1992/93, No. 46, p. 3457).

60 "In een vrije samenleving behoort de vrije uitoefening van vrijheidsrechten voorop te staan" (*Handelingen II* 1992/93, No. 48, p. 3572).

by the GPV, RPF and SGP, a shared view (with shared Calvinist origins[61]) emerges which professes that religious freedom is distinctive, that it should not be interfered with, and that it should have priority over other rights: a textbook case of the liberty-based view on rights.

Given the orthodox Protestant factions' views on the question of rights, their take on the question of interests comes as no surprise. After all, as the debate of 1985 had already made clear, the liberty- based frame's distinct 'vertical' perspective on the issue of rights - meaning that the focus lies on the relation between the state and its citizens, and not on the relation between these citizens - also means that its proponents exclusively emphasize the harms suffered (or burdens borne) by citizens as the result of state regulations. And the fact that the orthodox factions prioritize *religious* freedom over other rights suggests that it is particularly the interests of religious citizens that are taken to heart. During the 1993 debate, the harms or burdens in question are partially conceptualized in a way that is similar to the debate in the eighties, and that coincides with the liberty-based storyline described earlier: What is happening here is the impending "eradication" from society of communities living "according to the Bible" (RPF),[62] the "process of repression of Christian norms and values by a levelling state ethos" (GPV),[63] et cetera: an impact that is perhaps not suitably defined as a 'mere' burden, and even suggests a certain physical threat ensuing from a more symbolic oppression. In a prolonged lamentation, the RPF even suggests that the new law "create(s) circumstances somewhat comparable to those which have prevailed for centuries in Russia", where "Christians that want to live according to Biblical norms ... will be

61 That the orthodox Protestant parties share this Calvinist origins and, as this chapter shows, a liberty-based perspective on religion in general, does not mean they fundamentally agree on all matters regarding religious freedom. One of the main differences is that the SGP does not support (religious) freedom for religions other than their specific Reformed Christianity, whilst parties like the GPV also endorses religious freedom for those that diverge from biblical norms (See for example Hippe 1988). The SGP is therefore also a less enthusiastic supporter of the neo-Calvinist Kuyper, whose view on religious freedom and freedom of education was too pluriform for their taste (Vlies, B.J. van der & Brouwer, E.J. (2002, April 3)) SGP niet bij Abraham Kuyper in de leer. *Reformatorisch Dagblad*. Retrieved from: https://www.rd.nl/artikel/9382-sgp-niet-bij-abraham-kuyper-in-de-leer [Accessed on 8 June 2023]). For the SGP, the freedom of education is a 'next best' solution, given that they would prefer exclusive public education on a Reformed Protestant basis, while the GPV wholeheartedly supported the freedom of education and its equal funding of religious and non-religious schools (Hippe 1988, 80-1).

62 *Handelingen II* 1992/93, No.46, p. 3455.

63 *Handelingen II* 1992/93, No. 48, p. 3573.

dragged to court if they do not want to comply against their conscience to what is deemed appropriate in society".[64]

By referring to the conscience of Christians, this last statement also points to a more specific burden, namely the violation or coercion of conscience, and it is this burden (or harm) that is most often referred to by the orthodox factions. The GPV faction, for example, sees the potential allegations of discrimination against "denominational schools or organizations" as being "at odds with an age-old tradition of spiritual freedom and resistance against coercion of conscience".[65] And as the RPF faction argues more explicitly, conscience-based claims do not only ground the freedom of education, but also the freedom of religious organizations more generally: "Also in a Christian elderly center, also in a Christian nursing home, also in at a Christian newspaper or at a Christian broadcasting company there should be ample space to live in word and deed as the bible teaches. The government would not only jeopardize the existence of this kind of institutions and organizations, but would also cause a conflict of conscience for the persons in question."[66]As this statement shows, the orthodox Protestant parties refer to both organizations and individual persons as potential victims of the imminent anti-discrimination law; often these individual and collective interests are mentioned in the same breath. An example of this is SGP's Van den Berg mentioning "persons and institutions" that want to do justice to their creed, and whose legal muzzling would lead to "coercion of conscience and therefore moral conflict".[67]

64 "Toch is het uitermate triest dat achtereenvolgende bewindslieden van CDA-huize zich er toch voor beijveren, de vrijheid van medechristenen aan banden te leggen, om toestanden te scheppen, enigszins vergelijkbaar met de toestanden die decennialang in Rusland hebben geheerst. Het is nauwelijks te geloven, maar toch lijkt het die kant op te gaan. Christenen die in hun eigen instellingen en bedrijven naar Bijbelse normen willen leven, zullen voor de rechter worden gesleept als zij niet tegen hun geweten in meegaan met wat in de maatschappij betamelijk wordt geacht" (*Handelingen II* 1992/93, No. 46, pp. 3458-9).

65 "Zo'n verwijt zou immers haaks staan op een eeuwenlange traditie in dit land van geestelijke vrijheid, van verzet tegen gewetensdwang" (*Handelingen II* 1992/93, No. 48, p. 3573).

66 "Ook in een christelijk bejaardencentrum, ook in een christelijke verpleegtehuis, ook bij een christelijke krant of bij een christelijke omroep moet er de volle ruimte zijn om in woord en daad te leven zoals de bijbel dat leert. De overheid zou niet alleen het voortbestaan van dit soort instellingen en organisaties op het spel zetten, maar ook de verantwoordelijke personen in gewetensnood kunnen brengen" (*Handelingen II* 1992/93, No. 46, p. 3458).

67 "De regering heeft de ogen tot nu toe gesloten voor de principieel onaanvaardbaremaar ook praktisch onwerkbare gevolgen van deze wet, met name voor personen en instellingen die ook in hun maatschappelijk functioneren aan hun grondslag recht willen doen. Dit leidt tot gewetensdwang en dus gewetensnood" (*Handelingen II* 1992/93, No. 46, p. 3449). See also a similar argument by the RPF at No. 46, p. 3462.

On the surface, these claims about the protection of religious conscience seem to be compatible with egalitarian theories that recognize the importance of obligatory commitments (or what Laborde calls obligation IPC's). Various arguments also refer to a broader notion of integrity, lamenting the separation of word and deed or, in egalitarian terms, the lack of congruence between one's ethical commitments and one's actions[68] – for another example, see the "deep concern and sadness" expressed by Van den Berg about "the choices the legislator will make here, that [seem to] have extraordinarily radical consequences for those that want to arrange their personal and social lives according to the norms of the Word".[69] At the same time, there is a specific religiously inspired reason for the SGP's usage of notions like conscience, which fundamentally departs from the egalitarian view that is cherished by practically all other factions. From their theocratic perspective, the SGP has traditionally rejected religious freedom as a broader principle that also protects other religions, and instead preferred a more restricted principle of the freedom of conscience ('gewetensvrijheid'); a principle only aimed to provide the conditions to serve a specific (Reformed Protestant) God.[70] With this knowledge in mind, the invocations of the notion of conscience have a very different ring to it, and may explain why the SGP mainly locates these conflicts of conscience in (Reformed) Christian communities. In each case, it goes to show how even seemingly straightforward concepts like conscience can be imbued with widely differing meanings.

This more sectarian focus is not limited to the SGP, however. To underline just how obligatory these threatened the commitments in question are, the other orthodox factions also employ the notion of sin; a notion which is used and interpreted in a way that, in the eyes of these factions, the defended freedom applies first and foremost to a specific religious community. For example, when Leerling (RPF) shows concern for "organizations that contribute to beliefs being kept alive … that do not conform to what is generally accepted in society", he adds that "these are circles where, on the basis of biblical principles, a sin

68 Laborde 2017, 203.

69 *Handelingen II* 1992/93, No. 46, p. 3442.

70 Van der Zwaag 2018, 83. The SGP had also (unsuccessfully) attempted to have freedom of conscience (instead of freedom of religion) included in the 1983 Constitution (Schippers 2023, 61). By the nineties, however, the SGP had also started - however hesitantly – to invoke freedom of religion to defend their cherished causes. This was partly for strategic reasons, in the light of the decreased presence and influence of religion in Dutch society and politics, but also - among other reasons - because the concept of conscience was judged to be too individualistic and subjective compared to the (more collective-oriented) freedom of religion (Schippers 2023, 61-4).

must and will continue to be called a sin".[71] And to emphasize the urgency of the threats to these communities, Schutte (GPV) argues that "the use of this word [of sin, LN] in the parliament and in many churches and civil society … makes it crystal clear how much the freedom of religion against the coercion of conscience is at stake in this matter".[72]

As Leerling, Schutte and Van den Berg are above all concerned with the plight of their own community, they tend to view any other interest or harm as a distraction from what they consider to be the real issue. From their sectarian and 'vertical' frame, the alleged harm caused to homosexual citizens are simply not sufficiently relevant or weighty to outbalance the burdens borne by religious citizens and communities. Taking such a stance in a parliamentary debate about the establishment of an Equal Treatment Act comes with considerable challenges, however, as the other participants regularly hold up a mirror to them, confronting them with the harms of religiously inspired discrimination. The most notable of these is GroenLinks' Peter Lankhorst, one of the first Dutch members of parliament to openly express his homosexuality. At one point during the debate, Lankhorst turns to the Christian representatives and says: "I understand that from your views you have difficulty with parts of this bill, but I do not understand why you are being so heartless. No doubt you do not want to hurt homosexuals, but you do." Because of their "unyielding norms", Lankhorst continues, churches have "hurt and excluded" people, and have caused "unbearable pain".[73] Lankhorst's intervention is a response to GPV's Schutte, who, after being pressed about religiously inspired discrimination, responds that he does not want to talk too much about "the stale issue of the homosexual teacher on a denominational school": "Much more important" or

71 "Het gaat om leefkringen waar men op grond van Bijbelse principes zonde zonder meer ook zonde moet en wil blijven noemen" (*Handelingen II* 1992/93, No. 46, p. 3455).

72 "In de eerste plaats maakt het gebruik van dit woord in de Kamer en in tal van kerken en maatschappelijke organisaties in dit verband in ieder geval zonneklaar, hoezeer in deze zaak de vrijheid van godsdienst tegenover gewetensdwang in het geding is" (*Handelingen II* 1992/93, No. 48, p. 3572).

73 "Ik begrijp dat u vanuit uw opvattingen moeite heeft met onderdelen van dit wetsvoorstel, maar ik begrijp niet waarom u zich zo harteloos opstelt. U wilt homoseksuelen ongetwijfeld niet kwetsen, maar u doet het wel. Homo's en lesbiennes komen in alle kringen voor, evenzeer in die van u. Dat zijn geen uitzonderingen. Maar mensen niet herkennen en erkennen zoals ze zijn, mensen hun liefde niet gunnen, mensen met schuld overladen, dat gaat ver, te ver, als u zegt niet te willen kwetsen. De onwrikbare norm van veel kerken heeft mensen in de loop der jaren gekrenkt en uitgezonderd Er is ondragelijke pijn geleden" (*Handelingen II* 1992/93, No. 48. P. 3580).

even "dozens of times more important" than this "secondary issue", Schutte holds, "is that the freedom of religion remains fully intact".[74]

This really is a collision of two different worlds – of two different frames, to be precise, each with a distinct view of which harms matter. This is confirmed when Lankhorst interjects Schutte and exclaims: "Chairman! I speak of the essence of this legislative proposal", and Schutte simply replies "for me, it is not".[75] Even Lankhorsts' emotional appeal later on in the debate does not have the desired effect of bridging the divide. RPF's Leerling, after assuring Lankhorst that "it is not my intention do any kind of injustice to homosexual fellow men", simply repeats his stance: "Let us realize that this debate is not about the position of the gay fellow man as such, but about the right of a competent authority to establish … its own rules in their own organizations."[76] Even after minister Dales, whose own homosexuality was an open secret, presses Leerling on the same issue, Leerling sticks to his point: "The minister keeps trying, perhaps unconsciously, to lure me into speaking about the issue of homosexuality. I have very consciously ignored that because I find it to be an overly narrow treatment of the issue presently at hand." The issue at hand, Leerling maintains, is "much broader", while the issue of (gay) sexual relations is simply "much too painful".[77]

But however painful, the orthodox Protestant factions do have to admit that the world that now prevails no longer functions according to their moral standards. Much to their dismay, in fact, their world is turned upside down, as the imminent Equal Treatment Act constitutes, in Van den Berg's words, a fundamental "reversal". Instead of allowing distinctions until they are proven

74 "Ik heb zojuist gesproken over het afgezaagde punt van de homoleerkracht op een bijzondere school. … Tientallen malen belangrijker dan deze casus, … vind ik de principiële lijnen in het wetsvoorstel. … Voor mij is het … een secundaire zaak. Veel belangrijker is het dat de vrijheid van onderwijs volledig overeind blijft" (*Handelingen II* 1992/93, No. 46, p. 3434).

75 "Voorzitter! Ik praat over de essentie van dit wetsvoorstel.", "Dat is het voor mij dus niet" (*Handelingen II* 1992/93, No. 46, p. 3434).

76 "De heer Lankhorst weet van mij dat ik er niet op uit ben, de homofiel geaarde medemensen op enigerlei wijze te kort te doen. … Laten wij beseffen dat het in dit debat niet om de positie van de homofiele medemens als zodanig gaat, maar om het recht dat een bevoegd gezag in sommige situaties heeft om eigen regels te stellen binnen de zelf gestichte instellingen en opgerichte organisaties" (*Handelingen II* 1992/93, No. 46, p. 3586).

77 "De minister probeert mij toch steeds, wellicht onbewust, in die fuik te krijgen dat ik ook spreek over de problematiek van de homoseksualiteit. Ik heb het heel bewust buiten beschouwing gelaten omdat ik dat een te vernauwende behandeling vind van de problematiek die nu aan de orde is. Die is veel breder … Daar gaat het mij om en daarom wil ik dat loskoppelen van die seksuele relatie. Die kwestie is veel te pijnlijk" (*Handelingen II* 1992/93, No. 48, p. 3592).

illegitimate, he observes that "every distinction is in principle discriminatory": "Even if one of the exemptions that have been included in the law is applicable, the behavior in question is still associated with discrimination, often completely without justification."[78] While the secular parties, and even the CDA,[79] consider this allocation of the burden of proof to be the most natural state of affairs, the orthodox parties find themselves uprooted and vulnerable, from now on unavoidably confronted with a presumed harm inflicted on homosexual citizens by their own communities' religious organizations – a reality that they are unable to accept. As GPV's Schutte argues, the state "must carry a very heavy burden of proof to clarify why this system must be chosen and why it is willing to accept all the consequences",[80] but this process of providing proof and arguments, the orthodox factions feel, did not sufficiently take place: "It is starting to look like this legislative proposal constitutes a much more far-reaching intervention than could be expected from the discussion of the constitution",[81] Leerling notes, and Van den Berg similarly states that "it will be obvious that … the elaboration that is presented now was not what my faction had in mind at the time".[82]

'That time', however, has irrevocably passed, and the new law presents the orthodox Protestant factions with a *fait accompli*. Employing their liberty-based perspective as an outside view, they are uniquely placed to witness this growing egalitarian dominance. After all, frame theory tells us that those that

78 "In feite vindt hier dus een omkering plaats: elk onderscheid is in beginsel discriminerend. Zelfs als een der uitzonderingen die in de wet zijn opgenomen aan de orde is, ligt de bewuste gedraging dus toch in de sfeer van discriminatie, vaak volstrekt ten onrechte. Bovendien wordt aldus de bewijslast omgekeerd" (*Handelingen II* 1992/93, No. 46, p. 3443).

79 Even the CDA faction, which comments that "no-one denies that deviations from the basic rule are conceivable and happen often" also adds that "there must be a justification" ["Niemand ontkent waarschijnlijk dat afwijkingen van die grondregels zeer wel denkbaar zijn en heel vaak voorkomen. Er is dan echter een rechtvaardigingsgrond nodig."] (*Handelingen II* 1992/93, No. 46, p. 3435).

80 "Als dit systeem wordt ingevoerd op een zo breed terrein in het maatschappelijke leven, in de relaties tussen burgers onderling, rust toch bij de wetgever een zeer zware bewijslast om duidelijk te maken waarom er voor dat systeem moet worden gekozen en waarom men bereid is, alle consequenties daarvan te aanvaarden" (*Handelingen II* 1992/93, No. 47, p. 3505).

81 "Het heeft er intussen alle schijn van dat met dit wetsvoorstel een veel ingrijpender ingreep wordt gepleegd, dan bij de behandeling van de Grondwet verwacht mocht worden" (*Handelingen II* 1992/93, No. 46, p. 3456).

82 "Voor mijn fractie blijft echter de grote vraag of, lettend op de nu voor ons liggende uitwerking van artikel 1 Grondwet aan de toenmalige grondwetgever niet te veel wordt toegedicht. Het zal geen betoog behoeven dat de nu gepresenteerde uitwerking mijn fractie destijds in ieder geval niet voor ogen heeft gestaan"
(*Handelingen II* 1992/93, No. 46, p. 3445).

participate in the dominant frame are often not fully conscious of it, just like fish do not know they are surrounded by water. In the meanwhile, it is those that find themselves outside the dominant frame, holding a contrasting view, that throw this dominance into the sharpest relief. This also means, however, that instead of comfortably swimming along the dominant stream, these outsiders find themselves like a fish on dry land, thus raising the question: how long can they last, without feeling compelled to dive in themselves?

7.4 Caught in the egalitarian slipstream: leaving behind the liberty-based frame

Despite their best efforts, the orthodox Protestant factions do not manage to alter the course of the debate in any substantial way. The egalitarian wave rolls on, confronting the remaining opposition with the dilemma that already reared its head in 1985, but that now imposes itself even more strongly: Will these factions persist in criticizing the egalitarian dominance by staying true to their liberty-based frame, without any prospect of influencing the debate, or will they grant legitimacy to their arguments by clothing them in egalitarian garb, thus shedding their liberty-based skin and possibly undermining their initial positions? As frame theory shows - see also Chapter 5 -, speaking with any influence unavoidably entails a departure from the competing, subordinate frame, and the adoption of the dominant perspective. The debate of 1993 shows that often this is not even a pro-active or conscious decision, as opposition parties are basically forced to soften, nuance or even reformulate their stance in the dynamics of the debate. Whether they want it or not, the orthodox factions are simply caught in the egalitarian slipstream.

Sometimes this is reflected in what seems like a mere change in tone, in the decision to smooth over the sharp edges when one's undiluted liberty-based views generate too much criticism. An example of this is the discussion that ensues after the notion of sin is introduced by the orthodox factions. This notion is not only religiously charged, but also emotionally charged, as evidenced by a fierce tirade of minister of the Interior Ien Dales. Dales, besides lesbian also an avowed Christian, notes that "three parties place [certain behavior] in the category of sin", and thereby "place themselves outside of the discussion". "That is extremely painful for these parties", she continues; "It is also painful for me, not to be able to exchange views with some parties, because we will not

come together anymore".[83] This comment sparks a heated exchange between the minister and the orthodox Protestant parties, with the minister in the later stages of the debate making remarks that seems to diverge from the Cabinet's self-professed neutral stance, and seem to (over)stretch the government's competence on religious matters. "By now", she states, "many churches have the theologically accepted stance that a homosexual relationship does not have to be at odds with the word of God. There are enough examples of individuals who suffer enormously. We do not want this to continue".[84] This latter remark sparks immediate replies from the RPF and SGP, both of whom rail against the minister's suggestion that a certain interpretation of the Bible is not considered to legitimate anymore by the state.[85]

The responses to Dales' earlier remarks about the notion of sin are more nuanced, however. To be sure, the SGP faction persists in the religious use of this notion, arguing that it is "a loaded word, but nevertheless a Biblical word that affects all of us".[86] The RPF and the GPV, on the other hand, are quick to emphasize that the notion of sin was not central to their arguments, and (re) phrase their arguments in terms of the constitution, rule of law and the sphere of competence of religious organizations. As the GPV elaborates:

> "The word "sin" was mentioned. It is not the point whether we - the minister, us, or whoever - speak about sin here. It is about the freedom of religion, the freedom of association and the freedom of education. This means that you can indeed label something as sin within the sphere of competence of the organization or the

83 "Ik weet en begrijp, dat drie partijen dit in de categorie van zonden zetten. Daarmee onttrekken zij zich aan de discussie. Dat is buitengewoon pijnlijk voor die partijen. Het is voor mij ook pijnlijk om met enkele partijen wat dat betreft niet meer van gedachten te kunnen wisselen, want wij komen niet meer bij elkaar" (*Handelingen II* 1992/93, No. 47, p. 3510).

84 "Ook in zeer veel kerken bestaat de inmiddels theologisch aanvaarde opvatting dat een homofiele relatie niet strijdig hoeft te zijn met Gods woord. Er zijn voldoende voorbeelden voorhanden van individuen die in grote narigheid worden gebracht, die ernstig leed wordt toegebracht. Dat willen wij niet meer laten voortgaan" (*Handelingen II* 1992/93, No. 48, p. 3592).

85 The impact of these specific remarks of minister Dales is also confirmed in a later interview with SGP-representative Van der Vlies, who considered this debate to be the low point of his career (Oomen & Rijke 2013, 382).

86 "Er is gesproken over zonde. Dat is een geladen woord, maar wel een Bijbels woord dat ons allemaal raakt" (*Handelingen II* 1992/93, No. 48, p. 3580).

> school, and that this should have repercussions … That is the central constitutional question here."[87]

In the ensuing exchange with Dales, Schutte reformulates the question by stating that "the point of departure should in my opinion be: you have these liberties. How much room do you give to this [liberty] to make distinctions also in your own social sphere?"[88] Meanwhile, the RPF faction - from which the comment on sin originated - actually denies that it has used this term, and that this was a deliberate choice in order to avoid the kind of misunderstandings that are now on display. Directly after the minister's critical response, Leerling hastens to interpret or recast his initial remark in liberal-democratic and constitutional terms, just as GPV had done:

> "My point is the following: Is a competent authority authorized to be the master in its own house - which is not the public society as a whole -, irrespective of how this is evaluated in the society as a whole? The minister says that this is not possible anymore. This, then, is a violation of the freedom of religion, as we have known it for centuries in this country. If this is the case, that is a very salient point to note today. It is a low point in the Dutch rule of law!"[89]

Despite their strong wording, the statements above clearly show how, in the dynamics of the debate, the orthodox Protestant factions are pressured to drop their religiously inspired jargon and instead use 'neutral' liberal terminology to clarify their position. To be sure, factions like the GPV and RPF can still insist that this liberal constitutional framework is a Calvinist invention, thereby denying any

87 "Het woord "zonde" is gevallen. Het gaat er niet om, of wij - wie dan ook, de minister of wij - hier spreken over zonde. Het gaat om de vrijheid van godsdienst, de vrijheid van vereniging en vergadering en de vrijheid van onderwijs. Dit betekent dat je inderdaad binnen de eigen bevoegdheidssfeer van de organisatie of de school iets tot zonde kunt bestempelen en hieraan consequenties verbinden, terwijl anderen dit vanuit hun uitgangspunt niet als zodanig beschouwen. Dat is de staatsrechtelijk-juridische vraag waar het om gaat" (*Handelingen II* 1992/93, No. 47, p. 3510).

88 "Maar het uitgangspunt behoort wat mij betreft te zijn: je hebt die vrijheidsrechten. Hoeveel ruimte geef je hieraan om ook in eigen kring onderscheid te maken tussen mensen?" (*Handelingen II* 1992/93, No. 47, p. 3511).

89 "Het gaat mij nu hierom: is een bevoegd gezag gerechtigd om binnen de eigen organisatie - dat is niet de publieke samenleving als geheel - baas in eigen huis te zijn, ongeacht het feit hoe dit in de samenleving als geheel wordt gewaardeerd? De minister zegt, dat dit niet meer mag. Dit is dan een aantasting van de godsdienstvrijheid, zoals wij die door de eeuwen heen in ons land hebben gehad? Als dat zo is, dan is dat een heel markant punt om vandaag te noteren. Het is een dieptepunt in de Nederlandse rechtsstaat!" (*Handelingen II* 1992/93, No. 47, p. 3510).

contradiction with their beliefs.[90] At the same time, by raising the questions about the scope of constitutional freedoms in parliamentary setting, they do squarely situate the discussion in a liberal-democratic framework. Moreover, phrasing the question in terms of the *degree* of freedom or competence that should be granted recognizes the possibility of delimitation, thereby even more strongly suggesting that there is an equality-based perspective at work here.

Sometimes, critical scrutiny does not only lead the opposition to rephrase their stance, or suggest a more egalitarian perspective, but also induces them to make actual concessions to a more nuanced, and perhaps even equality-based view. An apt illustration of this is an exchange that takes place regarding the question of rights, and more specifically the question whether religious freedom should be considered as an absolute or an unavoidably limited right. In this case, it is not a matter of the secular majority compelling the orthodox Protestant factions to nuance their views, but rather a prolonged and heated exchange with fellow Christian party CDA. The latter employs a rather nuanced and mixed view on the various questions concerning religious freedom: it endorses the egalitarian perspective that is reflected in the bill, but also feels compelled to present its liberty-based credentials. This is clearly visible in the following plea by CDA's Krajenbrink:

> "[T]ension may arise between article 1 of the Constitution and the classic constitutional rights with regards to spiritual freedom: religious freedom, freedom of education, of expression, of association and of assembly. These are rights that have been carved out from state power by the citizens' struggle throughout the centuries. They are rights which are now anchored in the Constitution. This does not mean that they have become absolute rights or liberties. Nevertheless, the government should in principle refrain from impairing these rights. The exercise of these rights should be guaranteed as much as possible. These rights are essential for and characteristic of our democratic rule of law."[91]

90 Compared to the other orthodox Protestant factions, the SGP generally remains more skeptical of the constitution, especially to the degree in which the constitution is grounded in a humanist vision (Van der Zwaag 2018, 83).

91 "Zo kan het grondrecht van artikel 1 van de Grondwet bijvoorbeeld in een spanningsveld komen met de klassieke grondrechten die betrekking hebben op de geestelijke vrijheid: godsdienstvrijheid, vrijheid van onderwijs, van meningsuiting, van vereniging en van vergadering. Het gaat hierbij om rechten die in de loop van de eeuwen door de burger op die overheid zijn bevochten. Het zijn rechten die nu verankerd liggen in onze Grondwet. Daarmee zijn zij nog geen absolute grondrechten of vrijheidsrechten geworden. De overheid dient zich evenwel in beginsel van aantasting van deze rechten te onthouden. De uitoefening van deze rechten dient zoveel mogelijk te worden gewaarborgd. Het gaat hierbij om voor onze democratische rechtsstaat wezenlijke en karakteristieke grondrechten" (*Handelingen II* 1992/93, No. 46, p. 3436).

This is a perfect example of a more nuanced liberty-based view on rights. Krajenbrink ascribes a certain distinctiveness to religious freedom, although he only refers to its historical role and makes no theological allusions or epistemological assumptions. And yes, the state should in principle refrain from impairing such a right - a textbook example of religious freedom as a presumptive right - but this does not mean that religious freedoms are absolute; undoubtedly a dig at the orthodox Protestant parties, who do seem to advocate for such an unimpaired, pristine right. Put differently, both the CDA faction and the orthodox factions strive for a maximized religious freedom, but each has different views on how high to set the bar for this 'maximum'. And this clearly puts them at odds with each other, perhaps even more so because of the fact their shared religious origins - after all, one of the parties that merged into the CDA was Kuyper's Anti-Revolutionary Party - and the fact that they both to a certain extent refer to liberty-based principles. There is clearly some sorrow and resentment between these parties, especially on the side of the orthodox factions, which comes to the surface when the GPV representative remarks:

> "What I … find shameful is that, especially in the initial phase, Christian-democratic politicians stimulated this process [of the development of anti-discrimination legislation, LN] and then got no further than putting the brakes on a process that they themselves had helped to initiate."[92]

When it comes to substantive views in the discussion on rights, however, it is the CDA that strongly criticizes the orthodox parties' rigid stance, starting a discussion that results in a clear shift - or at least an important concession - in the views of the orthodox parties.

The exchange in question takes place between RPF's Meindert Leerling and CDA's Jan Krajenbrink, and is initially sparked by very critical remarks made by the former on the negative impact of the Cabinet's legislative proposal on religious organizations. Addressing Krajenbrink, Leerling says he cannot square this purport of the Equal Treatment Act with "the ideas which you defend here on behalf of your followers": "How can this be defended from

92 "Wat ik wel beschamend vind, is dat vooral in de beginfase christen-democratische politici dit proces hebben gestimuleerd en vervolgens niet veel verder kwamen dan het afremmen van een proces dat zij zelf mee op gang hadden gebracht" *Handelingen II* 1992/93, No. 48, p. 3573.

the perspective of CDA's philosophy?"[93] Krajenbrink subsequently goes on the offensive and ripostes that "it seems that, in Leerling and his fellow travelers' way of thinking, somehow the right is claimed to be able to make distinctions in these organizations entirely how one wishes. In this country, not all distinctions can be made".[94] When the RPF reiterates its criticism of the CDA at a later stage of the debate, Krajenbrink replies in a more direct way:

> "[Leerling] just said that the freedom of education absolutely cannot undergo a reduction. … Do I have to understand this as meaning that denominational education can under all circumstances do whatever it pleases, and that no limitation should be imposed in any way […]. I think the answer will be 'no'."[95]

And indeed, Leerling does eventually acknowledge that it is "in itself true" that religious freedom is not absolute.[96] The exchange quickly devolves into bickering and stinging remarks: Leerling sneers that Krajenbrink has been "very quiet" during the debate, even though he imagines that the issue under debate "will also be of great importance to the faction of the CDA". He goes on to criticize the absence of Krajenbrink's colleagues: "I know that one can follow these debates through intercom, but there is also such a thing as personal involvement to experience this debate live".[97] Krajenbrink ultimately brings

93 "Ik kan dat niet plaatsen, gelet op het gedachtengoed dat u hier verdedigt namens de CDA-fractie. … Hoe kan dat vanuit de CDA-filosofie worden verdedigd?" (*Handelingen II* 1992/93, No. 48, p. 3578).

94 "Voorzitter! Het lijkt wel alsof in het denken van de heer Leerling en de zijnen enigszins het recht wordt geclaimd om onderscheid te mogen maken in die organisaties geheel zoals men dat zelf wil. In dit land mag niet alle onderscheid gemaakt worden" (*Handelingen II* 1992/93, No. 48, p. 3578).

95 "Hij zei zojuist dat de onderwijsvrijheid absoluut geen reductie mag ondergaan. … Moet ik dat nu zo verstaan dat hij bedoelt dat het bijzonder onderwijs onder alle omstandigheden zijn gang kan gaan en dat daar op geen enkel punt enigerlei begrenzingen aan mogen worden gesteld. … Ik denk dat het antwoord "nee" zal zijn" (*Handelingen II* 1992/93, No. 48, p. 3584).

96 "Minister Ritzen heeft gisteren laten blijken dat de inrichtingsvrijheid op onderwijsgebied niet absoluut is. Het is mogelijk om daarop beperkingen aan te brengen. Dat ligt in het verlengde van de discussie die ik zojuist met de heer Krajenbrink heb gevoerd en op zichzelf is dat juist" (*Handelingen II* 1992/93, No. 48, p. 3584).

97 "Ik denk dat die vraag ook voor de fract ie van het CDA van groot belang is. Ik sluit mij aan bij opmerkingen van andere collega's dat de beide coalitie–partners - maar ik kijk toch naar de heer Krajenbrink, gelet op de gevoeligheid van deze materie voor ook zijn eigen achterban - erg stil zijn geweest. … Ik weet dat je de debatten via de intercom kunt meebeleven, maar er is ook nog zoiets als persoonlijke betrokkenheid om zo'n debat live mee te maken." (*Handelingen II* 1992/93, No. 48, p. 3585)

the dispute to an end by stating that "this is not a manner of addressing other factions that is befitting to this house".[98]

These passages offer a glimpse of the discord and simmering tension between Christian parties, which obviously does not abate during the course of the exchange, but which also does not stop the orthodox Protestant RPF to concede that religious freedom is not an absolute right – by all indications a step in the direction of the equality-based frame, or at the very least a significant watering down of undiluted liberty-based defense of an absolute religious freedom. In this stance, it would later also be joined by other orthodox factions like the GPV, whose representative Schutte also admits that "restrictions may be imposed [to liberties], especially considering the freedom of others"[99] – a textbook example of the equality-based view on rights.

And so, while the orthodox Protestant factions have a point when they note CDA's silence, ambiguity or even its 'complicity' when it comes to their role in the developments leading up to the Equal Treatment Act, they also yield to equality-based criticism themselves. What is more, the remainder of this chapter will show how the orthodox opposition even ends up actively endorsing various tenets of the equality-based frame, far beyond the concessions described above. And in the ensuing equality-based disagreements, ambiguity will prove to be the rule rather than the lamentable exception.

7.5 Navigating the egalitarian wave: a struggle at the helm

While they merely dipped their toes in egalitarian waters in the eighties, the GPV, RPF and SGP are now not only dragged along by the slipstream – they also decide to take the plunge themselves. Confronted with the egalitarian hegemony and the accompanying dilemma of either criticizing or hitching on to the dominant frame, they refrain from solely preaching to their own liberty-based choir and instead hedge their bets. They pro-actively adopt egalitarian tenets like the equality of rights, and egalitarian principles like parity and equal treatment. But there is a catch, as the orthodox Protestant factions interpret these components of the equality-based frame in ways that

98 "Ik vind dat een manier van bejegenen van andere fracties die niet past in dit huis" (*Handelingen II* 1992/93, No. 48, p. 3585).

99 "In een vrije samenleving behoort de vrije uitoefening van vrijheidsrechten voorop te staan. Daaraan kunnen grenzen worden gesteld, in het bijzonder met het oog op de vrijheid van anderen, maar de noodzaak van die begrenzing zal in concrete situaties aangetoond moeten worden" (*Handelingen II* 1992/93, No. 48, p. 3572).

clearly diverge from the liberal-progressive mainstream. As the parliament rides the egalitarian wave, a struggle thus ensues at the helm of the ship, with different sides wrestling to gain control over its course. And the question is, to what extent can competing factions rely on an equality-based compass?

When it comes to the egalitarian tenet of the equality of rights, the 1993 debate sees the GPV mounting the same equality-based defense of religious freedom as before: "The government states that our Constitution knows no hierarchy of rights, and it is right", Schutte proclaims. "But it does not act accordingly", he continues, as "the structure of the proposed law would mean that the right to equal treatment would prevail over rights like the freedom of religion or education".[100] Schutte is joined by Leerling (RPF), who similarly notes that "beautiful declarations are made that there is no hierarchy of constitutional rights", but simultaneously observes that "freedom of religion and freedom of education are being violated to give substance to the principle of equality".[101] Again, the equal status of rights is pro-actively invoked to argue against the limitation of religious freedoms. And the GPV goes further: just like a decade prior, it tries to argue for a certain prevalence of religious freedom *despite* the equality among rights:

> "Recognizing the fact that the Constitution knows no hierarchy, I want to counterpose that there is all reason to accord a central place to the freedom to profess religion. In our country, that freedom has been fiercely fought for throughout the centuries, even at a time when no one thought about equal treatment."[102]

The difference with the debate of 1985, however, is that the secular parties now actively forward their own views about the equality of rights, and the

100 "De regering stelt dat onze Grondwet geen rangorde van grondrechten kent en zij heeft gelijk. Maar zij handelt er niet naar. De structuur van het wetsvoorstel komt erop neer dat het recht op gelijke behandeling voorgaat op rechten als de vrijheid van godsdienst of van onderwijs" (*Handelingen II* 1992/93, No. 46, p. 3432).

101 "Er worden prachtige verklaringen afgelegd dat er geen rangorde in die grondrechten is, maar feit is dat de huidige grondrechten, zoals vrijheid van godsdienst en vrijheid van onderwijs toch worden aangetast om inhoud te geven aan het gelijkheidsbeginsel" (*Handelingen II* 1992/93, No. 48, p. 3583). The RPF faction uses this argument several other times during the 1993 debate: see also No. 46, p. 3456, 3457, 3458, and No. 48, p. 3582.

102 "Onder erkenning van het feit dat de Grondwet geen rangorde kent, wil ik hier tegenover stellen dat er alle reden is de vrijheid van godsdienstig belijden centraal te stellen. Voor die vrijheid is de eeuwen door in ons land fel gestreden, ook in een tijd dat niemand dacht aan gelijke behandeling" (*Handelingen II* 1992/93, No. 46, p. 3432). See also p. 3445/6 for a similar argument.

egalitarian fair scheme of rights more generally. A tug of war ensues, in which the statements of the secular parties are practically a mirror image of the argumentation above. Take this statement of VVD's Rempt-Halmmans de Jongh:

> "There is no hierarchy among the constitutional rights. In case of conflict, the legislator rather than the judge further delimits these constitutional rights. Non-discrimination is, given its meaning, general. No religious or similar ['levensbeschouwelijke'] organization may detract from that."[103]

The statements from the GPV and VVD are illustrations of a broader disagreement: While both orthodox Protestant and secular factions endorse the equal status of fundamental rights, they could not be further apart when it comes to their specific interpretations and emphases. The former mostly invoke the equality of rights to object against the perceived prevalence of non-discrimination, and rather grudgingly acknowledge the non-absolute nature of religious freedom, while secular parties basically do the opposite: they eagerly emphasize religious freedom's limited nature, precisely in order to give way to non-discrimination. The latter line of argument comes to the fore in various contributions to the debate, by other secular factions like that of D66 and PvdA.[104]

Such statements are also the mirror opposite of the orthodox parties' view, in that they do not hold religious freedom but rather non-discrimination to be the more essential right. In Rempt-Halmmans de Jongh's words, "Restriction of the exercise of a constitutional right … is indeed only admissible if this

103 "Er bestaat geen hiërarchie tussen de grondrechten onderling. Bij eventuele botsing met andere grondrechten bakent de wetgever en niet de rechter deze grondrechten verder af. Non-discriminatiewetgeving is, gezien de strekking, algemeen. Daaraan mag ook door levensbeschouwelijke instellingen geen afbreuk worden gedaan" (*Handelingen II* 1992/93, No. 46, p. 3425).

104 D66 emphasizes that religious freedom applies 'except for each's responsibility to the law', and succinctly states: "Freedom of religion exists, but cannot entail racial discrimination. In that sense that freedom is not absolute" ["Vrijheid van godsdienstbelijdenis mag, maar dat mag geen rassendiscriminatie inhouden. In die zin is die vrijheid dus niet absoluut"] (*Handelingen II* 1992/93, No. 46, 3418.). PvdA similarly states that "Freedom cannot be absolute, if at the same time a prohibition of discrimination exists" ["Vrijheid kan niet absoluut zijn, als er tegelijkertijd een discriminatieverbod bestaat"] (No. 46, p. 3463), and GroenLinks states that "consistent elaboration of article 1" is not even at odds with the freedom of education to begin with, as "this freedom is not absolute after all" and "special education may also be asked to understand the signs of the times" ["Ik zie het als een consequente uitwerking van artikel 1 en niet in strijd met de vrijheid van onderwijs. Die vrijheid is immers niet absoluut. En ook van het bijzonder onderwijs mag toch gevraagd worden, de tekenen des tijds te verstaan"] (No. 46, p. 3452).

restriction is necessary to protect other values that are deemed essential in our society", and "[t]he principle of non-discrimination has to be seen as such a value".[105] In fact, the liberal faction suggests that it is non-discrimination and not religious freedom that should be regarded as paradigmatic when it says of religious freedom that "[i]t is but one of the first important expressions of discrimination that asked for regulation, because civilization advances and other forms of discrimination ask our regulatory attention".[106] It is therefore not surprising that, when the VVD faction refers to the contribution of then Interior minister Koos Rietkerk during the 1985 debate - who, as we saw in the previous chapter, has stated that the non-discrimination law is a general law from which no organization may detract - it takes it to mean that "the legislator has to constrain other constitutional rights in order to let [non-discrimination] fully blossom".[107] Strikingly, this wording is almost identical to the orthodox factions' liberty-based pleas for 'fully intact' and 'optimal' freedom of religion.

If any perspective could be said to represent the middle position between these two opposites, it is that of the cabinet members, and of the parliamentary faction of the CDA. Education minister Jo Ritzen (PvdA) and especially Justice minister Ernst Hirsch-Ballin (CDA) repeatedly emphasize that there is no hierarchy of constitutional rights, and that the anti-discrimination bill restricts religious freedom as well as non-discrimination.[108] And the CDA faction,

105 "Beperking van de uitoefening van een grondrecht binnen de grondwettelijke beperkingsmogelijkheden is immers slechts aanvaardbaar als deze beperking noodzakelijk is ter bescherming van andere waarden die in onze samenleving als wezenlijk worden ervaren. Het beginsel van non-discriminatie moet als zo'n wezenlijke waarde worden beschouwd" (*Handelingen II* 1992/93, No. 46, p. 3427).

106 "Vrijheid van godsdienst en wat daarbij komt is niet voor niets één van onze oudste en dus klassieke grondrechten. Maar daaraan kon volgens de VVD geen extra voorkeursrechten worden ontleend. Het is slechts èèn van de eerste belangrijke uitingen van discriminatie die om ordening vroegen, want de beschaving schrijdt voort en andere vormen van discriminatie vragen onze regelende aandacht" (*Handelingen II* 1992/93, No. 46, p. 3424).

107 "Hij [Rietkerk, LN] bedoelde daarmee, getuige ook de discussie, dat de wetgever andere grondrechten moet afbakenen om deze helemaal tot volle bloei te laten komen" (*Handelingen II* 1992/93, No. 48, p. 3578).

108 The exemptions in the law, Hirsch Ballin states, can be interpreted as limitations to the principle of non-discrimination (*Handelingen II* 1992/93, No. 47, p. 3518). See also statements by Ritzen (for example that "both rights need to be done justice to" (No. 47, p. 3525)), and Hirsch Ballin (No. 47, p. 3513; No. 48, p. 3601).

echoing interior minister Rietkerk's statement during the debate of 1985, takes aim at the more absolutist stances on both sides of the debate:[109]

> "Some voices in the discussion demand an almost absolute precedence of Article 1 of the Constitution over the other fundamental rights. Others tend to well-nigh absolutize the rights of liberty. We share the Cabinet's view that there is no hierarchy of fundamental rights from which any priority of one over another can be derived in advance. Neither from the order, nor from the systematics, nor from the wording, nor from the age of fundamental rights, nor from the constitutional history, can any order of precedence be distilled; to the contrary."[110]

This stance seems pretty clear, until one realizes that this formal equality can be interpreted in many different ways, and does not preclude the prevalence of a fundamental right in specific cases. This only reinforces the impression that the egalitarian precept of the equality of rights is inherently and unavoidably ambiguous. And with room to maneuver that granted by the equality-based frame, the CDA faction seems to be moving towards an even more outspoken egalitarian stance – just like minister Rietkerk and his fellow VVD minister Korthals Altes did not let the equality of rights get in the way of suggesting a certain preference for non-discrimination in 1985. In particular, the CDA faction proves to be susceptible to the claim that an anti-discrimination law is and should be general, and that no one should detract from that. This becomes clear in an exchange with VVD's Rempt-Hallmmans de Jongh, who presses CDA's Krajenbrink on this point. Indeed, Krajenbrink responds, "non-discrimination is obviously general" and "of course no-one in this country may discriminate". However, he claims that "this is not the issue here", and that he

109 In general, the CDA faction reinforces the Cabinet's stance, and emphasizes that the absence of a constitutional hierarchy is not only a position taken by the government, but also one of the (constitutional) legislator, the parliament (*Handelingen II* 1992/93, No. 46, p. 3425-6). Minister Ritzen expresses the same view (No. 46, p. 3426).

110 "Sommige stemmen in de discussie eisen een vrijwel absolute voorrang van artikel 1 van de Grondwet boven de andere grondrechten. Anderen neigen naar welhaast een verabsolutering van de vrijheidsrechten. Wij zijn met het kabinet van oordeel dat er geen hiërarchie van grondrechten bestaat, waaruit op voorhand enigerlei voorrang van het ene boven het andere grondrecht kan worden afgeleid. Noch uit de volgorde, noch uit de systematiek, noch uit de formulering, noch uit de ouderdom van grondrechten, noch uit de grondwetsgeschiedenis is er rangorde te destilleren, integendeel" (*Handelingen II* 1992/93, No. 46, p. 3439).

has "the feeling that [VVD's] Mrs. Rempt sometimes confuses the notion of discrimination with, for example, making distinctions or something similar".[111]

Krajenbrink is not playing a semantical game here, but refers to the law's essential criterion that only (indirect) *unjustified* distinctions are not allowed. A similar point is made by the faction of CDA's coalition partner, the PvdA. One the one hand, the PvdA faction argues that "[f]reedom cannot be absolute, if at the same time a prohibition of discrimination exists", but it also adds an important caveat: "On the other hand, the commandment of equal treatment exists only where there are equal cases".[112] This moves the discussion away from the question of the relative status of rights, and shifts it to the question when unequal treatment is in fact condemnable and to be prohibited – in other words, when can one speak of discrimination to begin with?

The discussion about these principles of equal treatment and non-discrimination shows similar patterns as the debate about the equality of rights. Both secular and orthodox Protestant factions endorse these principles, albeit with wildly diverging views on their interpretation and application. Even the staunchest opponents of the imminent law endorse the fight against discrimination – or, put differently, against unjustified unequal treatment. As Leerling asks: "Who can be against the fight against discrimination? Nobody, right? … Discrimination in the truest sense of the word is an assault on the public justice that the government should promote and serve."[113] Similarly, Van den Berg states that "[f]or the SGP faction discrimination is condemnable at all times",[114] and Schutte (GPV) confirms that "[t]he principle of equal treatment in equal cases is of course endorsed by me".[115] The RPF specifies its stance on discrimination by arguing that "[d]iscrimination against citizens in the

111 "Non-discriminatie is uiteraard algemeen. Er is geen enkele instelling die daaraan afbreuk mag doen. Het is ook een kenmerk van deze discussie. Maar dat is hier helemaal niet aan de orde. Natuurlijk mag niemand in dit land discrimineren. Ik heb het idee dat mevrouw Rempt het begrip discriminatie wel eens verwart met bijvoorbeeld het maken van onderscheid of iets van dien aard" (*Handelingen II* 1992/93, No. 48, p. 3578).

112 "Vrijheid kan niet absoluut zijn, als er tegelijkertijd een discriminatieverbod bestaat. Het gebod tot gelijk behandelen bestaat aan de andere kant alleen daar waar sprake is van gelijke gevallen" (*Handelingen II* 1992/93, No. 46, p. 3463).

113 "Wie kan er nu tegen de bestrijding van discriminatie zijn? Niemand toch? Wij ook niet. Discriminatie in de rechte zin van het woord is een aanranding van de publieke gerechtigheid, die de overheid moet bevorderen en dienen" (*Handelingen II* 1992/93, No. 46, p. 3455).

114 "Voor de SGP-fractie is discriminatie te allen tijde afkeurenswaardig" (*Handelingen II* 1992/93, No. 46, p. 3443.

115 "Het beginsel van gelijke behandeling in gelijke gevallen wordt uiteraard door mij onderschreven" (*Handelingen II* 1992/93, No. 46, p. 3435).

sense of unjustified unequal treatment in equal circumstances must be fought vigorously".[116] Even the radical right Centre Democrats (CD) seems to subscribe to this principle, even if it also labels "'discrimination'" (in quotation marks) as a "tendency of this time", and adds that "no man is the same" and so "equal cases rarely occur".[117]

These quotes show how opposition parties embrace endorse the dominant egalitarian frame and its storyline – even though they find their inspiration for this stance elsewhere.[118] But they also hint at another tried and true defense strategy, namely a specific interpretation of similar or (un)equal circumstances. In an exchange with GroenLinks' Peter Lankhorst, for example, GPV's Schutte reiterates that discrimination entails unequal treatment in equal cases without any justification, but then argues that such a justification is indeed available: "What I am arguing is that the freedom of education ... can be a very legitimate ground for making a distinction that Mr. Lankhorst and I might not make in other circumstances."[119] It is the religious nature a specific school or organization in general, then, which makes certain cases different (or dissimilar) from others; something which to certain degree is also acknowledged in the discussed bill. Among other things, the legislative proposal omits the ground of religion from the sole fact construction, and thus enables direct distinctions based on religious nature. Orthodox Protestant

116 "Discriminatie van burgers in de zin van een ongerechtvaardigde, ongelijke behandeling in gelijke omstandigheden moet met kracht worden bestreden" (*Handelingen II* 1992/93, No. 46, p. 3461).

117 "Dus het woord "discr iminatie" is een tendens van deze tijd. ... Overigens denkt de CD dat, voor zover zich discriminatie in onze samenleving voordoet die bestreden moet worden ... Maar, zoals al terecht is opgemerkt, geen mens is gelijk. Dus gelijke gevallen doen zich zelden voor" (*Handelingen II* 1992/93, No. 46, pp. 3469-70).

118 It is the SGP faction that most explicitly elaborates a different, religion-inspired justification of equality: "The Biblical commandment of charity is perfectly clear in this regard. All people, as creatures of God, are of equal worth, which, by the way, is another thing than equal" ["Het Bijbelse gebod van naastenliefde is wat dat betreft volstrekt duidelijk. Alle mensen zijn als schepselen Gods gelijkwaardig, wat overigens nog iets anders is dan gelijk" (*Handelingen II* 1992/93, No. 46, pp. 3443). Or elsewhere: "All people are sinners, without an exception, Christians and non-Christians, of whatever race, gender, sexual orientation or marital status. Therefore, no one can place themselves above another" ["Alle mensen zijn zondaren, zonder een uitzondering, christenen en niet-christenen, van welk ras, geslacht, seksuele geaardheid of burgerlijke staat ook. Daarom kan niemand zich boven een ander plaatsen"] (*Handelingen II* 1992/93, No. 48, p. 3580).

119 "Er is sprake van discriminatie bij ongelijke behandeling in gelijke gevallen, zonder dat daar enige rechtvaardigingsgrond voor Is. Ik betoog nu juist dat de vrijheid van onderwijs waar de schoolbesturen verantwoordelijk voor zijn, een heel legitieme grond kan zijn om een onderscheid te maken dat de heer Lankhorst en ik in andere omstandigheden wellicht niet zouden maken" (*Handelingen II* 1992/93, No. 46, p. 3434).

factions also seize upon this omission, by concluding, like the GPV does, that "[t]he competent authority of an institution is … free to distinguish on the basis of the sole fact of religion or belief".[120] And while the bill does forbid such religious distinctions when they lead to distinctions on other grounds like homosexuality, factions like the RPF offer a reasoning why this can never the case:

> "… I am convinced of the following: If homosexuality would occur, the applicant would on other issues also hold views that are completely different from what is common in a certain establishment. … The point is that there is a very different interpretation of the Scripture and that someone does not fit with the organization because of that. That does not have anything to do with homosexuality, but with the fact that someone interprets the Scripture differently."[121]

The RPF thus reformulates the refusal of homosexual personnel to a distinction made solely on religious grounds and related to the core ethos of the organization; distinctions that are generally deemed to be more justifiable. After all, in Laborde's words, "a religious association that is unable to insist on adherence to its own religious tenets as a condition of membership is unable to be a religious association".[122] The above quote also illustrates, however, how such a stance can be ambiguous at best, and problematic at worst, as many distinctions can potentially be reduced or recast to a distinction on religious grounds.

Religious background is not only invoked to justify differential treatment that suits the orthodox Protestant factions' views, but also to criticize differential treatment when it is not to their liking. For example, they criticize the fact that the law offers protections to religious schools that it does not grant other religious organizations. The CDA-PvdA Cabinet justifies this unequal treatment by referring to the article of freedom of education, but the orthodox

120 Het bevoegd gezag van een instelling heeft … de vrijheid om op het punt van het enkele feit van godsdienst of levensovertuiging te onderscheiden" (*Handelingen II* 1992/93, No. 48, p. 3585).

121 "Als ik de problematiek van de homoseksualiteit dan toch bij de kop neem, dan ben ik van het volgende overtuigd: als homoseksualiteit zich zou voordoen, dan huldigt de sollicitant ook op een aantal andere punten totaal andere opvattingen dan binnen een bepaalde inrichting usance is. Dan kan men zeggen dat het enkele feit niet aan de orde is. Het gaat erom dat er sprake is van een heel andere uitleg van de Schrift en dat iemand daardoor niet binnen die organisatie past. Dat heeft niets te maken met de homoseksualiteit, maar met het feit dat iemand de Schrift anders interpreteert" (*Handelingen II* 1992/93, No. 48, p. 3592).

122 Laborde 2017, 179.

factions are not convinced. As the RPF faction argues, the freedom of education should be seen as "only a specialization of the freedom of religion and belief", a right which "in principle" also applies to other religious organizations.[123] It is therefore, as Van den Berg argues, "extremely unfortunate that as a result of this law, ideological institutions such as homes for the elderly will not be allowed to maintain their own identity", given that "the people concerned precisely want such institutions so they can have their own identity and lifestyle".[124] And as Leerling laments:

> "Now that is rightfully an unacceptable unequal treatment in similar situations. Also in a Christian retirement home, also in a Christian nursing home, also in a Christian newspaper or in a Christian broadcasting company, there must be full space to live in word and deed as the Bible teaches."[125]

In these attempts to establish parity between religious schools and other religious (or Christian) organizations, the previously described frictions between the various Christian parties also (re)surface. In the same exchange between the RPF and the CDA discussed earlier, RPF's Meindert Leerling specifically focuses on the unequal treatment of "Christian education and Christian elderly centers" when he rhetorically asks "how can this be defended from the CDA philosophy?"[126] CDA, as expected, points to the constitutional article protecting the freedom of education, but in its response the RPF states that it was precisely in this freedom of education that a whole broader range of Christian organizations emerged. What is more, even the VVD intervenes

123 "De vrijheid van onderwijs is wat de organisatievrijheid betreft, in principe slechts een verbijzondering van de vrijheid van godsdienst en levensovertuiging. De vrijheid die hier nauwkeurig is gedefinieerd komt in principe ook toe aan andere georganiseerde uitingen van de vrijheid van godsdienst en levensovertuiging …" (*Handelingen II* 1992/93, No. 46, pp. 3459-60).

124 "Het is overigens buitengewoon wrang, dat het voor levensbeschouwelijke zorginstelllngen als bejaardenhuizen als gevolg van deze wet niet toegestaan zal zijn een eigen identiteit te handhaven. En dat, terwijl de betrokkenen juist dergelijke instellingen met het oog op die eigen identiteit en de eigen levensstijl wensen!" (*Handelingen II* 1992/93, No. 46, p. 3447). See also p. 3446 for a similar argument)

125 "Dat is nu met recht een niet te accepteren ongelijke behandeling in gelijke situaties. Ook in een christelijk bejaardencentrum, ook in een christelijke verpleegtehuis, ook bij een christelijke krant of bij een christelijke omroep moet er de volle ruimte zijn om in woord en daad te leven zoals de bijbel dat leert" (*Handelingen II* 1992/93, No. 46, p. 3458).

126 *Handelingen II* 1992/93, No. 47, p. 3578. See also No. 47, p. 3583 for the repeated complaint that "[u]nder pressure from the CDA, a more flexible regime seems to have been negotiated for special education than for other institutions on a denominational basis", amounting to "unequal treatment in a similar situation".

by stating that it does not understand why schools are allowed to make certain distinctions that other organizations may not. "It is fascinating to see how the extremes sometimes manage to unite here, Chairman!", CDA's Krajenbrink concludes.[127]

Although the VVD and the orthodox Protestant factions may agree on the parity within the category of religious organizations, the VVD obviously has a different intention here; instead of 'levelling up' the protection to cover all religious organizations, it questions the privileged treatment of religious organizations to begin with. This is the general stance of all secular opposition parties, who reject the unequal treatment of (homo- and heterosexual) individuals as well as (religious and non-religious) organizations. In Rempt-Halmmans de Jongh's words:

> "The bill even creates legal inequality between employers inside or outside of special education, inside or outside of institutions on religious and philosophical basis. The same for employees, pupils, students with the same characteristics inside or outside religiously based institutions. This is not democracy, but theocracy, as the D66's Glastra van Loon said recently."[128]

In fact, the VVD extends this argument by also suggesting that not only individuals or organizations, but also different communities are treated unequally within the Dutch society, and unjustifiably so. The current bill, Rempt-Halmmans de Jongh says, seems to implicitly depart from the viewpoint of Christian religions. "Would the Cabinet also be so understanding", she asks, "of the governing body of a school on another religious or philosophical basis wanted to check with female teachers or students to see if they had been circumcised?"[129]

127 "Het is boeiend om te zien hoe de uitersten zich hier soms weten te verenigen, voorzitter!" (*Handelingen II* 1992/93, No. 48, p. 3578).

128 "Het wetsvoorstel schept zelfs rechtsongelijkheid tussen werkgever binnen of buiten het bijzonder onderwijs, binnen of buiten instellingen op godsdienstige/levensbeschouwelijke grondslag. Idem dito voor werknemers, leerlingen, studenten met dezelfde kenmerken binnen of buiten instellingen op godsdienstige grondslag. Dat is geen democratie, maar theocratie, zoals de D66'er Glastra van Loon onlangs zei" (*Handelingen II* 1992/93, No. 46, pp. 3427-8).

129 "Hierbij komt dat er in het wetsvoorstel impliciet lijkt te worden uitgegaan van de christelijke godsdiensten. Zou het kabinet bijvoorbeeld ook zo vol begrip zijn als het bevoegd gezag van een school op andere godsdienstige of levensbeschouwelijke grondslag bij vrouwelijke leerkrachten of leerlingen wilde nagaan of men wel besneden is?" (*Handelingen II* 1992/93, No. 46, p. 3428).

The orthodox factions, on the other hand, clearly disagree with this suggestion of Christian privilege. To the contrary, they argue that the law is a further sign of discrimination suffered by Christian communities. Especially the RPF and SGP factions criticize the law for its choice of 'making distinctions' as the central notion instead of the narrower and pejorative term of discrimination - the effect of which, they say, is that distinctions as such are criminalized and viewed as inherently suspect.[130] These equality-based arguments, in other words, are added to the (previously quoted) arguments about the reversal of the burden of proof:

> "[P]eople and organizations who do not want to discriminate in the slightest, and who want to give shape to biblical standards from their honest conviction, also in social life, are associated by this proposal with the evil of discrimination, and will at best only be tolerated in exceptional cases. Unequal treatment, in other words. And so we encounter the great paradox of this bill: a law that aims to provide equality leads to a serious form of inequality and discrimination."[131]

This alleged paradox, which had already surfaced in 1985, is a recurrent theme in 1993. It is also pointed out by the RPF, who states that the law "will lead, for the sake of fighting discrimination, to Bible-believing Christians being discriminated against in our society".[132] For these factions, then, one of the most fundamental objections against the new anti-discrimination law is that it leads to unequal treatment and discrimination of not only religious or Christian organizations, but also individual Christians and the Christian communities as such.

This, of course, shows just how dominant the equality-based frame has become, but perhaps even more telling of this egalitarian dominance is the somewhat puzzling claim forwarded by the radical right Centre Democrats. Its leader Hans Janmaat argues that "a group of people that want to fight

130 RPF: *Handelingen II* 1992/93, No. 46, p. 3455, 3458. SGP: No. 46, p. 3442.

131 "Immers, mensen en organisaties, die zonder ook maar in het minst te willen discrimineren, vanuit hun eerlijke overtuiging aan Bijbelse normen gestalte willen geven, ook in het maatschappelijke leven, worden door dit voorstel in de kwade reuk van de discriminatie geplaatst en zullen hoogstens nog bij wijze van uitzondering worden gedoogd. Ongelijke behandeling dus. En daarmee stuiten wij op de grote paradox van dit wetsvoorstel: een wet die gelijkheid beoogt te verschaffen, leidt tot een ernstige vorm van ongelijkheid en discriminatie" (*Handelingen II* 1992/93, No. 46, p. 3449).

132 "Het zal ertoe leiden dat ter wille van de bestrijding van discriminatie bijbelgetrouwe christenen in onze samenleving worden gediscrimineerd" (*Handelingen II* 1992/93, No. 47, p. 3586)

homophilia within the possibilities allowed by the rule of law", even if he himself does not support it, "should also not be discriminated against" – which, he adds, also applies to "groups that want to fight the Islam", a religion whose norms "are at odds" with the norms and values of Dutch society.[133] What Janmaat suggests, it seems, is that even those who discriminate should not be discriminated against, even though in this context he arguably would not agree that the fight against Islam or against 'homophilia' is necessarily discriminating to begin with. Although such a stance really stretches the equality-based frame to its limits - and probably beyond -, it also goes to show just how much how malleable this frame can potentially be.

And indeed, this brief overview already points to a multitude of different interpretations of precepts like the equality of rights, and principles of equal treatment and non-discrimination. This only underlines the equality-based frame's ambiguity, and repeatedly prompts the questions that have haunted egalitarian theories from the beginning. When can one speak of equality and when, for example, does the prevalence of one right over the other violate this equality? When, furthermore, can a specific religious community like the orthodox Protestant community be deemed either privileged or discriminated? And even leaving aside this 'when'; equality of *what*? Which rights are sufficiently important to be included in a fair scheme of equal rights to begin with? What makes religious organizations similar or different from non-religious organizations, and religious schools from religious elderly centers, media outlets or camping sites? And what characteristics or beliefs should be protected through the ban on discrimination? Such questions ultimately all refer to a kind of standard to measure the relative weight of underlying interests – as well as the harms and burdens that affect these interests. Liberty- and Equality-based Theories, Chapter 3 showed, cannot provide such independent measures, and so we have to dive deeper into the parliamentary debate to find out which balancing of interests, of burdens and harms, is deemed proportionate.

133 "Ik kan mij voorstellen, ik sta er niet achter, dat een groep mensen de homofilie wil bestrijden binnen de mogelijkheden die de rechtsstaat ons laat. Die mogen dan ook niet worden gediscrimineerd. Hetzelfde geldt voor groepen die de islam willen bestrijden" (*Handelingen II* 1992/93, No. 46, p. 3470).

7.6 Opportunity and dignity: irresistible but ambiguous and slippery criteria

Chapter 3 already concluded that of all the questions regarding religious freedom, it is the question of interests that is most decisive, and may offer a way out of equality's ambiguity. In the end, determining the relative weight of conflicting interests (or the severity of burdens and harms) determines which right prevails, and how individuals and organizations need to be treated to achieve equality. The views that the various factions express regarding this question during the 1993 debate are almost exclusively situated in the equality-based frame, which once more underlines this frame's dominance. To start with, resolving the conflict of interests is treated as a matter of proportionality, or equality-as-proportionality. What counts as (dis)proportionate is a question that is most explicitly explored by the orthodox Protestant factions, especially when it comes to weighing opportunity harms against the religious interests at stake. Both orthodox and secular factions, moreover, also identify dignity harm as a harm that can never be outweighed – a broad consensus which, again, harbors a multitude of different interpretations on what precisely constitutes the harm(s) in question. Could it be that even the decisive harms prove inherently ambiguous?

That even orthodox Protestant factions could subscribe to the idea of equality-as-proportionality was hinted at in 1985, when Schutte posed the rhetorical question whether there are "really structural, harrowing forms of unequal treatment in this country, that can only be remedied with government measures".[134] Even though setting such a high bar made it easier for Schutte to undermine the justification for anti-discrimination measures, at the same time it suggested that the GPV faction did recognize the relevance of interests of discriminated citizens – which in turn granted its argument a certain legitimacy with the equality-based frame.

When the interests of discriminated citizens become an even more central and weighty issue in the 1993 debate, the orthodox factions do not only respond by emphasizing the seriousness of religious burdens, but also feel compelled to follow up on this strategy. This time, however, they set a bar that is more specific and considerably easier to meet. They primarily focus on what we identified in Chapter 4 as opportunity harms: the deprivation of a basic opportunity like education, employment and housing. This harm is not invoked in a generalized way, as the 'disadvantaged citizens' the parliamentary majority spoke about

134 *Handelingen II* 1985/86, p. 263

in 1985, but is made more concrete. This view of the deprivation of a basic opportunity as a specific and significant harm - one that may even outweigh the religious interests in question - can be clearly inferred from statements like these from the GPV and SGP:

> "The government would be right if it could prove that citizens, without distinction, would be forced to rely on certain facilities of a certain denomination. That would be the case if the institution would occupy a position of monopoly."[135] (GPV)

> "The realistic chance being deprived of essential facilities could, under circumstances, constitute an argument to breach a strict admission policy."[136] (SGP)

Even though these statements are meant to undermine the justification for an anti-discrimination law by denying that a certain interest has in fact been violated, they also and undeniably suggest a certain balancing of interests; to be more specific, they establish a point in which the religiously inspired harms outweigh the religious interests in question. In the end, this boils down to an endorsement of the principle of equality-as-proportionality, an admission that religiously inspired harms to others must be proportionate to the burden that religious citizens would have to bear. To be sure, the context in which these statements are made is not the specific case of homosexual teachers, but rather the access of facilities and services in general, but the criterion in question does apply to this more specific issue; it sets a precedent for any other comparable cases, one which the orthodox factions in the future would not be able to distance themselves from. If religious organizations on other terrains, or in other contexts, would in fact occupy a monopoly position, the orthodox Protestant parties cannot anymore diminish the importance of such a harm in a credible way.

Moreover, the orthodox factions also enter a debate about what precisely constitutes a disproportionate opportunity harm. As the secular factions' views

135 "De regering zou gelijk hebben als zij kon aantonen dat er burgers zonder onderscheid wel aangewezen moeten zijn op een bepaalde voorziening van een bepaalde signatuur. Dat zou het geval zijn als de instelling een monopoliepositie zou innemen" (*Handelingen II* 1992/93, No. 46, p. 3434). The next day of debate, the GPV faction would similarly argue that "[i]f there is a position of monopoly, like in education, then one would have to be generally accessible" ["Als er een monopoliepositie is, net als bij het onderwijs, dan zal men algemeen toegankelijk moeten zijn."] (No. 47, p. 3519).

136 "De reële kans op het verstoken blijven van essentiële voorzieningen zou onder omstandigheden een argument kunnen vormen om een strikt toelatingsbeleid te doorbreken" (*Handelingen II* 1992/93, No. 46, p. 3445).

on the priority of non-discrimination already suggest, they are of the opinion that any discriminatory deprivation of opportunities, however small, are sufficient to overrule religious freedom. And this take on proportionality even seems to be shared by the Cabinet, or at least by the ministers of the Labour Party (PvdA). Interior minister Ien Dales, for example, states the Cabinet is (and has been) of the opinion that the behavior of homosexuals should be protected "to such a degree, that no human being is ever brought to ruin, or refused or robbed of his job".[137]

Having entered this debate about (dis)proportionate harms, the orthodox factions have a hard time formulating a consistent and clear line, and will find that establishing disproportionate opportunity harm is an especially slippery affair. When Schutte insists, in the previously quoted statement, that the mentioned monopoly is "by no means always the case", and that "often" a diversity of schools is present, the GPV faction seems to be unsure themselves about whether such harm does in occur in practice[138] – thus undermining their own arguments against the Equal Treatment Act. The parties themselves also seem to (inadvertently) relax their criteria to establish a deprivation of opportunity, a point in case being the addition of the qualification of "a realistic chance" in Van den Berg's (SGP) statement displayed above.

Elsewhere, the orthodox factions go even further in softening their stance, making it easier for something qualify as a disproportionate opportunity harm – thus further tilting the balance towards the interests of the discriminate citizens. What happens is that a more explicitly gradual yardstick would slip into their reasoning: At times, they argue that not only the *categorical* deprivation of a basic opportunity that would outweigh religious interests, but also a certain degree of *relative* access to that opportunity. In the following statement, for example, Schutte employs a fixed and demanding criterion as well as a more relative yardstick:

> "The government does not have the right to impose all kinds of obligations on citizens regarding the way they treat each other if no significant public interest can be cited for such an obligation. Such a public interest may exist if a citizen,

137 "Het kabinet is thans van mening … dat het zo ver is dat deze gedragingen zodanig mogelijk moeten zijn, dat geen mens daardoor meer in de vernieling wordt gebracht, van zijn baan beroofd of daarin niet toegelaten" (*Handelingen II* 1992/93, No. 47, p. 3510).

138 *Handelingen II* 1992/93, No. 46, p. 3434.

> organization or company occupies a monopoly position or if, more generally, there is a clear scarcity of provisions."[139]

The notion of scarcity is important here, as it is introduced not by the orthodox parties themselves but by the Cabinet in its explanatory memorandum, as a specific limitation to the hiring- and admission policy of religious individuals and their organizations. As we have described at the start of this chapter, the Cabinet identified education (alongside housing, welfare, health care and culture) as essential but "scarce goods", and goes on to say that "[i]f one would be excluded from these [goods] by a certain institution on one of the mentioned grounds [of discrimination, LN], one could possibly be deprived of these goods or services".[140]

Scarcity is a broad and contentious notion, however, open to widely divergent interpretations.[141] The RPF faction therefore calls for an objective qualification of this criterion - for which it also introduces amendments during the debate -, while simultaneously offering its own interpretation of scarcity: "At the most, admission should not be refused if there is no other suitable facility within reasonable distance."[142] Schutte (GPV) formulates a similarly open-ended criterion when it argues that religious organizations can be limited in case of "concrete problems regarding the availability of necessary facilities".[143] The SGP and the RPF (elsewhere) employ potentially even more 'relaxed' criteria

139 "De overheid heeft niet het recht allerlei verplichtingen aan burgers op te leggen over de wijze waarop zij met elkaar omgaan als voor een dergelijke plicht geen publiek belang van betekenis kan worden aangevoerd. Van zo'n publiek belang kan sprake zijn als een burger, organisatie of bedrijf een monopoliepositie inneemt of als meer in het algemeen sprake is van een duidelijke schaarste aan voorzieningen" (*Handelingen II* 1992/93, No. 48, p. 3572).

140 *Kamerstukken II* 1990/91, 22014, No. 3, p. 21.

141 In fact, even the Cabinet itself does not speak with one voice on this matter, as Hedy D'Ancona, minister of Welfare, Public Health and Culture, rejects the scarcity criterion - albeit in the context of the specific discussion about retirement homes -, suggesting that it is not always sufficient: ""Irrespective of the question whether or not scarcity exists, the accessibility for anyone and anywhere is paramount" ["Afgezien van de vraag of er al dan niet sprake zou zijn van schaarste, staat bij ons de toegankelijkheid voor een ieder waar dan ook voorop."] (*Handelingen II* 1992/93, No. 47, p. 3530).

142 "Hooguit zou toelating niet geweigerd mogen worden indien binnen redelijke afstand geen andere passende voorziening beschikbaar is" (*Handelingen II* 1992/93, No. 46. p. 3461).

143 "Een rechtvaardiging voor deze ongelijke behandeling zou gevonden moeten worden in concrete problemen met betrekking tot de beschikbaarheid van noodzakelijke voorzieningen" (*Handelingen II* 1992/93, No. 46, p. 3447).

when they speak of "the availability of facilities in these areas [being] *affected*"[144] (SGP) and the "*[in]sufficient* supply for those [individuals] that are rejected" (RPF) (emphasis added).[145] It goes without saying that 'concrete problems regarding availability', '(in)sufficient supply' 'affecting the availability' are criteria that are open to multiple interpretations, and all suggest some kind of process of detailed weighing and balancing.

What the above shows is that even the specific harm that is supposed to be decisive in debates about religious freedom is itself fundamentally ambiguous. What constitutes a sufficiently weighty opportunity harm cannot be derived from the notion itself, but is rather the result of a balancing act – a process where, as concluded in Chapter 3, no theoretical method or principle provides concrete guidelines for determining the appropriate balance. In the end, it is not a theoretical but rather a political matter, which is decided in arenas like the Dutch parliament. And this does not only apply to the notion of opportunity harm: Ambiguity and indeterminacy can also be found in the seemingly more uncompromising (and, as Chapter 1 showed, egalitarian) threshold of human dignity.

That dignity can be interpreted in many ways is already suggested by the fact that it is not only championed by the Cabinet in its explanatory memorandum, but also by the law's most vocal critics. Even staunch opponents of the anti-discrimination law like the GPV emphasize that the "at stake are human dignity and equality", adding that "[i]t is good to explicitly state here once again that in our opinion the fundamental dignity of people should be the starting point in every society".[146] The SGP offers a more qualified endorsement of the frame, but an endorsement of the weight of expressive harm nonetheless:

144 "Het gaat hier om een relatief zeer klein segment van het totale aanbod van goederen en diensten, bijvoorbeeld in de sfeer van recreatie of ontspanning … waarvan in redelijkheid onmogelijk kan worden volgehouden, dat de beschikbaarheid van voorzieningen op deze gebieden zou worden *aangetast,* indien deze niet voor een ieder open zouden staan" (*Handelingen II* 1992/93, No. 46, p. 3447).

145 "Een camping die zich richt op één bepaalde doelgroep, met uitsluiting van anderen, mag niet meer onderscheiden op basis van één der onderscheidingsgronden, ook niet als geen enkel publiek belang gediend is met dit verbod, omdat voor degenen die toegang wordt geweigerd, *voldoende aanbod* resteert" (*Handelingen II* 1992/93, No. 48, p. 3585).

146 "In geding zijn de menselijke waardigheid en gelijkwaardigheid. Het is goed om hier nog eens expliciet uit te spreken dat naar onze opvatting in elke samenleving de fundamentele gelijkwaardigheid van mensen uitgangspunt behoort te zijn" *Handelingen II* 1992/93, No. 46, p. 3435.

> "All human beings, as God's creatures, are of equal worth, which, by the way, is something else than equal. There is therefore never any reason for one human being to place himself above another or to offend and humiliate another."[147]

The key question, however, is what precisely violates dignity, and this in turn depends on the question which characteristics are inherently tied up with this personal dignity. A debate thus unfolds about the relative importance of various personal characteristics, and about the question whether a distinction based on these grounds amounts to a violation of dignity. The Cabinet seems to take a stance on this relative importance of grounds in its written reply to questions of the parliament. Even though it expressly assures it does not recognize a hierarchy of grounds - just like it rejected a hierarchy of rights - it does specifically single out gender and race as grounds that are especially connected to human dignity, and implicitly suggests that grounds like sexuality do not qualify for similar protection:

> "Discrimination on the ground of *gender* or *race* is a matter of violating human dignity through unjustified distinctions that are merely made on the basis of a personal characteristic as such. It is different with *other grounds*, because certain beliefs, behavior and affiliations play a role there. This justifies the fact that, within our legal order, partly different criteria are established for the other grounds than the criteria that at the international level are accepted with regards to race and gender" (emphasis added).[148]

Secular opposition parties VVD and D66 clearly do not agree with this assessment. During the debate, Rempt-Halmmans de Jongh vehemently

147 *Handelingen II* 1992/93, No. 46, p. 3443. Elsewhere, it offers a similar religion inspired defense of equal dignity, albeit from the more pejorative and perspective of sin: "All people are sinners, without an exception, Christians and non-Christians, of whatever race, gender, sexual orientation or marital status. Therefore, no one can place himself above another. … All therefore need conversion to the living God, but can also still be converted, in and through Jesus Christ. With God there is discrimination of persons ['Bij God is geen aanneming des persoons'], so says Holy Scripture" (*Handelingen II* 1992/93, No. 48, p. 3580).

148 "Bij discriminatie op grond van geslacht of ras gaat het om aantasting van de menselijke waardigheid door ongerechtvaardigd onderscheid dat louter op basis van een persoonskenmerk als zodanig wordt gemaakt. Bij de andere gronden ligt dat anders, omdat daar bepaalde opvattingen, gedragingen of de gezindheid een rol spelen. Dit rechtvaardigt dat binnen onze eigen rechtsorde voor onderscheid gebaseerd op de andere gronden ten dele andere maatstaven worden aangelegd dan de maatstaven die in internationaal verband zijn aanvaard ten aanzien van onderscheid naar ras en geslacht" (*Kamerstukken II* 1991/92, 22014, No. 5, p. 10).

criticizes the Cabinet for the above distinctions, lamenting that this means that "human dignity may be squandered" when it comes to grounds other than race and gender.[149] Similarly, D66 argues that the very existence of the sole fact construction - which is not applicable to race or gender but with its distinction between characteristic and behavior seems specifically developed for the ground of sexuality - effectively establishes a hierarchy among grounds.[150] What is implied by these statements by the VVD and D66 is that all characteristics, all grounds, are equally connected with human dignity – something which Groen Links are suggests when it proclaims that "human dignity needs to be protected in all aspects".[151]

The orthodox Protestant parties have a different view altogether. On one hand, they side with the Cabinet's implicit assessment of the relative importance of grounds. Speaking about the grounds of sexual orientation and civic status, for example, Van den Berg (SGP) argues that "[t]hese grounds do not only concern typical personal characteristics, as such defining the individual, but also about behavior which implies beliefs and choices of ethical nature".[152] Instead of including these grounds to begin with, it argues, the Cabinet could have better recognized other grounds: "In our opinion discrimination based on … age and handicap, would be more eligible for inclusion in this bill than some of the other sorts of distinctions".[153] Schutte (GPV) similarly objects against the "political choice" to include homosexuality while leaving out "grounds which are broadly experienced as discriminatory such as age and handicap".[154]

The distinction between grounds made by the Cabinet proves to be a double-edged sword for the orthodox factions, however. On the one hand, as

149 "Daarom mogen ten dele andere maatstaven worden aangebracht dan de maatstaven, die in internationaal verband zi jn aanvaard ten aanzien van ras en geslacht en zo voeg ik eraan toe, mag menselijke waardigheid te grabbel worden gegooid. " *Handelingen II* 1992/93, No. 46, p. 3427.

150 *Handelingen II* 1992/93, No. 46, p. 3419.

151 "De menselijke waardigheid dient in alle aspecten beschermd te worden" (*Handelingen II* 1992/93, No. 46, p. 3450)

152 "Het gaat bij deze gronden niet louter om typisch persoonsgebonden eigenschappen, als zodanig bepalend voor het individu, maar ook om gedragingen, die opvattingen en keuzes van ethische aard impliceren" (*Handelingen II* 1992/93, No. 46, p. 3443).

153 "Naar onze opvatting zou discriminatie ter zake van beide genoemde persoonsgebonden kenmerken, te weten leeftijd en handicap, eerder in aanmerking komen voor opneming in dit wetsvoorstel dan enkele andere soorten onderscheid" (*Handelingen II* 1992/93, No. 46, p. 3446).

154 "Maar de regering maakt een andere politieke keuze. Zij voegt aan de grondwettelijke opsomming de hetero– of homoseksuele gerichtheid en de burgerlijke staat toe, maar laat bijvoorbeeld in brede kring als discriminerend ervaren gronden leeftijd en handicap buiten de werkingssfeer van de wet" (*Handelingen II* 1992/93, No. 46, p. 3431).

we have seen, it helps them to relativize the importance of grounds such as sexuality or civil status. On the other hand, it also poses several problems. Seen from the government's perspective, for example, the ground of gender is rightly treated on a par with race as an immutable personal characteristic, which does not square with the orthodox Protestant parties' more conservative religious views. This leads Van den Berg to comment: "With regards to the ground of 'gender' ... I would like to say that this bill embodies the spirit of the emancipation ideology. Man and woman are completely equal, but not the same. In line with the Biblical telling of the creation, man and women each have their own task and calling."[155] There is a certain inconsistency in Van den Berg's position, however, which becomes apparent in another passage where he fulminates against the "emancipatory aims" of the imminent law. In that passage, he defends religious citizens that are willing to accept others in their homosexual orientation, but cannot accept "the expressions for which they invoke this orientation".[156] However, if the party wants to prohibit individuals to invoke their homosexual orientation or nature to justify certain expressions of this nature, it cannot similarly invoke a supposed nature of women to condone certain types of expressions (related to being a housewife, for example) and prohibit others (such as having a paid job).

The other problem the government's classification poses for the orthodox Protestant parties concerns its implications for the ground of religion. After all, in the government's classification this would be categorized as a matter of belief - which is mentioned in the same breath with behavior and political affiliations - and not necessarily as a personal characteristic directly related to human dignity. The GPV's struggles with this implication are obvious in the following statement:

> "By the way, in the written preparation the government has in fact applied a certain distinction between the bill's grounds of discrimination. It labels race and gender as purely personal characteristics which as such are immutable. It is different with other grounds, because certain beliefs, behavior and affiliations play a role there. I do not

155 "Wat betreft de - overigens niet nieuwe - grond "geslacht" merk ik op, dat dit voorstel sterk de geest van het emancipatiedenken ademt. Man en vrouw zijn volstrekt gelijkwaardig, maar niet gelijk. Overeenkomstig de Bijbelse scheppingsgegevens hebben man en vrouw ieder hun eigen taak en roeping" (*Handelingen II* 1992/93, No. 46, p. 3443).

156 "Dat mag passen in de emancipatoire doelstelling van de beoogde wet, maar de regering had zich bewust moeten zijn van de extra problemen die het inbrengen van de aldus omschreven grond zou meebrengen voor diegenen die een medemens ook qua geaardheid als naaste aanvaarder, maar niet de uitingsvormen waarvoor men zich op die geaardheid beroept" (*Handelingen II* 1992/93, No. 46, p. 3446.

> know whether the distinction is as black-and-white as the government suggests, but it is right in pointing out that beliefs, behavior and affiliation play a clear role with certain grounds of discrimination. If opinions that stem from inner convictions play a role, one should be extra careful when labelling a distinction as discrimination. I missed this carefulness in answering our question in the provisional report if distinctions on the grounds of gender and sexual orientation could just be put on a par with for example distinctions on grounds of religion or belief"[157]

Since the government's distinction between 'fixed' characteristics and beliefs would undermine GPV's desired priority for the ground of religion, it tries to nuance this distinction by suggesting that it might not be "black-and-white". The party seems to try to disassociate the ground of religion from the category of beliefs, behavior and affiliations by speaking of "inner convictions", which suggests a type of anchored and less mutable beliefs that are more intimately tied up with one's personality, bordering on the category of personal characteristics. In fact, GPV holds these inner convictions to be weightier than even this latter category, given that Schutte argues that the ground of gender cannot "just be put on a par" with religion.

As the above shows, entering the discussion about the relative weight of various grounds clearly puts one on a slippery slope, as the criteria that are employed may prove to be overly expansive, or a double-edged sword that ultimately undermines own position. A final example of a particularly slippery slope can be found in an excerpt where the RPF defends its views:

> "Every right-thinking person will resist if fellow citizens are discriminated against on the basis of certain qualities or characteristics determined at birth. That is to say: to be put at a disadvantage in unjustifiable ways in similar circumstances on the basis of essential characteristics such as race, gender and skin color. However,

157 "Overigens heeft de regering in de schrlftelijke voorbereiding toch wel een zeker onderscheid aangebracht tussen de discriminatiegronden van het wetsvoorstel. Zij noemt ras en geslacht louter persoonskenmerken als zodanig die onveranderlijk zijn. Bij andere gronden ligt dat volgens haar anders, omdat daar bepaalde opvattingen, gedragingen of gezindheid een rol spelen. Ik weet niet of het onderscheid zo zwart/wit is als de regering hier suggereert, maar zij heeft wel gelijk als zij erop wijst dat opvattingen, gedragingen of gezindheid een duidelijke rol spelen bij bepaalde discriminatiegronden. Als opvattingen die voortkomen uit een innerlijke overtuiging een rol spelen, moet extra zorgvuldig worden omgegaan met het bestempelen van onderscheid tot discriminatie. Die zorgvuldigheid miste ik in het antwoord op onze vraag in het voorlopig verslag of onderscheid naar geslacht of seksuele gerichtheid zomaar op één lijn kan worden gesteld met bijvoorbeeld onderscheid naar godsdienst of levensovertuiging" (*Handelingen II* 1992/93, No. 46, p. 3431).

> in certain circumstances - particularly in the interaction between citizens - it is unavoidable to make a distinction on the basis of characteristics such as religion, sexual behavior and lifestyle, since these matters can be judged differently … on the basis of different religious beliefs."[158]

Based on this statement, the decision to grant special importance to grounds like race and gender rests on their immutable character; the fact that they are 'determined at birth'. This also means that, once sexuality is recognized as immutable, discrimination on this ground should be recognized as a violation against human dignity. And given that orthodox parties have already acknowledged that dignity outweighs any other interest, this would also justify a limitation of religious freedoms. This, as we will see, is exactly the direction the debate would head in two decades later.

7.7 Conclusion: more egalitarian dominance – and more ambiguity

The 1993 debate was a watershed moment when it comes to the dominance of the equality-based frame. This frame had already structured the debate of 1985 to a large extent, but was now also being (further) institutionalized with the imminent establishment of the Equal Treatment Act. Many egalitarian assumptions, precepts and principles that had marked the debate in the eighties were also reflected in the bill introduced by the third Lubbers cabinet, from the assertion of state competence to the equality of rights, from embodying the principle of equal treatment of similarly situated citizens to identifying dignity, liberty and opportunity harm as disproportionate. While frame structuration thus led to institutionalization, the law and its underlying rationale in turn also stimulated further structuration. The introduction of notions like legal certainty and privacy, the liberal binary of public and private, and the aforementioned harms provided ammunition for the secular majority to push

158 "leder weldenkend mens zal zich verzetten als medeburgers op grond van bij geboorte bepaalde eigenschappen of kenmerken worden gediscrimineerd. Dat wil zeggen: in gelijke omstandigheden op niet te rechtvaardigen wijze ten achter worden gesteld op grond van wezenskenmerken als ras, geslacht en huidskleur. Er valt echter in bepaalde omstandigheden - met name in het verkeer tussen burgers onderling - niet te ontkomen aan het maken van onderscheid op grond van kenmerken als godsdienst, seksueel gedrag en leefstijl, aangezien deze zaken op grond van onderscheiden geloofsopvattingen verschillend kunnen worden beoordeeld en zo men wil, gewaardeerd" (*Handelingen II* 1992/93, No. 46, p. 3456).

for further egalitarian advances. The egalitarian wave thus surged even higher, and became nigh unstoppable.

The dominance of the equality-based frame was not absolute, however; the pleas for further advancements already suggested as much, and the law indeed still bore traces of the bygone era of liberty-based dominance. Moreover, conflict between the equality- and liberty-based frame was stoked through the fierce opposition from orthodox Protestant factions, which showed that the liberty-based fire was not extinguished completely – at least the embers were still glowing. At the same time, the orthodox factions were only too aware of the impending changes, and their sharp Calvinism-inspired liberty-based criticism provided the contrast to throw the egalitarian dominance into even sharper relief. Another proof of this dominance was the fact that the orthodox factions were themselves repeatedly forced to soften or nuance their stances when faced with equality-based criticism, thereby smoothening over the sharp edges of their liberty-based stance. What is more, the RPF, GPV and SGP faction increasingly clothed their arguments in egalitarian garb, invoking precepts like the equality of rights, the equal treatment of similarly situated citizens, and equality-as-proportionality – and recognizing, most strikingly, that the right to non-discrimination and the protection against opportunity and dignity harm (potentially) outweighs the rights and interests of religious believers.

The ensuing disagreements about the correct reading of the egalitarian precepts unavoidably underlined the inherent and fundamental ambiguity of the equality-based frame. The debate made it only too clear that the equality-based frame cannot prescribe exactly what ought to be treated equally, or placed on a par. It also does not clarify when equality is undermined, when a specific interest is (sufficiently) violated, or how the relative weight of various interests or grounds for discrimination should be determined. Riding the egalitarian wave without a clear compass, then, the opposing factions were thus left struggling for control over the helm, with each side trying to impose their preferred interpretation of the equality-based frame.

For the orthodox Protestant factions, embracing the equality-based frame granted some legitimacy to their arguments and gave them more room to maneuver, but now also made them vulnerable. For one thing, it forced them to argue why certain inequalities are justified while others are not, and compelled them to compare various religious and non-religious practices, organizations and characteristics. This task proved to be all the more challenging in a parliamentary context where the secular (and equality-inclined) majority ultimately pulled the most weight, and would ultimately determine what interpretation of equality would prevail. And as the criteria and principles

that are invoked to stem the egalitarian tide - such as equality of rights and the tipping points of opportunity- and dignity harm - turned out to be especially slippery, it only seemed a matter of time before further shifts towards and within the equality-based frame would take place.

Omens for such impending shifts were plentiful. After the law was approved, the debate about its religious exemptions did not quiet down, but rather flared up with every new case of a dismissed, rejected or otherwise unequally treated homosexual teacher.[159] The sole fact construction remained a bone stuck in the throat of the secular parties, and its main sponsor, the Christian Democratic Appeal, would soon suffer several electoral beatings. No serious obstacles therefore remained for a further egalitarian landslide.

159 Rijke 2019, 236-7.

8

2014: Culmination of Egalitarian Dominance

Although criticism of the Equal Treatment Act - and its sole fact construction in particular - had been fierce, it still took more than twenty years before it underwent any significant change. Since the introduction of the law in the nineties, very few cases concerning the 'sole fact' construction had been brought forward to the court, or to the new Equal Treatment Committee.[1] The few rulings that had taken place suggested that the so-called 'additional circumstances' criterion in practice was a high bar to meet, and that religious schools had little chances of dismissing or refusing homosexual teachers.[2] This did not mean that the issue was settled, at least not politically.

The debate was rekindled after a formal advice from the European Commission in 2008, stating, amongst other things, that the construction conflicted with European directive for equal treatment in employment and education (2000/78/EC).[3] The letter provided a further stimulus to those wanting to abolish the exemption, and forced the predominantly Christian cabinet of the CDA, the newly formed Christian Union (CU; a merger of the GPV and RPF) and the Labour Party (PvdA) to act. In a letter asking the Council of State for advice on this matter, the Cabinet voiced its concerns about endangering the balance between the principle of non-discrimination and freedom of religion and freedom of education.[4] In its response, the Council emphasized that this balance should indeed remain intact; if the sole fact construction were to be abolished, religious organizations should still retain their freedom to demand occupational requirements - a "core aspect of the organizational freedom of religion" - and in religious schools specifically there should also be "more room" to impose further requirements on the behavior of employees.[5]

While these circumstances seemed to prevent any substantial changes being made to the Equal Treatment Act, the subsequent elections clearly changed the way the wind blew politically. A large majority emerged that was in favor of going beyond the largely cosmetic changes proposed by the Council

1 Kortman 2018, 15.

2 Maussen & Vermeulen 2015, 96.

3 Reasoned Opinion of the European Commission (31.01.2008) 2006/2444, C(2008)0115.

4 *Kamerstukken II*, 2009/10, 28 481, No. 7, p. 2.

5 "Zo zijn de interne organisatie van kerkgenootschappen en de positie van bepaalde medewerkers daarbinnen zodanig verbonden met de kern van het belijden en de uitoefening van een godsdienst, dat deze instellingen voor bepaalde functies, waaronder zeker ook het geestelijk ambt, op dit punt vergaande eisen mogen stellen. En de positie van het confessioneel onderwijs is een specifieke, omdat het onderwijs identiteitsbepalend kan zijn in de vorming van kinderen overeenkomstig een bepaalde godsdienst of overtuiging, welke in lijn is met de overtuiging van hun ouders, zodat er ook voor functies binnen dit onderwijs meer ruimte moet zijn om nadere eisen te kunnen stellen" (*Kamerstukken II*, 2009/10, 28 481, No. 7, p. 9).

of State. A first proposal to simply strip the sole fact construction as such did not come from the Cabinet, but was formulated by representatives of a wide array of secular parties; the liberal-democratic D66, the liberal-conservative VVD, the social-democratic PvdA, the Socialist Party (SP) and the green progressive party GroenLinks. Although this first effort was thwarted by the CDA - at the time still a coalition party - its underlying intentions were laid down in the so-called Pink Ballot Box Agreement ('Roze Stembusakkoord'). In this agreement, signed by all except the three Christian parties in the run-up to the 2012 elections, the promise was made to address all regulations that had a discriminatory effect on homosexuals. As a result, several attempts were made to amend the Equal Treatment Act, until eventually a proposal by the same five secular parties was accepted after two days of debate in April and May of 2014.

In the twenty years between the establishment of the Act and its amendment, the Dutch society and its politics had undergone significant changes. Religious participation had plummeted further,[6] and as a result, religion's influence on Dutch politics waned. A clear and early sign of the latter was the record-breaking loss suffered by the CDA in the elections of 1994, which took place two months after the Equal Treatment Act's official adoption. For the first time since 1918, a cabinet was formed that did not include a Christian party. This defeat would not prove to be an anomaly, mainly being the result of a dwindling Christian electorate[7] – an electorate, moreover, whose political priorities themselves had also started to change.[8] The 1998 election already hinted in this direction, when the Christian democrats for the first time ever attracted less Catholic voters than the secular PvdA.[9] In general, the Dutch electorate had become more skeptical about religion's influence on politics

6 For example, in the late 1990s 60 percent of Dutch people aged 15 or older still counted themselves as belonging to a church affiliation or ideology, but by 2010, this percentage had dropped to 54.7, declining slightly each year thereafter (CBS StatLine, 2020 (accessible at www.opendata.cbs.nl/statline))

7 Voerman 2011. Applied to the CDA, what can (or could) be considered the natural constituency of its predecessors amounted to about 60 percent of the Dutch population in the sixties, while only 30 percent remained for the CDA in 2006 (Voerman 2011, 10).

8 The declining religious participation has clear impact on voting behavior, and in the Netherlands one of the consequences has been that religiously affiliated voters increasingly vote for secular parties (see for example Maussen & Appels 2021, 69-70).

9 Wits 1998, 377.

at the turn of the new millennium,[10] and increasingly held more progressive views on cultural and religious issues.[11] The CDA resigned itself to these facts and in 2002 decided to cease its resistance against recently introduced progressive legislation on euthanasia and same-sex marriage, so it could finally govern again after eight years of opposition – only to receive a new historical hammering another eight years later, during the elections of 2010.

The diminishing influence of religion is not only visible in CDA's trajectory. It has also been discernable in the traditionally more steadfast and principled orthodox Protestant parties. The merger of RPF and GPV into the Christian Union in 2000,[12] for example, was a first step towards a more inclusive Christian form of politics which did not restrict itself to a specific (Reformed) church or perspective - hence the usage of the broader notion of "Christian" -, even though the predecessors' views themselves were initially not questioned or modified.[13] These views did start to shift when government participation became a realistic prospect in 2002. During the negotiations, both the CU and SGP refrained from formulating breaking points, recognizing that their orthodox views would not be accepted by a majority – a stance which the CU would also officially adopt in their election program of 2006.[14] In these years, the Christian Union had also edged closer to the CDA by opening itself up to members from the Roman-Catholic church – even though, unlike the Christian Democrats, the party has remained off-limits for any aspiring Muslim members.[15] Through

10 In 2006, fewer Dutch people believe that religion and politics should go hand in hand than in 1996 (15 against 20 percent). Moreover, in 2002 only 11 percent of the Dutch population and 26 percent of church members lets its political preferences be determined by religious views. One third of official church members, finally, believes that religion should be a private matter (Becker & Hart 2006).

11 Duyvendak 2011, 88; Tonkens & Duyvendak 2016, 2; Mepschen & Duyvendak 2012, 1. See also reports showing that, among other things, attitudes towards homo- and bisexuality have become considerably more positive (Huijnk 2022, 15).

12 Both parties had seen their mutual differences dissipate while their disagreements with SGP increased, and were hoping for an electoral push as the result of the merger. The process of unification started in 1994, and was only finalized in 2000, after a rather arduous trajectory in which RPF generally took the lead, and GPV regularly applied the brakes (Hippe & Voerman 2010).

13 Harinck & Scherff 2010. As Joop Hippe and Gerrit Voerman write, it was the RPF that was always more in favor of an open protestant perspective, given that the party itself did not restrict itself to a specific reformed (sub)church (2010, 217,218).

14 Vollaard 2010, 183-4.

15 According to former CU chair Van Dijke, the basic difference with the CDA is "that we do not see the Bible merely as an inspirational book, but as normative" (Hippe & Voerman 2010, 222, translated). Aspiring members are also asked to subscribe to the CU's explicitly Christian views.

this more open membership policy, the CU clearly distanced itself from the SGP. It even came to a breakup of sorts, when the CU decided to suspend formal parliamentary cooperation with the reformed party because of the latter's rejection of female political representation.[16]

But even the SGP, which overall has remained more persistent in its adherence to strict Reformed views, was not unaffected by the societal and political upheavals. Like the CU,[17] it also knew its fair share of debate and internal disagreement about issues like the role religion plays in the party, or its membership policy. Regarding the former issue, a gradual loosening of the SGP's traditional theocratic view can be perceived.[18] And regarding the latter, the lure of drawing votes from Catholics, Jews and conservatives has become stronger.[19] And while the CU is slowly but steadily coming to terms with political participation of ('practicing') homosexual party-members,[20] the SGP has undergone a fundamental upheaval regarding its view on political participation of women. The rejection of women's right to vote was one of the motives of the Reformed party's establishment in 1918, but an evolving electorate as well as prolonged social (and later also legal) pressure has ultimately led the SGP to formally accept women's active voting rights in 1989, female party membership in 2006, and women's passive voting rights in 2013.[21]

And so, when the orthodox Protestant factions lamented the disappearance of the Christian state and the erosion of Christian norms during the debate of 1993, they were more right than perhaps even they themselves had expected[22] – specifically when it comes to secularization's eventual impact on their own parties. Their fear that this decline of religion's role in politics would lead to

16 Hippe & Voerman 2010, 220.

17 Hippe & Voerman 2010, 225.

18 Van der Zwaag 2018. As Schippers (2023) also describes, the SGP had also fully embraced the notion of freedom of religion, which would eventually lead them to officially replace the old phrase "no religious freedom, but freedom of conscience" with "freedom of religion, no religious equality" in 2016 (Schippers 2023).

19 Voerman & Vollaard 2018, 14. A turning point in SGP's history is its openly professed support of religious freedom for Catholics after a Catholic church service was disturbed by activists (Schippers 2023, 51).

20 Hippe & Voerman 223-4.

21 Post 2018.

22 For the replacement of Christian by a secular view of the Dutch nation, see also Van Dam & Van Trigt 2015, 227-230. And Meijering documents how the orthodox Protestant parties came to this general conclusion, with SGP noting that the secular cabinets in the nineties exuded the spirit of the French revolution and illustrated how humanism's growing importance came at the expense of Christianity, and the GPV observing that the tendency to stop seeing the government as Gods servant was already visible in the preceding cabinets of the CDA (2012, 201-2).

the further curtailing of religious freedom proved to be well-founded. And after the 2012 election, resulting in an overwhelming secular majority and leaving Christian parties with only 14 percent of the seats, the controversial sole fact construction turned out to be one of the main targets.

8.1 The amended Equal Treatment Act: culmination of egalitarian dominance

With the secular parties firmly in charge in the Dutch parliament, their 'Pink ballot agreement' could be executed. The agreement featured five initiatives to further the emancipation of gays, lesbians, bisexuals and transgenders, and the abolishment of the sole fact construction was the last to be realized with the amendment of the Equal Treatment Act proposed by members of GroenLinks, the Labour Party (PvdA), the liberal-conservative VVD, the Socialist Party (SP) and the liberal-democratic D66. More than just stripping this exemption, the proposed amendments in general exuded an egalitarian spirit that was very much in line with the precepts and principles of the equality-based frame, with much of the secular criticism levied in 1993 incorporated in the bill, and the final traces of the liberty-based frame all but purged. Given that the proposed amendments directly reflected the views of the secular parliamentary majority, it is worth delving deeper into these legal changes and their underlying beliefs.

Starting with the official motivation for the proposed amendments, it is clear that the bill basically consolidated the main lines of argument against the sole fact construction from the previous debate. The notion of legal certainty had already figured prominently in the debate of 1993, and was now cited in the official explanatory memorandum as the main reason for changing the law. What is more, it was expressly "homosexual teachers in denominational education" that were identified as the primary "victim" of this legal uncertainty.[23] The memorandum more specifically stated that the amendments were meant to provide clarity about the employee's private sphere[24] – thus aiming to settle another disputed issue of the nineties, namely that of the boundaries between the public and private domain. The bill and its underlying documents did not so much focus on the public-private binary itself, however, acknowledging

23 "Deze constructie is bekend komen te staan als de "enkele-feitconstructie". Zij heeft aanleiding gegeven tot veel rechtsonzekerheid. Met name homoseksuele leraren in het bijzonder onderwijs zijn daarvan het slachtoffer" (*Kamerstukken II* 2012/13, 32476, No. 7, p. 2).

24 *Kamerstukken II* 2012/13, 32476, No. 7, p. 2.

that this boundary is not as absolute as is often assumed.[25] Instead, the bill aimed to protect the employee's privacy by imposing clearer limits on religious competence, thereby reflecting an equality-based view on competence more generally; a view, in other words, where state competence is firmly asserted, and religious competence is strictly delineated.

For one thing, the proposed amendments definitively cut off the potential 'escape route' of reducing distinctions based on sexuality to distinctions based on religion. From now on, religious organizations would only be able to make distinctions based on religion, belief and political affiliation if these would not lead to (any) distinctions on other grounds - also not on the 'sole fact' - like that of sexual orientation. Moreover, the amended law also introduced specific conditions regarding the functions for which certain distinctions could be made. Religious schools were not given a special license anymore to impose demands 'necessary for the realization of their ethos'. They were now treated like any similar religious or philosophical organization - and even political organizations -, which could only make distinctions based on religion, belief or political affiliation if this constituted 'an essential, legitimate and justified occupational requirement, given the organization's ethos'. Moreover, the amendments stated, the distinctions in question 'should not go beyond what is appropriate given the attitude of good faith and loyalty that may be demanded of the institution's employees' – a wording which, as the European Commission demanded, would bring the Act in line with the European Directive on equal treatment in employment and education.

Regarding the interpretation of this final criterion, the proposers argued that the stipulation concerning an 'attitude of good faith and loyalty' should not be taken to entail an expansion of religious organizations' competences – which was what the Council of State had stated in its official reaction.[26] If anything, the proposers argued, the criterion should be seen as a *limitation* of these competences, which certainly do not extend beyond the regular requirements in the labor law that apply to organizations or companies in general. Such requirements could apply to the employee's behavior in the private sphere, but not mainly so, or more so than normal: the proposers saw a stronger relation with the question of "the intensity of the mental connection

25 *Kamerstukken II* 2012/13, 32476, No. 7, p. 12.

26 *Kamerstukken II* 2009/10. 28481, No. 7, p. 11.

with an organization".[27] In this context, they made a distinction between subscribing and respecting the ethos, arguing that an attitude of good faith and loyalty does not necessarily mean that an employee "completely subscribes to all the positions of an association or church", even though he or she might respect the organization's ethos.[28] And although this distinction itself was not featured in the eventual explanatory statement that accompanies the law, such preliminary (written) statements were indicative of how the proposers themselves interpreted one of the central criteria of the amended law.

The proposed restrictions and their underlying motivation did not only resonate with equality-based views on competence - and the clearer curtailment of religious competence specifically -, but also reflected an egalitarian perspective on rights. Firstly, we already saw that the principle of equality-as-parity is more strictly enforced in the amendments, by putting religious schools on a par with other religious organizations, and the latter with philosophical and political organizations and employers in general. The latter was also confirmed in the explanatory memorandum, where it is stated that "[i] nstitutions of special education may, *like all employers*, require their employees to conduct themselves as good employees and to comply with internal regulations" (emphasis added).[29] Secondly, the explanatory memorandum did not only refer to the need for clarity about the private sphere, but also to "the

27 "Belangrijker achten zij dit element echter voor de vraag naar de intensiteit van de mentale binding met een organisatie, die van een werknemer, een vakbondslid of een leerling mag worden verlangd" (*Kamerstukken II* 2013/14, 32476, No. 10, p. 14). In fact, during the debate in 2014 the proposers argue that, if there are any differences between "being a good employee" and the "attitude of good faith and loyality", it is that the latter has more to do with intention and the former rather refers to behavior (*Handelingen II* 2013/14, No. 85, item 13, p.5).

28 "Binnen kerkgenootschappen komen regelmatig theologische discussies voor. Meestal wordt dat niet als een probleem ervaren; mits de betrokkenen maar een loyale houding tegenover de kerk blijven houden. Voor die houding is niet nodig dat het lid van een vereniging of kerkgenootschap àlle standpunten ervan volledig onderschrijft" (*Kamerstukken II* 2013/14, 32476, No. 10, p. 14. See also p. 8).

29 "Instellingen van bijzonder onderwijs mogen, zoals alle werkgevers, van hun werknemers verlangen dat zij zich als een goed werknemer gedragen en dat zij zich houden aan interne voorschriften" (*Kamerstukken II* 2012/13, 32476, No. 7, p. 16). As they also stress during 2014's debate, the proposers explicitly take the amended law's formulation of the required "good faith and loyalty" to mean no more than what would normally count as being a good employee, for which they refer to the generally applicable Dutch Civil Code (see the proposers' representative Bergkamp's remarks on *Handelingen II* 2013/14, No. 85, item 13, pp. 5, 6). As they say, "It is not appropriate for us to impose all kinds of additional requirements on top of the Civil Code in the Dutch Equal Treatment Act" ["Het past ons niet om in de Algemene wet gelijke behandeling allerlei extra eisen bovenop het Burgerlijk Wetboek te stellen."] (No. 85, item 13, p. 6).

excessive violation of the principle of non-discrimination" as one of the main reasons for legal reform[30] – thus echoing the secular criticism levied against the sole fact construction two decades prior, and anchoring the guiding principle of equal treatment of similarly situated citizens (even) more strongly. That the amendment exuded the spirit of the equality-based view on rights, thirdly and finally, is also evidenced by the emphasis its memorandum places on individual (as opposed to collective or institutional) rights. After arguing that limitations on religious freedom are necessary for the protection of the rights of others - and mainly the right not to be discriminated against -, the document stated:

> "[Í]f the *institutional* aspect of the freedom of religion is at stake here to begin with, in this case it may weigh less heavy than the *individual*, fundamental human right to equal treatment" (emphasis added).[31]

Quotes like these express a clear prevalence of non-discrimination, even though the amended bill's proposers also held on to a kind of equality of rights; this tension (and the ensuing discussion) is further discussed in the later stages of this chapter. Finally, the prevalence of non-discrimination also suggests a certain view on how conflicting *interests* should be weighed, even though the official documents (the bill, the explanatory memorandum, etc.) did not explicitly identify these interests. They would become all too apparent, however, in the ensuing debate.

How to summarize the significance of this amended law? Perhaps it is best articulated by VVD parliament member Norbert Elias, who, in his opening statement in the ensuing debate, would proclaim: "The law originated from an advice from the Emancipation Commission in 1977, and now we are experiencing its actual culmination in this Chamber."[32] Indeed, the notion of culmination does seem to aptly describe the new situation, also in terms of this study, considering the extent to which it reflects the dominance of the equality-based frame. The question is, how would this degree of dominance

30 "het uit de Awgb schrappen van de enkele feit-constructie, wegens de te ver gaande inbreuk op het beginsel van non-discriminatie die het oplevert" (*Kamerstukken II* 2012/13, 32476, No. 7, p. 10).

31 "[Á]ls het institutionele aspect van de vrijheid van godsdienst hierbij al aan de orde is, mag dat in dit geval in een democratische samenleving minder zwaar wegen dan het individuele, fundamentele mensenrecht op gelijke behandeling" (*Kamerstukken II* 2012/13, 32476, No. 7, p. 15).

32 "De wet kwam voort uit een advies van de Emancipatiecommissie uit 1977, ruim 35 jaar geleden dus, en nu beleven we het eigenlijke sluitstuk ervan in deze Kamer" (*Handelingen II* 2013/14, No. 73, item 3, p. 7).

be reflected in the parliamentary debate, in the way and degree this debate would be structured by the equality-based frame? Which components or aspects of the equality-based frame would the secular majority invoke to endorse these imminent amendments? And would the liberty-based frame still be employed by the only two factions that voted against the amendments, the Christian Union (CU) and the Reformed Political Party (SGP)? Finally, given that the institutionalization of the equality-based frame in 1993 laid bare the fundamental ambiguity of the equality-based frame, what does this (further) culmination mean for this ambiguity? Does such an unambiguous dominance reduce the ambiguity of the equality-based frame itself, for example when it comes to the implications of proportionality or the equality of rights – or does it only amplify it? To answer these questions, we once more direct our attention to the parliamentary proceedings in question; the debate taking place on the 9th of April and 21st of May of the year 2014.

8.2 Dignity above all: the prevention of insult and offense

Well before the parliament convenes on the 9th of April, it is clear that the proposed amendments enjoy broad support. After all, its initiators hail from a wide range of secular parties that now constitute an overwhelming parliamentary majority. For them, the amended law above all washes away the bitter aftertaste left by the incorporation of the sole fact construction in the original Equal Treatment Act. These factions do not shy away from describing this bitterness in more detail, and from these descriptions one interest clearly emerges; one type of harm, to be more precise, that the amendments are meant to remedy. Representing the proposers of the bill, Vera Bergkamp (D66) elaborates:

> "The first reason why the proposers want to abolish the sole fact construction, is because it contains an offensive reasoning. In a passage of the current Equal Treatment Act, it says that you cannot fire a teacher based on the sole fact that he or she is homosexual. But why then? We have started to call this additional circumstances. There is an offensive reasoning behind this, because if we talk about additional circumstances, these cannot be an independent ground that provides a reason to make distinctions. In combination with a personal characteristic, namely

homosexual orientation, this is possible, but not with heterosexual orientation. We find this offensive."[33]

As all secular parties argue in unison, the sole fact construction is offensive and insulting and should therefore go.[34] Although the notion of dignity itself is not explicitly mentioned here like it was in the nineties, it is clearly the same egalitarian conception dignity harm that is invoked here; a harm which, employing another egalitarian yardstick, is deemed *disproportionate* to the religious freedom enabling such harm. Moreover, the fact that more subdued and everyday notions like insult and offense are used instead of the more grave or solemn notion of dignity can be seen as an indication of the high degree of dominance of the equality-based frame. After all, it suggests that this frame, along with its emphasis on dignity and equal standing, is largely taken for granted and not in need of any further explicit confirmation.

Another difference with the debate of the nineties is that it is not mainly the insult *added* to a specific material injury (namely the loss of a job (opportunity)) that is referred to here. As Chapter 4 already established, dignity harm can also be inflicted in the absence of any material impact, and may also affect larger groups and communities instead of one specific person. It is this broader and exclusively expressive dignity harm that is deemed as a sufficient reason for a

33 "De eerste reden is dat de indieners de enkelefeitconstructie willen schrappen, omdat deze een kwetsende redenering bevat. In een passage van de huidige Algemene wet gelijke behandeling staat dat je een docent niet kunt ontslaan wegens het enkele feit dat hij of zij homoseksueel is. Maar wat dan wel? Wij zijn dat bijkomende omstandigheden gaan noemen. Daar zit een kwetsende redenering achter, want als wij het hebben over bijkomende omstandigheden, kunnen deze als zelfstandige grond geen reden zijn om onderscheid te maken. In combinatie met een persoonskenmerk, namelijk homoseksuele gerichtheid, kan dat wel, maar niet bij heteroseksuele gerichtheid. Dat vinden wij kwetsend" (*Handelingen II* 2013/14, No. 85, item 13, p. 1)

34 See for example D66 approvingly noting that "with the abolishment of the sole fact construction, its offensive nature also disappears. … It is good that we are getting rid of that" ["Met het schrappen van de enkelefeitconstructie verdwijnt ook het kwetsende karakter ervan. … Het is goed dat we daarvan afkomen."] (*Handelingen II* 2013/14, No. 85, item 15, p. 6). The VVD similarly states that it is "pleased with the initiative, because the current formulation of the law wrongly suggests that a mere homosexual orientation already leads to a disadvantage. The sole fact may not be a reason for dismissal, but with some supporting evidence it is a done deal. That is an insulting suggestion for homosexuals." ["De VVD-fractie is tevens verheugd met het initiatief omdat de huidige formulering van de wet ten onrechte suggereert dat louter een homoseksuele gerichtheid al leidt tot een achterstand. Het enkele feit is dan wel geen reden voor ontslag maar met wat ondersteunend bewijs is de zaak beklonken. Dat is een voor homoseksuele beledigende suggestie."] (No. 73, item 3, p. 8). See also PvdA (No. 73, item 3, p. 19).

universal ban on discrimination by the parliamentary majority. This becomes clear when the amendment's proponents justify the legal changes *despite* the fact that very few instances of discrimination have actually been recorded. As the Socialist Party's (SP) Michiel van Nispen:

> "Perhaps, indeed, it does not matter very much materially. It is not the case, for example, that teachers are being fired by the dozen in denominational education. ... The world, then, may not be completely changed by this bill, but the sole fact construction is removed and that is certainly very important. During the more than twenty years that the sole fact construction existed, it is like a bone stuck in our throat. It is, in its core, an offensive reasoning. That is why I think it is a good thing that this construction is removed from the law, that it is abolished."[35]

The proposers themselves also admit that their argument is highly juridical and symbolic, but also stress that, as legislator, "we also have a role when it comes to what we want to project to society in terms of values".[36] Even the Christian Democrats, who did not actively participate in drafting the amendment and were arguably the driving force behind the sole fact construction's conception in the first place, now also identify the problem as an expressive or symbolic issue, as a matter of impressions. As CDA's Michel Rog reflects:

> "At the time, the single fact construction was a good construction within the Equal Treatment Act. In the course of time, however, it turned out that this construction also left much ambiguity. It also created the impression that orthodox schools could simply dismiss homosexual teachers, while of course this was never the intention."[37]

35 "Misschien maakt het inderdaad materieel gezien niet heel erg veel uit. ... Het is nu niet zo dat bijvoorbeeld in het bijzonder onderwijs de docenten bij bosjes ontslagen worden. ... De wereld is dan misschien niet helemaal veranderd door dit wetsvoorstel, maar de enkelefeitconstructie wordt wel uit de wet gehaald en dat is wel degelijk erg belangrijk. De twintig jaar dat de enkelefeitconstructie er is, steekt deze al als een graat in de keel. Het is in de kern een kwetsende redenering. Daarom vind ik het goed dat deze constructie uit de wet wordt gehaald, dat ze wordt geannuleerd.*Handelingen II* 2013/14, No. 85, item 15, p. 7.

36 "[I]k vind het belangrijk om op te merken dat de indieners hebben gemeend dat wij als wetgever ook een rol hebben als het gaat om wat wij willen uitstralen naar de samenleving qua waarden" (*Handelingen II* 2013/14, No. 85, item 13, p. 1).

37 "De enkelefeitconstructie was indertijd een goede constructie binnen de Algemene wet gelijke behandeling. In de loop der tijd is echter gebleken dat die constructie ook veel onduidelijkheid liet bestaan. Ook is het beeld ontstaan dat orthodoxe scholen zomaar homoseksuele docenten mochten ontslaan, terwijl dit natuurlijk nooit de bedoeling is geweest" (*Handelingen II* 2013/14, No. 73, item 3, p. 20)

The CDA thus joins the ranks of a vast parliamentary majority, voting for an amended law that so obviously reflects the equality-based frame of religious freedom. And this time, they would not be the only ones making a definite shift from liberty to equality.

8.3 Waving a white flag: watered down resistance in egalitarian terms

In 1993, the orthodox Protestant factions were still caught in the dilemma whether to hitch on to the dominant equality-based frame; in other words, whether to adopt the metaphors, principles and conceptualizations of this egalitarian perspective to safeguard their cherished freedoms, or to put up a fight against this dominance for the sake of liberty. Two decades later, however, the liberty-based banner is definitively replaced by a white flag, with the surrendering orthodox factions almost exclusively formulating their objections against the legislative proposals in egalitarian terms. It is especially the newly formed Christian Union (CU) that betrays a significantly less radical view regarding religious freedom than its predecessors did in 1993. But even the more orthodox SGP visibly softens its opposition against the hegemonic equality-based frame.

To start with, it is striking that the references to religion's uniqueness and religious freedom's distinctiveness - which were omnipresent in the orthodox factions' contributions in the previous debates - are practically absent in 2014. The Christian Union does not speak of historical struggles and religion's formative role as its predecessors did. Even the stricter SGP no longer refers to objective characteristics like "central" or "most fundamental" when speaking of this right, but merely laments that "the classic *approach* of the constitutionally guaranteed freedom is undermined" (emphasis added).[38] That there is hardly an allusion to such uniqueness is all the more significant given the prevailing tendency - in the proposed amendments as well as the ensuing debate - of putting religious organizations on a par with non-religious organizations.

Strikingly, the only party that does provide an account that tends to view rights like the freedom of education as distinctive is a secular one, namely the radical-right Party for Freedom; a party which was founded in 2006 by Geert

38 "Als getornd wordt aan die kernpunten van vrijheid van onderwijs, wordt de klassieke benadering van de grondwettelijk gegarandeerde vrijheid ondergraven" (*Handelingen II* 2013/14, No. 73, item 3, p. 11).

Wilders, a former MP of the VVD, and quickly found its spot among the largest parliamentary factions. In the 2014-debate, PVV's Harm Beertema elaborately sings the praises of the freedom of education, which has enabled schools "for more than 2.000 years" to pass on the Western identity - including classic and Christian virtues - from one generation to the next. And he laments the "dogged ideological struggle" that imposes egalitarianism ('gelijkheidsdenken') on Christian schools, where the freedom of conscience is now increasingly under pressure. This "left-liberal pressure", Beertema argues, "has found its culmination in the fierce struggle against the sole fact construction".[39]

And while this sounds like the typical orthodox Protestant criticism of the dominant equality-based frame, Beertema's account also reveals that egalitarian thinking is not PVV's actual target. Similar to the Centre-Democrats in 1993, the PVV faction zones in on "ideologies like the Islam", which in Beertema's eyes do not qualify for the protection offered by the freedom of education. In fact, he does not as much object against the 'left-liberal pressure' as such, but more against its alleged target, namely Christian schools and not Islamic schools: "[I]t was and is always about Christian education, never about Islamic education where the ideology inequality between gender, between gay and straight, between believer and apostate is on the roster daily."[40] In its criticism of Islamic education, the PVV faction does endorse egalitarian thinking after all and, correspondingly, also shows itself to be in favor of abolishing the sole fact construction. In Beertema's view, this will "ensure that homosexual teachers in special education do not anymore have to fear that their sexual orientation and the fact that they have a relationship with someone

39 "Het onderwijs geeft al meer dan 2.000 jaar die westerse identiteit, met onze kennis en tradities, onze vrijheid en onze aandacht voor die zo belangrijke individuele verantwoordelijkheid, door van de ene generatie naar de andere. ... Het is een soort links-liberaal onderwijs ... waar leerlingen vaak op militante wijze worden gekneed in klimaatdenken, in gelijkheidsdenken en vooral in de "weg met ons"-ideologie ... Die links-liberale druk heeft bij ons zijn hoogtepunt gevonden in de felle strijd tegen de enkelefeitconstructie" (*Handelingen II* 2013/14, No. 73, item 3, p. 4, 5).

40 "Het ging en gaat dan altijd over het christelijk onderwijs, nooit over het islamitisch onderwijs waar de ideologie van de ongelijkheid tussen man en vrouw, tussen homo en hetero, tussen gelovige en geloofsverlater dagelijks op het rooster staat" (*Handelingen II* 2013/14, No. 73, item 3, p. 4).

from the same sex could be grounds for dismissal".[41] Christian Union's Segers is puzzled by all of this:

> "Mr. Beertema casts himself as a defender of reformed education, which is terribly attacked by evil left-liberals. In an aside he says: I conclude and agree with this bill. However, if anywhere freedom is curtailed, it is in that [Reformed] education."[42]

Leaving aside the confused exchange that ensues between the CU and PVV faction, this statement by Seger is also significant because it is a rare instance of the CU faction primarily framing the issue as a (problematic) infringement of freedom. It is the SGP that more often argues in line with the liberty-based principle of non-interference, albeit in a more subdued tone compared to the preceding debate(s). The faction arguably expresses its most undiluted liberty-based view when, in his opening statement, SGP's Roelof Bisschop warns against "a kind of state morality that not only loses sight of the value of civil society but also irresponsibly restricts freedom".[43] Moments later, however, Bisschop also observes that this freedom should "of course" go accompanied by "due compliance" to the law.[44]

In general, then, the omission of religion's uniqueness and religious freedom's distinctiveness goes hand in hand with the adoption of a distinctively equality-based perspective, and it is from within this frame that the remaining resistance against the proposed amendments takes shape. Where the orthodox parties rejected the private-public distinction in 1993, they now actively engage in the debate about another liberal boundary, namely that between the religious and the non-religious. With the debate about the private and the public

41 "De enkelefeitconstructie is een gaatje in de wet dat gedicht moet worden. Dat realiseren wij ons terdege. Het repareren van de wet zal ervoor zorgen dat homoseksuele leraren in het bijzonder onderwijs geen angst meer hoeven te hebben dat hun geaardheid en het feit dat zij een relatie hebben met iemand van hetzelfde geslacht reden voor ontslag kunnen zijn" (*Handelingen II* 2013/14, No. 73, item 3, p. 5.

42 "De heer Beertema werpt zich op als verdediger van het reformatorisch onderwijs, dat verschrikkelijk wordt aangevallen door boosaardige links-liberale mensen. In een bijzin zegt hij: ik rond af en ben het eens met dit wetsvoorstel. Als er echter ergens vrijheid wordt ingeperkt, dan is het bij dat onderwijs" (*Handelingen II* 2013/14, No. 73, item 3, p. 6).

43 "Wie dat niet toe wil staan, kiest voor een soort staatsmoraal die niet alleen de waarde van het maatschappelijk middenveld uit het oog verliest, maar ook de vrijheid onverantwoord inperkt" (*Handelingen II* 2013/14, No. 73, item 3, p. 9).

44 "Het is juist de kern van artikel 23 van de Grondwet dat scholen zelf bepalen hoe zij hun personeelsbeleid inrichten, welke leermiddelen zij willen gebruiken enzovoorts. Dit moet uiteraard allemaal gebeuren met inachtneming van" (*Handelingen II* 2013/14, No. 73, item 3, p. 11).

largely settled, the new central criterion regarding 'good faith and loyalty' (in light of an organizations' ethos) ensures that this other liberal binary takes its place. While the secular parties, as mentioned earlier this chapter, seize the distinction between subscribing and respecting to argue that (fully) subscribing to an organization's ethos is not (always) necessary, the Christian parties take an opposite stance. The factions of the SGP and the CU join the CDA in emphasizing that schools should retain the possibility of demanding that its employees subscribe to their ethos: this is a "logical consequence of the freedom of education" (SGP),[45] and otherwise 'good faith and loyalty' would be "vacuous terms" (CDA).[46] The SGP and the CU faction also object that, in the words of the latter, "the proposers say that the behavior of employees is completely outside the scope of this bill".[47]

The Christian Union, moreover, also voices its skepticism about the ability of the judge to assess and interpret the religious aspects surrounding the bill's ethos-centered criteria. In an exchange with Vera Bergkamp, a D66 parliamentarian and co-sponsor of the bill, the CU's Gert-Jan Segers wonders: "Does [the judge] need to read to Bible to determine to which extent a relationship can be established between the Bible … and specific behaviors? … This is very hard to imagine, isn't it?" More specifically, it is the distinction between respecting and subscribing to the school's ethos that Segers finds problematic in this context. Determining which behavior qualifies for these labels, Segers argues, "is a very difficult quest that forces the judge to engage in theological hair splitting".[48] And while CU tries to sow doubts about the extent of the judge's competence, the SGP explicitly attempts to delimit this competence by explicitly asking the minister to confirm that it is the institution's board that decides about its ethos.

45 "De SGP acht het een logisch uitvloeisel van de vrijheid van onderwijs dat wij accepteren dat scholen van hun personeel volledige onderschrijving van de grondslag vragen" (*Handelingen II* 2013/14, No. 73, item 3, p. 11).

46 "Om goede trouw en loyaliteit geen inhoudsloze begrippen te laten zijn, vindt het CDA het volstrekt logisch dat de indieners … de mogelijkheid openhouden dat schoolbesturen die daaraan hechten, hun leraren, de identiteitsdragers van de school, kunnen vragen om de grondslag van de school ook te onderschrijven" (*Handelingen II* 2013/14, No.,85, item 15, p. 10).

47 "De indieners zeggen dat het gedrag van werknemers volledig buiten dit wetsvoorstel staat, terwijl de Raad van State heeft gezegd dat de geloofwaardigheid van werknemers in het geding is, de geloofwaardigheid in het dragen van identiteit en in het vervullen van een functie binnen een organisatie. Dat is niet helderder geworden. Integendeel, dat is minder helder geworden en dat vind ik jammer" *(Handelingen II* 2013/14, No.,85, item 15, p. 19).

48 "Dat is een heel moeilijke zoektocht waarmee je de rechter dwingt aan theologische haarkloverij te gaan doen" (*Handelingen II* 2013/14, No. 85, item 13, p. 9).

In the end, however, all of these statements 'merely' amount to attempts to push and pull the boundaries of competing competences, and do not imply a complete negation of the state's competence as such – let alone its *Kompetenz-Kompetenz*. The trust in the state is evident when CU's Segers states that "I hope that we can find each other in trusting that the judge weighs the circumstances in each case".[49] It also implied when the SGP states that "[o]f course schools may be asked to explain their staff policy, and to be clear about this. But if this is a staff policy that is consistent, then the law simply allows this".[50] In the end, Bisschop suggests here, it is the law (and its interpretation by the judge) that determines the scope of religious competence – a reversal, also, of the faction's view on the allocation of the burden of proof, an issue that was so vehemently debated in 1993 but which is now a thing of the past.

When the orthodox Protestant parties choose to hitch on to the equality-based view on competence, their arguments gain legitimacy: it allows them to speak with influence. But, as frame theory teaches, it also poses risks of undermining their position, and weaking their resistance vis-à-vis the impending changes. Having entered the debate about the religious and civil, the factions are quickly pushed to the defensive. In exchanges with the SGP, for example, secular parties SP and GroenLinks argue that occupational requirements should only concern pedagogical skills: "I would like to make clear that the sexual orientation does not say anything about someone's qualities as a teacher and also not about the ethos of a school",[51] SP's Van Nispen states, and GroenLinks' Linda Voortman similarly argues that "if a homosexual teacher teaches, what matters is the question whether he is good in this. That should be paramount. How he or she lives at home surely does not influence that?"[52] SGP's Bisschop retorts: "In my view, this is a too narrow view on education. … Education is … the transfer of knowledge for which you need professionals with the requisite knowledge and skills, but education also

49 "Ik hoop dat we elkaar kunnen vinden in het vertrouwen dat de rechter per geval omstandigheden weegt, in het licht van de verschillende grondrechten" (*Handelingen II* 2013/14, No. 73, item 3, pp. 15-6)

50 "Natuurlijk mag van scholen worden gevraagd dat zij uitleg geven over hun personeelsbeleid, dat zij daarover helder zijn. Maar als dit duidelijk een personeelsbeleid is dat consistent is, dan is dat op basis van de wet gewoon mogelijk" (*Handelingen II* 2013/14, No. 73, item 3, p. 11).

51 "Ik wil vooropstellen dat de seksuele gerichtheid helemaal niets zegt over iemands kwaliteiten als docenten en ook niet over de grondslag van de school" (*Handelingen II* 2013/14, No. 73, item 3, p. 11).

52 "Als een homoseksuele leraar les geeft, gaat het toch om de vraag of hij dat goed kan? Dat moet toch vooropstaan? Daarbij is het toch niet van invloed hoe hij of zij thuis leeft?" (*Handelingen II* 2013/14, No. 73, item 3, p. 12).

has this pedagogical dimension: development and upbringing."[53] For the latter dimension, Bisschop argues, it is adamant that the teacher's way of living is consistent with his teachings: "You surely cannot claim and maintain that, being a teacher in a pedagogical relation with the students in your class, that you tell one thing but practice the opposite?"[54]

Initially, the SGP's stance seems to entail a complete rejection of any attempt to distinguish between religious and non-religious aspects of a function at a religious school. But the critical remarks of the SP and GroenLinks also lure the SGP into even addressing the distinction at all, and even sees the orthodox Protestant representative formulate a crude and implicit criterion to make such distinctions: functions have religious aspects when they involve 'telling' about issues like (the acceptability of) homosexual relationships, which arguably only applies to a limited number or cases or contexts. Orthodox factions thus enter - unwillingly or not - the liberal universe of religious-civil binaries, and find themselves providing assessments of the religious nature of specific functions. They even come closer to the bill's secular proposers' stance that schools may demand adherence to the school's vision to the extent that it concerns "a function of which the expression of a vision is a part".[55] Earlier in this thesis, we already saw theorists like Laborde admitting that there are no definite and conclusive guidelines for grey areas involving cases such as teachers of non-religious subjects at religious schools, and it is these cases, where egalitarian ambiguity is at full display, that end up being a particularly slippery slope for the orthodox factions.

Something similar happens in the debate about competing competences. When SGP's Bisschop asks Interior minister Plasterk (of the Labour Party) to confirm the competence of religious institutions' boards, the reply it receives can hardly be called satisfying from their perspective: Plasterk does confirm that it is the board's responsibility to interpret the organization's ethos, but adds

53 "Dit is wat mij betreft een te smalle visie op onderwijs. Onderwijs is niet alleen kennisoverdracht. Onderwijs is wel kennisoverdracht en daar heb je vaklui voor nodig met de benodigde inhoudelijke kennis en overdrachtsvaardigheden, maar onderwijs heeft ook die pedagogische dimensie: vorming en opvoeding" (*Handelingen II* 2013/14, No. 73, item 3, p. 12).

54 "Je kunt toch niet beweren en niet overeind houden dat je, als je als docent in een opvoedingssituatie zit op school ten opzichte van de leerlingen die je in je klas hebt, het ene vertelt en het andere, het tegenovergestelde, praktiseert?" (*Handelingen II* 2013/14, No. 73, item 3, p. 11).

55 "Scholen mogen ook van hun personeel verlangen dat zij een visie vertolken die in overeenstemming is met de visie van de school, voor zover het gaat om personeel met een functie waarvan het vertolken van een visie deel uitmaakt" (*Kamerstukken II* 2013/14, No. 10, p. 15).

that "it could be that the employee that does not agree", and that in the end it is the judge that subsequently decides whether the board has applied the legal criteria correctly.[56] The minister then does leave room for internal contestation of (the interpretation of) an institution's ethos, suggesting a more 'dynamic' view of authority that the bill's proposers also describe in their earlier written reply to other parties' comments:

> "For each member of an association, whether this is a union or a political party, loyalty goes without saying. This does not rule out that an individual member has an opinion on important issues that diverges from the official view. In fact, that is in the interest of these organizations: it keeps them vital. Churches are no exceptions in this respect. Within congregations, theological discussions frequently occur. Most of the times this is not experienced as problematic, as long as those involved maintain a loyal attitude towards the church."[57]

This speaks of a rather democratic and individualized conception of power and authority, where collective competence ultimately rests on the support and shared interpretations of individual members of a group; a view which also coincides with the egalitarian frame of sovereignty, whose dominance is thus underlined even further. The SGP attempts to resist such a more individualized view, and counters that "[a]n individual vision, contrary to what the proposers suggest, is not of greater weight than a common vision of the school that forms the basis of the society in miniature".[58] Inadvertently or not, Bisschop's wording here - especially the 'not of greater weight' - is already considerably nuanced, and other statements only add to ambivalence. The faction states, for example, that "the vision of a school is not a collection of individual employees' views but, ideally, a coherent and consistent story upon which the educational vision is

56 "maar het zou kunnen dat de werknemer het daar niet mee eens is. Dan is in volgende instantie de rechter degene die toetst of het bestuur dat juist heeft toegepast en binnen de kaders van de Algemene wet gelijke behandeling is gebleven" (*Handelingen II* 2013/14, No. 85, item 15, p. 4).

57 "Voor ieder lid van een vereniging, of het nu een vakbond is of een politieke partij, spreekt loyaliteit vanzelf. Dat sluit echter niet uit, dat een individueel lid op belangrijke onderdelen een mening kan hebben, die afwijkt van de partijlijn. Sterker nog, dat is in het belang van dit soort organisaties: het houdt hen vitaal. Bij kerkgenootschappen ligt dat niet anders. Binnen kerkgenootschappen komen regelmatig theologische discussies voor. Meestal wordt dat niet als een probleem ervaren; mits de betrokkenen maar een loyale houding tegenover de kerk blijven houden" (*Kamerstukken II* 2013/2014, 32476, No. 10, p. 14).

58 "Een individuele visie is, anders dan de indieners suggereren, niet van groter gewicht dan een gemeenschappelijke visie van de school die de basis van de samenleving in het klein vormt" (*Handelingen II* 2013/14, No. 73, item 3, p. 11)

based, an ideology that is supported by the board, teachers and parents".[59] – a view that by no means implies that the board unilaterally decides or dictates what a school's vision is, but where the board seems to be on equal footing with its employees, and even with the broader group of parents. Moreover, sketching an ideal in which the views of these various actors are aligned also implies that this is not always the case, and prompts the question when we can actually speak of such alignment. And this ultimately leads the SGP faction to the same questions that were addressed egalitarian authors like Laborde and Shorten who, as we saw in Chapter 2, attempt to developed various criteria or preconditions for establishing the sufficient degree of coherence between an association or institution and its members – criteria which, as these attempts show, are not that easy to satisfy.

The embrace of a more individualist approach is also clearly discernable in the orthodox Protestant factions' views on rights. Above all, it is the CU faction that increasingly employs an individualist perspective, thus embracing the equality-based view on rights. To be sure, CU's Segers does disapprovingly note that the amendment's proposers "split the freedom of religion into a collective and an individual aspect and give priority to the individual aspect", but subsequently asks:

> "Why do the proposers not consider the collective practice of religion to also be an expression of individual freedom of choice? It is about the individual freedom to form a community. In that case the priority of the individual does not apply. If individual wishes prevail within all collectives, these collectives lose their cohesion and will fall apart. This ultimately leaves no possibility to choose such collectives."[60]

The CU faction's statement is ambivalent in the sense that it criticizes the priority of individual rights, but at the same time suggests that collective rights are legitimized through the individual freedom of choice. The latter suggests that religious associations ultimately (at least partly) derive their rights from

59 "De visie van een school is geen vergaarbak van losse standpunten van personeelsleden maar, als het goed is, een coherent en consistent verhaal waarop de onderwijsvisie en het werk in die school is gebaseerd, een gedachtegoed dat door bestuur, docenten en ouders gezamenlijk gedragen wordt" (*Handelingen II* 2013/14, No. 73, item 3, p. 11).

60 "Waarom beschouwen de indieners een collectieve religiebeleving niet evenzeer als een uiting van individuele keuzevrijheid? Het gaat om de individuele vrijheid om een gemeenschap te vormen. In dat geval gaat de voorrang voor het individu niet op. Als individuele wensen voorrang krijgen binnen alle collectieven, verliezen collectieven hun samenhang en vallen zij uiteen. Dan is er uiteindelijk geen keuzemogelijkheid meer voor een dergelijk collectief' (*Handelingen II* 2013/14, No. 73, item 3, p. 16).

those of its members, and not vice versa; an equality-based stance on the matter of competence which we saw is also taken by egalitarian authors like Cécile Laborde. Another example of such a reduction of collective rights, where rights ultimately rest with the individual, is given by CU at another moment during the same debate:

> "Whoever reads our Constitution clearly notices the desire to do justice to people and their community. The citizen is paramount, and minorities are protected against the state and against the majority. In the end we all belong to a minority, even if only the smallest conceivable minority of the individual."[61]

The CU also shows that it is serious about protecting these 'smallest conceivable minorities', by embracing the concept that political theorists have conceived to address the 'minorities within minorities' question, namely that of exit-rights. This notion, described in Chapter 1 as example of a form of nuance or compromise *within* the equality-based view, is explicitly put forward by Gert Jan Segers:

> "The bill's proposers say that they want to defend vulnerable members of religious communities. In my opinion, this is done by ensuring a right of exit, a back door through which people can voluntarily leave the community. This should indeed be guaranteed by the government. It is not done, however, by demanding a right of entry. After all, this detracts from the voluntariness with which people connect through communities."[62]

Of the different varieties or possible shapes of an exit-right, CU would arguably favor a more restricted interpretation that guarantees a significant autonomy for religious collectives. But Segers also stresses the notion of voluntariness as the implicit foundation of such collective rights. Based on

61 "Wie onze Grondwet leest, proeft het verlangen om mensen en hun gemeenschappen recht te doen. De burger staat voorop en ook minderheden worden beschermd tegen de Staat en tegen de meerderheid. Uiteindelijk behoren we allemaal tot een minderheid, al is dat maar de kleinst denkbare minderheid van het individu" (*Handelingen II* 2013/14, No. 73, item 3, pp. 12-13).

62 "De indieners zeggen op te komen voor kwetsbaren binnen religieuze gemeenschappen. Dat doe je mijns inziens door je ervan te verzekeren dat er een right of exit is, een achterdeur waardoor mensen vrijwillig de gemeenschap kunnen verlaten. Dat moet de overheid inderdaad garanderen. Dat doe je echter niet door een right of entry te eisen. Dat doet immers afbreuk aan de vrijwilligheid waarmee mensen zich in een gemeenschap aan elkaar verbinden" (*Handelingen II* 2013/14, No. 73, item 3, p. 16).

the statements above, then, the CU faction takes a rather nuanced stance that is nevertheless unquestionably situated within the confines of the equality-based frame. Segers argues for a substantial degree of associational autonomy, but his justification and delineation of this autonomy betrays a view in which the rights of the individual are the ultimate concern. This recognition of individual rights also shows, finally, in CU's interpretation of equal treatment and non-discrimination. For one thing, no more references are made to unequal treatment or discrimination of religious organizations or Christian communities, as there were in 1993.

The only remnants of a more liberty-based view on rights can be found in the sparse allusions to a principle of non-interference, predominantly made by the SGP faction. In later stages of the debate, when the amendment's approval is drawing ever closer, the Reformed faction shows itself "very apprehensive" with the impending "interference with the philosophical identity of certain organizations",[63] and elsewhere pleads: "Can a community please keep close to their view … and the practice of the person who is supposed to be expressing that view? Or are they denied this right?"[64] What adds to the liberty-based character of these statements is that they clearly show that the concern lies not with the mentioned 'person'; it is rather the 'community', or its organizations that are mentioned in the other quotes, that should be protected. What makes these quotes less liberty-based, however, is their non-sectarian focus and the fact that this suggests that religion is not held to be unique or distinctive. The communities and institutions in question are not defined as Christian, or even religious. Instead, the Dutch term "levensbeschouwelijk" is used, denoting not only religion but also other philosophies or worldviews. The proactive reference to this term is significant, as it underlines the parity with non-religious ways of life. It is also a significant step for the SGP as a party, as the juxtaposition of religion and philosophies of life was the very reason why the party had voted against the article of religious freedom as it was phrased in the Constitution of 1983.[65]

63 "Wij zijn ook zeer beducht dat dit voorstel op onverantwoorde wijze ruimte gaat bieden om in te grijpen in de levensbeschouwelijke eigenheid van bepaalde organisaties die wij binnen onze samenleving nu eenmaal hebben" (*Handelingen II* 2013/14, No. 85, item 15, p. 8).

64 "Mag een gemeenschap alsjeblieft de opvatting die wordt uitgedragen en de praktijk van degene die die opvatting geacht wordt uit te dragen, dicht bij elkaar houden? Of wordt hun dat recht ontzegd? Ik vrees dat het laatste het geval is" (*Handelingen II* 2013/14, No. 85, item 13, p. 3).

65 Hippe 1988, 80.

The same non-sectarian perspective can also be found in the orthodox Protestant parties' conceptualizations of the affected religious interests, which marks another important shift compared to the previous debates. In 1985 and 1993, the interests in question were characterized as both essential and seriously and directly threatened: It was no less than the legitimacy and the survival of the Christian community that was at stake (as was argued in both debates), or the conscience and integrity of its members and their organizations (as was the claim during the 1993-debate). For these parties, the very possibility of an antidiscrimination law as discussed in 1985 raised specters of persecution and repression, while the actual (imminent) establishment of such a law during the 1993-debate fueled their belief that such a law would unavoidably lead to conflicts of conscience. How different, then, is the description of these interests by one of these very same parties, the SGP, when they argue against the abolishment of the remaining exemption for religious organizations during the 2014-debate:

> "Parents that send their children to such a school, a school with a clear ethos, want teachers that hold these values and the ethos of the school in the highest regard. They want teachers that, by word and deed, stand by the morality and philosophy which they themselves also adhere to and proclaim. They want teachers that are thus someone to identify with for pupils. If you do not take that as a starting point, insincerity soon arises. Especially young people will see right through it, which is fatal for a sustainable pedagogical relationship. This is a substantial pedagogical objection against this law, although it of course does not appear in the articles of the law."[66]

And it continues:

66 "Ouders die hun kinderen naar een dergelijke school, een school met een duidelijke levensbeschouwelijke grondslag, sturen, willen docenten die de waarden en de grondslag van de school hoog in het vaandel hebben. Zij willen docenten die in leer en leven staan voor de moraal en de levensvisie die zij zelf ook aanhangen en willen uitdragen. Zij willen docenten die zo tot een identificatiefiguur zijn voor leerlingen. Als je dat niet als uitgangspunt neemt, ontstaat er al snel onoprechtheid. Juist jongeren prikken daar feilloos doorheen, wat fataal is in een duurzame opvoedingsrelatie. Dat is een zwaarwegend pedagogisch bezwaar tegen deze wet, hoewel dat natuurlijk in de wetsartikelen verder niet terugkomt" (*Handelingen II* 2013/14, No. 73, item 3, p. 10).

> "If parents rightly choose to pass on to their children the worth of marriage as union between one man and one woman in which there is marital fidelity, they must be able to trust that the school they choose because of that philosophy of life ['levensvisie', LN] takes that philosophy very seriously, gives substance to it and proclaims it. This requires a coherent vision of what constitutes a good life. It also asks for the freedom to shape an ethos, curriculum and staff policy according to those beliefs."[67]

One of the things that catch the eye is that these statements contain no reference to Christianity – or any religion, for that matter. The SGP speaks of the 'ethos' of a school, of the 'philosophy' that parents and schools share: notions that were used in the law and the official memorandum,[68] and which also apply to secular organizations and citizens. As noted before, the party effectively employs the broad(er) principle of freedom of religion *and* philosophies of life, as enshrined in the Dutch Constitution of 1983. This is not only a significant step for the SGP as a party, but also has clear implications for the legal protection that the law potentially offers: it widens the range of those entitled to this protection, but simultaneously narrows it down by explicitly focusing on schools and parents, and not on other organizations or individual citizens as such.

This brings us to the nature of the interest in question. According to the SGP, what is ultimately at stake is not the individual's conscience, but rather the pedagogical relation between parents and children as facilitated (or to a certain extent embodied) by schools that promote a certain philosophy or way of life. SGP's position therefore implies the emphasis on a more cultural and identity-centered dimension of religion. Religion does not appear in the form of conscientious obligations but, in Laborde's words, more as a "way of life, an embodied habitus, a set of practices, none of them essential or central but which, put together, create a thick web of ethical and social meanings".[69] In this

67 "Als ouders er terecht voor kiezen dat zij hun kinderen de waarde van het huwelijk als verbond tussen één man en één vrouw waarin sprake is van huwelijkstrouw willen meegeven, moeten zij erop kunnen vertrouwen dat de school die zij juist vanwege die levensvisie kiezen daar ook serieus werk van maakt, daar inhoud aan geeft en die uitdraagt. Dat vraagt een samenhangende visie op wat het goede leven is. Het vraagt ook om vrijheid om die opvattingen in grondslag, lesmethode en personeelsbeleid vorm te geven" (*Handelingen II* 2013/14, No. 73, item 3, p. 10).

68 The use of these notions is arguably also informed by broader institutional developments regarding the freedom of education, which included a gradual opening up of notions such as direction, vision and philosophies of life that justified the recognition and funding of special or denominational schools (see also chapter five). Using such non-sectarian terms therefore also grants more legitimacy to the SGP's arguments.

69 Laborde 2017, 233.

sense, the interests that SGP refers to here resonate more with Laborde's earlier mentioned identity-IPC's than obligation-IPC's. In each case, characteristic of this cultural dimension is that it is even less particular to religion than the dimension of conscientious obligation, which also makes the choice of broader terms like 'philosophy of life' more obvious.

This shift towards a more collective and cultural and less sectarian interest is also discernable in the Christian Union's (CU) arguments. While its predecessors, the GPV and RPF, zoomed in on the conflicts of conscience suffered by Christian individuals and organizations as a result of the Equal Treatment Act, the CU in 2014 instead focuses on the (protection of the) identity of certain organizations. Such arguments are put forward in the context of the specific discussion about whether, in the amended law without the sole fact-construction, schools can still ask of their personnel to respect or subscribe to its basic philosophy. CU complains about the lack of clarity about this remaining condition or stipulation:

> "The proposers [of the law] say that the behavior of employees is completely beyond the reach of this law, while the Council of State has said that the credibility of employees is at stake, the credibility in embodying an identity ['dragen van identiteit'] and fulfilling a function within an organization. That has not become clearer. On the contrary, it has become less clear, and I find that a pity."[70]

That the CU itself values the preservation of a school or an organization's identity through credible personnel also becomes clear when it discusses the example of an individual who is employee of "a school that underlines the value of marriage and marital fidelity", but who nevertheless is "is intent on a divorce because he fell in love with someone else." Segers argues: "The question whether that person can still be the bearer of the identity of the school and whether he can still be a role model can then be very relevant."[71] Even the CDA,

70 "De indieners zeggen dat het gedrag van werknemers volledig buiten dit wetsvoorstel staat, terwijl de Raad van State heeft gezegd dat de geloofwaardigheid van werknemers in het geding is, de geloofwaardigheid in het dragen van identiteit en in het vervullen van een functie binnen een organisatie. Dat is niet helderder geworden. Integendeel, dat is minder helder geworden en dat vind ik jammer" (*Handelingen II* 2013/14, No. 85, item 15, p. 9).

71 "Als op een school de waarde van het huwelijk onderstreept wordt en als wordt geleerd dat je daar trouw aan moet zijn, dan kan het inderdaad relevant zijn als iemand uiteindelijk op een scheiding aanstuurt omdat hij verliefd is geworden op een ander. Dat kan in die context een bijkomend feit zijn. De vraag of die persoon dan nog de drager van de identiteit van de school is en of hij nog wel een voorbeeldfunctie kan vervullen, kan dan heel relevant zijn" (*Handelingen II* 2013/14, No. 73, item 3, p. 17).

which, as mentioned earlier, generally does not refer to the interests burdened by the Equal Treatment Act, does remark in the 2014-debate that it finds it important that "schools retain the possibility to demand of their personnel, the identity bearers ['identiteitsdragers'] of their organization, that they subscribe to the identity of the school".[72] Although the CDA and CU do not explicitly refer to the interests of parents and their children, their arguments roughly imply the same as the SGP's: it is about the protection and preservation of an identity, a way of life, by passing down values from one generation to the next through credible teachers working at a school with a clear and consistently enforced ethos.

The focus on non-sectarian identity-related interests makes the orthodox Protestant factions' claims easier to digest for the secular majority; in the terms of frame theory, it could perhaps even enable them to mobilize other parties - such as the CDA - and gather them in a certain discourse- or frame-coalition that would ultimately safeguard a certain degree of associational autonomy for their Christian organizations. At the same time, however, it also makes these claims more modest, since only a relatively small group of organizations would potentially qualify for legal protection. It also invites questions about the degree in which schools are really necessary for preserving and maintaining a communal identity to begin with. It compels the SGP to explicitly argue that education at school should be seen as an extension of the upbringing at home,[73] but even that does not necessarily mean that they are equally essential as such a domestic upbringing – also given the fact that the transfer of values and norms also takes place in other settings, even besides the home, such as in churches, through extracurricular religious education and during all kinds of activities organized by civil society.

The recurring theme here is that hitching on to the dominant equality-based frame grants legitimacy to the orthodox factions' views, but simultaneously opens these views up for criticism, making them more prone to slide down the egalitarian slippery slope towards the views of the secular majority. The

72 "Voor het CDA is het echter in die balans ook van belang dat scholen de mogelijkheid behouden om van hun personeel, de identiteitsdragers van de school, te verlangen dat zij de identiteit van de school onderschrijven" (*Handelingen II* 2013/14, No. 73, item 3, p. 20).

73 "We would like to see a clear recognition of the value of education that seeks to align with the beliefs that parents find important to impart to their children, not only within family upbringing, but also, as an extension, in schools" ["Graag zien wij een duidelijke erkenning van de waarden van onderwijs dat wil aansluiten bij de opvattingen die ouders belangrijk vinden om aan hun kinderen mee te geven, niet alleen binnen de opvoeding binnen het gezin, maar ook, als verlengde daarvan, in het onderwijs."] (*Handelingen II* 2013/14, No. 73, item 3, p. 11).

1993 debate already hinted at this effect, which became all the more apparent during the 2014 debate. What ultimately enables these shifts, this volatility within the egalitarian perspective, is another recurring theme, now coming to the fore more clearly than ever, namely the inherent ambiguity of the equality-based frame. This ambiguity is already apparent in the attempts to demarcate religiousness and religious competence described above, but is nowhere as pronounced as in the discussion about the equality of rights.

8.4 Stretched to the limit: malleable balance and egalitarian advances

As the previous chapters have already shown, one of the central controversies in the development of anti-discrimination legislation in the Netherlands has been the implications for the relative status of competing fundamental rights. The tension between non-discrimination and various (religious) freedoms was the reason to postpone in 1985, and the impetus behind the eventual introduction of the compromise of the sole fact construction in 1994. And now that the construction is to be abolished, the Council of State's official take on the proposed amendments is that they are too "unbalanced", mainly because of the further curtailment of the freedom of education they entailed.[74] Such an advice by the Council of State is an important part of any (significant) legislative process, and those who propose the legislation in question are obliged to offer a reaction. And although its warnings are generally not taken lightly, it does not stop the bill's proposers.

In their reaction to the Council, they reject the claim that their proposal is unbalanced; in fact, they argue, it is difficult to establish whether the new law does actually alter the balance, because the implications of the sole fact constructions were too vague to begin with.[75] And even if it could be established that such a shift has taken place, the proposers admit, they would find this "acceptable".[76] In fact, such shifts are only natural, they argue, as "the weight

74 "Zoals zij hierna zal uiteenzetten, is de Afdeling van oordeel dat het voorstel, bezien vanuit het perspectief van het voorgaande, onevenwichtig is. Dat geldt nog in versterkte mate waar het voorstel zich richt op het bijzonder onderwijs, en daarmee een beperking vormt op de vrijheid van onderwijs zoals gewaarborgd in artikel 23 van de Grondwet" (*Kamerstukken II* 2012/13, 32476, No. 5, p. 6).

75 *Kamerstukken II* 2012/13, 32476, No. 7, p. 15.

76 *Kamerstukken II* 2012/13, 32476, No. 7, p. 10). In their reaction to the Council of State's advice, they actually do admit that it is "probable" that the balance shifts (*Kamerstukken II* 2012/13, 32476, No. 5, p. 12).

to be given to different fundamental rights in this balance may change over time": What matters is finding a "*good* balance" (emphasis added).[77] They do seem to be back down a little after criticism from the CDA, SGP and CU prompts them to explicitly add that they do not actively seek to effectuate a shift in the balance.[78] But during the debate, the proposers again show their true colors, when their representative Vera Bergkamp again mentions a "good balance" between rights as the amendment's goal,[79] and admits that if the law "leads to a small shift" in this balance, "even though this was not our aim, we would find this acceptable, given the principle of equality".[80][81]

The issue of the relative status of rights, which came so prominently to the fore during the debates in 1993, thus also figures prominently in the debate of 2014. A significant difference with the earlier debates, however, is that a clear choice is made for the prevalence of individual equal treatment (or non-discrimination) over religious freedoms. As a result, it becomes harder to hold on to the egalitarian tenet that prescribes the equality of rights, and the proposers try to stretch the meaning of this idea of equality to such a degree that it can accommodate non-discrimination's priority. The choice of the notion to denote this relative status of fundamental rights is essential here. To start with, it is telling that the amendment's memorandum does not explicitly reject any *hierarchy* between constitutional rights as the explanatory memorandum of the original act in 1993 did. Only an earlier version of this document states that the law should do justice to "the *juxtaposition* of Dutch constitutional rights" (emphasis added),[82] but such assurances were removed when the proposers updated the memorandum following the Council of State's advice.

77 "Uitgaande van de wenselijkheid van een goede balans kan de enkelefeitconstructie moeilijk gezien worden als een meesterwerk van evenwichtskunst. … Zelfs als voldoende duidelijk zou zijn – quod non – welke balans de enkele-feitconstructie tot stand heeft gebracht, moet erop gewezen worden dat het gewicht dat in deze balans aan verschillende grondrechten moet worden toegekend in de loop van de tijd kan veranderen" (*Kamerstukken II* 2012/13, 32476, No. 7, p. 13).

78 Rijke 2019, 251.

79 *Handelingen II* 2013/14, No. 85, item 13, p. 3.

80 "We hebben in de memorie van toelichting echter ook gezegd dat als het leidt tot een kleine verschuiving, wat ons doel niet is geweest, we die aanvaardbaar vinden, kijkend naar het gelijkheidsprincipe en het principiële punt" (*Handelingen II* 2013/14, No. 85, item 15, p. 1)

81 Interestingly, a faction like the PVV, which called attention to the plight of Reformed schools, is also among the factions that most explicitly argues that such a shift in balance - albeit a "very small" or "slight" shift - would be acceptable (*Handelingen II* 2013/14, No. 73, item 3, p. 5; No. 73, item 3, p. 7).

82 "Met onderhavig wetsvoorstel willen de indieners deze onduidelijkheden zo veel mogelijk wegnemen. Zij menen met dit voorstel recht te doen aan een nevengeschiktheid van grondrechten" (*Kamerstukken II* 2009/10, 32476, No. 3, p.1)

In its stead, the term *balance* is employed to describe the relative status of rights. This notion leaves much more room for prioritizing one right over the other, especially if it does not refer to one specific state of affairs as being exclusively 'balanced', but instead (implicitly) distinguishes between (relatively) 'good' and 'bad' balances[83] – and even more so when it makes this evaluation of balances dependent on the historical or societal context, as the bill's proposers do.[84] The term juxtaposition already implies a bit more constrained and less dynamic state of affairs, painting a picture of rights standing side by side, on the same level, although it arguably still suggests more bandwidth for occasional instances of rights outweighing each other than the prescription of 'equal rights' and the explicit rejection of a 'ranking' or hierarchy of rights that often accompanies it.

But even the switch towards a more flexible notions like balance and juxtaposition cannot conjure away the tensions within the equality-based frame that had already become overly apparent in 1993; the tension, to be specific, between the equality of rights within the egalitarian fair scheme on the one hand, and the guiding principle of individual equal treatment (and non-discrimination) on the other. During the debate, it is the faction of the Christian Union is that mainly presses this issue: to which degree, it repeatedly asks, do the imminent amendments truly respect the juxtaposition of rights?[85] And to what extent is the corresponding tension between these juxtaposed rights - a tension that can never fully be resolved - recognized in the new law?[86] The debate of 1993 already saw the Christian Union's predecessors referring to the equal status of rights, but that was in a much more defensive manner: Now, the orthodox Protestant faction not only replaces the equality of rights with the less demanding juxtaposition, but also embraces this juxtaposition in a much more pro-active and principled way. It identifies the fair scheme of equal rights as something to aspire to:

83 The CDA in this context also approvingly speaks of a "clarification of the balance" ["Pogingen ter verduidelijking van de balans tussen de grondrechten steunt het CDA."] (*Handelingen II* 2013/14, No. 73, item 3, p. 20).

84 See section 8.1.

85 See mainly *Handelingen II* 2013/14, No. 73, item 3, p. 16.

86 See for references or allusions to such tensions by CU: *Handelingen II* 2013/14, No. 73, item 3, pp. 2-3; No. 73, item 3, p. 13; No. 85, item 15, p. 9; No. 85, item 15, p. 9.

> "Happy is the country with a functioning constitution, which grants citizens freedom and protects them. Happy is the country with a rule of law within which minorities are protected and everyone is equal before the law, regardless of race, sex, sexual orientation, civic state or beliefs. … How do we do justice to one another when there is difference of opinion, when constitutional rights conflict? How do we guard the balance, the juxtaposition of constitutional rights?"[87]

To be sure, the Christian Union is not the only faction that is concerned with the implications of the new amendments for relative status of rights. The SGP explicitly refers to "absolutely equal" rights, between which friction inevitably occurs.[88] And CDA's Michel Rog refers to the same unavoidable tensions between "juxtaposed rights",[89] and asks whether this "juxtaposition" will be "fully maintained".[90] Even secular factions like the VVD and the SP ask similar questions to the proposers: the latter after being pressed on the issue by the CU,[91] but the former more proactively, repeatedly asking the proposers for assurances that a hierarchy or ranking of rights is out of the question.

In the ensuing exchanges, it soon becomes clear that the bill's proposers are having a hard time defusing or explaining away these alleged tensions. The discussion quickly gets bogged down in semantics, leaving the participants more confused than before. The final day of the debate, for example, starts with Norbert Elia (VVD) asking proposers to ensure that the juxtaposition of

87 "Gelukkig is het land met een functionerende grondwet die burgers vrijheid geeft en beschermt. Gelukkig is het land met een rechtsstaat waarin minderheden zich beschermd weten en waarin iedereen voor de wet gelijk is, ongeacht ras, geslacht, seksuele gerichtheid, burgerlijke staat of levensbeschouwing. … Hoe doen wij recht aan elkaar als er verschil van opvatting is, als grondrechten botsen? Hoe bewaken wij de balans, de nevenschikking van grondrechten?" (*Handelingen II* 2013/14, No. 73, item 3, p. 12). In line with this, CU's Segers also argues that "a good employer … does not hide behind rights such as the freedom of religion but a good employer, *while respecting the entire Constitution*, will always want to do justice to his employees" (emphasis added) ["Een goede werkgever verschuilt zich niet achter zijn recht of grondrecht zoals de vrijheid van onderwijs of de vrijheid van godsdienst, maar een goede werkgever zal met inachtneming van de gehele Grondwet altijd recht willen doen aan zijn medewerkers."] (*Handelingen II* 2013/14, No. 73, item 3, p. 15).

88 "Het is een eenzijdig, sterk vanuit het gelijkheidsbeginsel geredigeerde wet en dat wringt met de andere grondrechten - het is al benoemd - die gelet op de Grondwet juist *volstrekt gelijkwaardig* zijn" (*Handelingen II* 2013/14, No. 73, item 3. Pp. 9-10.

89 "Kijk, wij hebben aan elkaar nevengeschikte grondrechten.Dat zijn wij gelukkig met elkaar eens. Die zullen zo nu en dan met elkaar schuren. Dat kan ook niet anders" (*Handelingen II* 2013/14, No. 85, item 15, p. 4).

90 "Aan de minister wil ik vragen: blijft bij de invoering van deze wet de nevenschikking tussen grondrechten volledig gehandhaafd?" (*Handelingen II* 2013/14, No. 73, item 3, p. 20)

91 *Handelingen II* 2013/14, No. 85, item 13, p. 8 (SP).

rights is guaranteed. On behalf of the proposers, D66's Bergkamp responds that they find "a small shift" acceptable, but that it is by no means certain that such a shift has actually taken place. In each case, she says, "a shift to achieve a different *ranking* ... has not been the goal. There is no different *ranking*" (emphasis added).[92] This response surprises CU's Segers, however, who asks the proposers to openly admit that a significant shift does take place in the *balance* between freedom of religion and education and the right of non-discrimination. But Bergkamp only adds to the confusion: "It is not about changing the *ranking* in the *balance* [sic] between fundamental rights" (emphasis added), she says, stating also that it is up to the judge and not the proposers to determine whether there is a different balance to begin with.[93] "I... I am completely puzzled",[94] is all that Segers can utter.

Other exchanges also show just how little clarity there is about the very meaning of the central notions of the debate. Later on during the debate, for example questions the VVD faction's stance that the amended law, in Elias' words, "offers the judge more tools to assess in a specific case which fundamental right *weighs more heavily* ... without disturbing the *ranking* as such" (emphasis added).[95] For the VVD - and as is later on also confirmed by the bill's proposers - the law ultimately leaves the decision to the judge, and the judge's ruling in a specific case can never impact overall relative status of fundamental rights. But this is a false solution, SGP's Bisschop claims, as the emerging jurisprudence based on the amended law will still lead to what it calls "a ranking of rights".[96] At this stage, the CU seems more consciously aware of the semantical confusion underneath the discussion, as Segers resignedly states that "[w]e could go into great detail here about the difference between rank,

92 "We hebben in de memorie van toelichting echter ook gezegd dat als het leidt tot een kleine verschuiving, wat ons doel niet is geweest, we die aanvaardbaar vinden, kijkend naar het gelijkheidsprincipe en het principiële punt. ... Een verschuiving om te komen tot een andere rangschikking is echter niet het doel geweest. Er is geen andere rangorde" (*Handelingen II* 2013/14, No. 85, item 15, p. 1).

93 "Het gaat er niet om in de balans tussen de grondrechten een andere rangorde te bewerkstelligen. Feit is ook dat we niet weten hoe de balans nu is, of hoe die straks is. ... De rechter bepaalt de balans uiteindelijk" (*Handelingen II* 2013/14, No. 85, item 15, p. 2).

94 "Ik ... Ik ben helemaal gepuzzeld" (*Handelingen II* 2013/14, No. 85, item 15, p. 2).

95 "In een specifiek geval moet de rechter met deze wet in de hand - als die aangenomen wordt, wat overigens te verwachten is - beter kunnen wegen welk grondrecht zwaarder weegt, zonder de rangorde te verstoren" (*Handelingen II* 2013/14, No. 85, item 15, p. 7).

96 "Dit is toch maar een schijnoplossing? De geachte afgevaardigde geeft aan dat het nevenschikkend moet blijven, maar op het moment dat de verantwoordelijkheid bij de rechter komt te liggen, ontstaat er jurisprudentie en ontstaat er dus een rangorde in grondrechten" (*Handelingen II* 2013/14, No. 85, item 15, p. 8).

juxtaposition and balance".[97] Minister Plasterk, finally, gives up on attaching any label describing the new relationship between rights. When asked whether the balance between rights has shifted, he acknowledges that "something has changed", but "what can be called 'the balance', then, I am happy to leave to one side".[98]

It is precisely this absence of a clear, universally accepted definition of the central notions that allows the parliamentary majority to legitimize its position. The fact that these terms have a general connotation but are not precisely defined enables factions to prioritize non-discrimination without losing their egalitarian (and constitutional) credentials. It allows the proposers to argue that the bill "creates more equality",[99] while simultaneously pointing to the remaining associational freedom to distinguish on religious grounds to prove that there is still a *balance* between rights, and that the juxtaposition of rights is therefore preserved.[100]

This new terminology does not only suit the egalitarian agenda of the secular parties, but ultimately also shapes the positions taken by the orthodox Protestant opposition parties – positions which in some cases have obviously shifted compared to the previous debates. To start with, when defining the stakes of the debate, the CU and SGP factions also mostly refer to the *balance* between rights, which is already a marked departure from the contention that the equality or equal status of these rights itself is violated, as was suggested in 1993. The CU, moreover, speaks of an impending "shift in the balance",[101] suggesting that such a shift does not rule out a balance as such. Similarly, despite its warnings against the removing or ignoring necessary tensions between fundamental rights, the CU faction also acknowledges that these

97 "We kunnen hier uitgebreid gaan spreken over het verschil tussen rangorde, nevenschikking en balans" (*Handelingen II* 2013/14, No. 85, item 15, p. 7).

98 Tot dusver liet de wet de suggestie open dat het homo zijn niet voor 100% een ontslaggrond opleverde, maar misschien wel voor 50%, omdat dit in combinatie met bijkomende omstandigheden een ontslaggrond zou kunnen worden. Die suggestie is nu weggenomen. In die zin is er dus wel iets veranderd. Wat je dan "de balans" noemt, laat ik graag in het midden" (*Handelingen II* 2013/14, No. 85, item 15, p. 5).

99 "het wetsvoorstel dat wij met elkaar gemaakt hebben, zorgt voor meer gelijkheid en zorgt ervoor dat een beter onderscheid gemaakt kan worden door de werkgever" *Handelingen II* 2013/14, No. 85, item 13, p. 3.

100 See for example on *Handelingen II* 2013/14, No. 85, item 13, p. 3; No. 85, item, p.7; No. 85, item 13, p. 10.

101 See for example *Handelingen II* 2013/14, No. 73, item 3, p. 6, or see Seger's comment that the balance can change (*Handelingen II* 2013/14, No. 85, item 15, p. 7).

tensions are still present after abolishing the sole fact construction.[102] CU's tone regarding this matter is also softer and more constructive than that of its predecessors in 1993, with Segers stating that "I hope that we can agree, more than we have done until now, ... in a balance between constitutional rights in which the legislator does not decides in detail which constitutional right prevails in each case".[103] Or as he somewhat cautiously suggests at the final day of debate: "So do we agree that at least it would be nice if the balance stays as it is now?"[104]

SGP strikes a more alarmist tone, and speaks of the imminent "violation of the fragile balance"[105] between fundamental rights, implying - contrary to what the CU suggests - that a shift would indeed endanger the balance as such. Nevertheless, it is still the *balance* that is at stake here, and not the equality of rights as such. Similarly, the SGP notes that the new legislation "chafes"[106] with the other constitutional rights, which is a long way from arguing that the fair scheme itself is in jeopardy – to the contrary, in fact, as such friction is part and parcel of the concept of a fair scheme. But the clearest confirmation that the SGP's idiom as well as its concrete position has shifted can be found in SGP's Bisschop's retrospection of the 1993 debate:

> "At the time, the SGP saw the established sole-fact construction as being far from ideal. However, we now recognize that it was a stipulation which aimed to search for a balance between equal treatment, freedom of religion and freedom of education."[107]

102 "There will always be tensions", Segers states; in his eyes, the removal of the sole fact construction does not (dis)solve these tensions (*Handelingen II* 2013/14, No. 73, item 3, pp. 2-3).

103 "Ik hoop dat we elkaar, ook meer dan tot nu toe gelukt is, kunnen vinden in ... een balans tussen grondrechten waarin de wetgever niet tot in detail bepaalt welk grondrecht te allen tijde voorrang heeft" (*Handelingen II* 2013/14, No. 73, item 3, pp. 15-6).

104 "Zijn we het er dan over eens dat het in ieder geval mooi zou zijn als de balans blijft zoals die nu is?" (*Handelingen II* 2013/14, No. 85, item 15, p. 2).

105 "Zoals ik zonet bij interruptie heb geprobeerd duidelijk te maken, gaat dit initiatiefvoorstel ons inziens inbreuk maken op de fragiele balans tussen grondrechten ten gunste van het non-discriminatiebeginsel" (*Handelingen II* 2013/14, No. 85, item 15, p. 8).

106 "Wat ik bedoel te zeggen, is dat dit schuurt met de vrijheid van onderwijs en de vrijheid op andere terreinen, die daardoor wordt ingeperkt" (*Handelingen II* 2013/14, No. 73, item 3, p. 9).

107 "De SGP vond de destijds vastgestelde enkelefeitconstructie bepaald geen ideale vondst. Toch was het wel een bepaling, zo erkennen wij, die beoogde te zoeken naar een evenwicht tussen gelijke behandeling, vrijheid van godsdienst en vrijheid van onderwijs" (*Handelingen II* 2013/14, No. 73, item 3, p. 9).

In the context of the discussion on rights, it is telling that even the faction that once was amongst the staunchest opponents of a general anti-discrimination law - and the equality-based frame in general - ultimately adopts the egalitarian frame to defend that very same legislation.

As the orthodox Protestant factions have become less harsh in their judgements on the anti-discrimination law, the underlying interests and (to be prevented) harms of this law are also more present in their reasoning. One the one hand, they indirectly recognize the (sufficient) weight of material harms, when they criticize the amendment's largely symbolic nature. "Where has the current Equal Treatment Act … made victims that justify this initiative?", Segers asks.[108] Given that conflicts between (homosexual) teachers and their schools are "generally settled peacefully", SGP's Bisschop argues, the issue is "blown out of proportion".[109] On the other hand, they do not only repeat the dutiful condemnations of discrimination already offered in 1993 ("Discrimination is not allowed. No-one argues for discrimination"[110]), but also go out of their way to show how the schools themselves are not (anymore) as discriminatory as is often thought: "Schools explicitly aim to become a gay-friendly school, where this subject is openly discussed, where people are indeed encouraged to come out of the closet if they are homosexual",[111] Segers exclaims in an elaborate defense of the orthodox Protestants' egalitarian credentials. Such (implicit) endorsements of gay-friendly climates at schools are as close as one can get to the recognition of (non-material) dignity harm.

More significant, however, is the increased recognition of sexuality as a serious ground of discrimination, in a process of equalizing of such grounds that runs parallel to the equalizing of rights. Where we saw that the RPF in 1993 already acknowledged that the prohibition of certain distinctions - it mentioned the more 'immutable' and 'fixed' grounds of race and gender - could

108 "Waar heeft de huidige Algemene wet gelijke behandeling en de huidige balans tussen de verschillende grondrechten slachtoffers gemaakt die dit initiatief rechtvaardigen?" (*Handelingen II* 2013/14, No. 73, item 3, p. 15).

109 "Dat dit thema buitenproportioneel is opgeblazen, zoals de heer Beertema signaleert, deel ik van harte … De problemen die zich voordoen, worden zoals de indieners zelf ook signaleren doorgaans in der minne geschikt" (*Handelingen II* 2013/14, No. 73, item 3, p. 7).

110 "Discriminatie is echter altijdverboden bij wet. Discriminatie mag niet. Niemand pleit voor discriminatie" (*Handelingen II* 2013/14, No. 85, item 13, p. 2).

111 "Scholen streven er expliciet naar om een homovriendelijke school te worden, waarin dit bespreekbaar wordt gemaakt, waarin mensen inderdaad worden aangemoedigd om uit de kast te komen als zij homo zijn" (*Handelingen II* 2013/14, No. 73, item 3, p. 14).

trump religious freedom, its successor in 2014 all but includes sexuality in this category:

> "In the opinion of the faction of the Christian Union … the freedom to choose your marital status requires a much stronger justification than in the case of sexual orientation. After all, your marital status is voluntary, while your sexual orientation is clearly of a more static and less voluntary nature."[112]

Although the aim of this argument is to diminish the importance of the ground of marital status, it ironically also has the effect of elevating the status and weight of the ground of sexuality.[113] It is a marked departure from the previously held conviction that sexuality should be seen as an 'opinion' or a 'choice' that is irrelevant in the fight against 'true' discrimination. Now that sexuality is considered to be more static and inextricably linked to the person, the connection with human dignity is even harder to deny – and it was this dignity that the orthodox factions had already recognized as an overriding interest two decades prior. The Christian Union thus edges closer to acknowledging the prevalence of the right to non-discrimination (of homosexuals) over the religious freedoms, thereby joining the ever-growing progressive majority in Dutch society. It is therefore not without reason that Labour Party's Astrid Oosenbrug, when reflecting on the decades building up to the Equal Treatment Act's amendments, discerns a clear development towards a more egalitarian outlook in society in general, and in its religious minorities in particular:

112 "Het ligt daarom naar het oordeel van de fractie van de ChristenUnie in de rede dat inperking van de vrijheid van onderwijs, godsdienst en vereniging ten koste van het beschermen van het zelf kiezen van je huwelijkse staat een veel zwaardere rechtvaardiging vraagt dan die ten aanzien van homoseksuele gerichtheid. Je huwelijkse staat is immers vrijwillig, terwijl je seksuele gerichtheid duidelijk statischer en minder vrijwillig van aard is" (*Handelingen II* 2013/14, No. 73, item 3, p. 16).

113 CU's growing esteem for sexuality as a prohibited ground of is further confirmed by other statements by Segers: "I find this an extraordinarily careless treatment of the different grounds", he says elsewhere: "The submitters have to realize that the fact of marital status has a much weaker status as protected ground than for example sexual orientation" ["Ik vind het een buitengewoon slordige manier van omgaan met de verschillende gronden. De indieners moeten zich echt rekenschap geven van het feit dat huwelijkse staat een veel zwakkere status heeft als beschermende grond dan bijvoorbeeld seksuele gerichtheid."] (*Handelingen II* 2013/14, No. 85, item 13, p. 11).

> "Since the implementation of the Equal Treatment Act, societal developments have not stood still. Different views on homosexuality exist within various churches and religious movements. One cannot say in advance that someone's sexual orientation is incompatible with the religious foundation of a school. For the PvdA, therefore, a general exemption in the Equal Treatment Act is not appropriate anymore. There is a clear shift from "homosexuality is a choice" to "homosexuality is someone's essence". Those are gradual but very important developments for LGBT people, who nowadays are granted much more recognition and room to live than, say, twenty years ago."[114]

8.5 Conclusion: egalitarian endgame

Although the equality-based frame was already dominant in 1985 and institutionalized in 1993, it took until 2014 until the egalitarian dominance experienced its culmination. Of course, the bill of 1993 itself already amounted to a confirmation of the liberal-democratic state's *Kompetenz-Kompetenz*, a proof of its specific competence on the area of discrimination, and the (further) establishment of an egalitarian fair scheme of equal (and mutually limiting) rights. Still, it is only in the new millennium that the parliament unapologetically prioritized non-discrimination over religious freedoms, realized true parity between religious, (similar) non-religious and political organizations, and (further) curtailed religious competence by categorically forbidding any religious distinctions that lead to distinctions on other grounds. The bill's proposers, moreover, expressed a clear preference of the individual over the collective in their explanatory memorandum, and even more clearly than before took for granted that the undoubtedly egalitarian interest of dignity overrides religious freedoms – even if the dignity harm inflicted is solely symbolic, and not an insult added to a tangible injury.

114 "Sinds de inwerkingtreding van de AWGB hebben de maatschappelijke ontwikkelingen niet stilgestaan. Ook binnen de verschillende kerkelijke en godsdienstige stromingen bestaan verschillende opvattingen over homoseksualiteit. Men kan niet op voorhand zeggen dat iemands seksuele gerichtheid niet verenigbaar zou kunnen zijn met de godsdienstige grondslag van een school. Een algemene uitzondering is voor de Partij van de Arbeid dan ook niet meer op zijn plaats in de AWGB. Er is een duidelijke verschuiving van "homoseksualiteit is een keuze" naar "homoseksualiteit is iemands wezen". Dat zijn geleidelijke maar uiterst belangrijke ontwikkelingen voor LHBT'ers, die vandaag veel meer erkenning en bestaansruimte krijgen dan bijvoorbeeld twintig jaar geleden" (*Handelingen II* 2013/14, No. 73, item 3, p. 18-19).

Where the bill of 1993 received its fair share of liberty-based criticism, the few remaining opponents of the proposed amendments now almost exclusively couched their complaints in egalitarian terms – another proof of the nigh absolute dominance of the equality-based frame. The orthodox Protestant factions altogether ceased to allude to religion's uniqueness, and instead found itself scrutinizing which function is relevantly religious – thereby endorsing the liberal-egalitarian endeavor of 'objectively' distinguishing the religious from the civil or non-religious. They pro-actively defended the equal status of rights, and found the justification as well as the limits of associational freedom in the rights of the individual. They took pains to emphasize the lack of material harm - thus implying its overriding force - as well as the efforts of Reformed schools to prevent expressive harms by creating a gay-friendly atmosphere. To counterbalance these interests, they forwarded watered down identity-centered interests that are considerably less ethically salient than the harms that they had invoked in the previous debates. In 2014, it was not the oppression or disregard of (orthodox) Christian communities that needed to be prevented, or the conscience and moral integrity of religious individuals and their organizations that had to be protected: Instead, it was 'merely' the (credible) intergenerational transfer of morals and values - religious as well as non-religious - that needed to be safeguarded, for the sake of maintaining a communal identity.

There is a reason why before, in 1993, the orthodox factions were still caught in two minds when confronted with the dilemma of either criticizing or hitching on to the dominant frame. By almost exclusively employing equality-based arguments during the 2014 debate, the positions of the SGP and (especially) the CU may have gained in legitimacy, but also proved to be more vulnerable for critical scrutiny. To which degree are one's religious beliefs really relevant for fulfilling the various functions in a school, and to what extent is a selective staff policy at religious schools truly essential for the protection of communal identity? What is the actual difference between the various grounds of discrimination (and thus their relevance for human dignity), and why precisely does a certain prevalence of non-discrimination contradict the equal status of rights? Far from providing solid ground, the equality-based frame proves to be a slippery slope where orthodox factions' positions inevitably slide towards the majority's view – to the extent that the SGP faction valued the original Act for the way it balanced fundamental rights, and the CU acknowledged sexual orientation as a sufficiently weighty ground of discrimination to curtail religious freedom. And so, where the nineties

predominantly saw shifts between frames, in 2014 these shifts generally take place within the equality-based frame.

The main explanation for this slipperiness is found in the inherent ambiguity of frames – a characteristic with which the equality-based frame seems to be particularly richly endowed. The parliamentary debate of 2014 once more underlined this ambiguity; in fact, the growing dominance of the egalitarian perspective only seems to amplify it. Against the background of an increasingly prioritized right to non-discrimination, the question of what equality demands becomes especially pressing. Does this prioritization contradict the equal status of rights, or should this equality simply be interpreted differently? The employment of a flexible notion of balance by the bill's proposers suggests that egalitarian notions like a fair scheme of equal rights can - in theory as well as practice - be stretched to accommodate almost any weighing of rights. In each case, it is not the equality itself that does the work. As the discussion about the importance of the various grounds of discrimination grounds also showed, what in the end makes the difference is the weight and seriousness that are accorded to (the prevention of) specific types of harm to a specific type of person. In this instance, it was the harm of the discriminated homosexual teacher that was obviously deemed weightier.

After the debate was over, and the proposed amendments turned into law, the case of the discriminated homosexual teacher was all but closed – at least in a political sense. To be sure, there was a court ruling in 2018 against a Reformed school's (planned) dismissal of a teacher in a homosexual relationship; a ruling that was based on the Equal Treatment Act. But the parliament has already moved on to other issues, or more specifically, other discriminatory harms that needed to be remedied. For example, the Act's wording of "hetero- and homosexual orientation" is aimed to be replaced by "sexual orientation" in order to protect other varieties of sexuality that the old term did not cover.[115] The year 2021 already saw the inclusion of this notion of "sexual orientation" in the Dutch Constitution, where it previously fell under the miscellaneous category of "other grounds".[116] More than these expansions and solidifications of the protection for teachers, however, it was the interests of (potentially) discriminated students that has attracted political attention. Recently, reports of discrimination in reformed school communities, where homosexual students suffered prejudice and were allegedly forced to come out of the closet, have led

115 Swiebel 2020.
116 *Stb*. 2021, 87.

to calls for reform of the freedom of education.[117] The secular parliamentary majority, moreover, has also pleaded for reforms that would make it impossible for religious schools to select students on the basis of (their parents') religion – the so-called duty to enroll ('acceptatieplicht').[118] And so the movement towards the recognition of ever more interests and harms proceeds, undoubtedly sparking new debates about what equality and non-discrimination entails.

117 *NRC,* 2021 26 March, *School duwt kinderen ongevraagd uit de kast*. Retrieved from: https://www.nrc.nl/nieuws/2021/03/26/school-duwt-kinderen-ongevraagd-uit-de-kast-a4037387 [Accessed on 8 June 2023].

118 See for example the motion *Kamerstukken II* 2020/21, 32824, No. 309 (by the Socialist Party).

9

Conclusions, Limitations, Suggestions

If there is one thing this thesis has made abundantly clear, it is that the question of religious exemptions - or the question, more generally, of the protection of religious freedom by and from the state - is still a highly topical and urgent issue. Both normative-theoretical and political debates are rife with sweeping statements and conflicting claims, expressing fundamentally opposing takes on religious freedom. This thesis reconstructed, analyzed and criticized these debates through the lens of liberty- and equality-based views on religious freedom; a distinction that is often alluded to, but had not been elaborated and applied in such a systematic and comprehensive way. The main research question driving this study was:

> *How can disputes about religious exemptions be explained and resolved in terms of liberty- and equality-based views on religious freedom, and how do conflicts and shifts between these views take shape in both normative theory and contemporary liberal democracies?*

The focus on normative theory as well as political practice meant that this thesis was divided into two: a theoretical and an empirical part. But in the course of its writing, it became clear just how intimately these two were connected. It is not just that they complemented each other; each actually needed the other in order to analyze and resolve religious freedom disputes. The theoretical framework developed in the first chapter proved to be essential in discerning conflicts and shifts in parliamentary debates. And the study of specific Dutch parliamentary debates shed a much-needed light on how religious freedom disputes are ultimately resolved through contextual assessments, given that inherently indeterminate theories of religious freedom are by itself incapable of bringing these disputes to a satisfactory ending. Theoretical and empirical analysis thus came together in a distinctly interdisciplinary endeavor, combining political and legal theory, historical science, and methods and insights from political science. In this final chapter, I discuss the conclusions that can be drawn from these various forms of inquiry, both theoretical and empirical. I also discuss the limitations of this study, and provide suggestions for further research.

9.1 Conclusions

At the start, what was needed first and foremost was a way of distinguishing between liberty- and equality-based views of religious freedom. For this purpose, the thesis turned to the normative-theoretical debate about

this freedom, asking whether it can be explained and reconstructed as a fundamental conflict between such views. The thesis demonstrated that the question of religious freedom can be broken down into four separate yet interrelated (sub)questions - questions of (conceptualizing) religion, competence, rights and interests -, and that what I call Liberty- and Equality-based Theories of Religious Freedom (LTRF and ETRF) offer contrasting answers to each of these questions.

First, on the issue of conceptualizing religion, LTRF argue that religion is a uniquely special phenomenon, while ETRF hold that at best religion is equally special compared to similar non-religious phenomena. On the issue of competence, secondly, LTRF stress that religious groups themselves primarily decide where the limits of their jurisdiction lie, invoking a specific theological or pluralist view to ground this religious sovereignty, while ETRF depart from a social contract perspective and argue that the ultimate holder of sovereignty can only be the liberal-democratic state. Thirdly, both approaches differ on the question of rights, with Liberty-based Theories holding religious freedom to be a distinctive, prioritized and primarily communal right, and Equality-based theories rather considering it to be part of a broader scheme of equal and primarily individual rights and liberties. The question of interests, finally, sees the opposing families of views prioritizing either religious interests (LTRF) or the interests protected by liberal-democratic laws (ETRF), and accordingly drawing fixed lines that are either (very) permissive or restrictive when it comes to granting (religious) exemptions. The (no-)harm principle is also a main bone of contention here, with ETRF rejecting exemptions to the extent that they result in (certain) harm to others' interests, and LTRF generally ignoring or relativizing this impact, arguing that such unavoidable costs are the 'bitter' that comes with the 'sweet' of religious freedom.

Besides shedding light on these fundamental disagreements between LTRF and ETRF, the theoretical reconstruction also yielded insights into the different ways in which ETRF interpret the notion of equality in the various (sub)debates – interpretations that coincide with the different meanings equality was endowed with in early modern history, as elaborated by Teresa Bejan. In the debate on competence, Equality-based Theories rally around the notion of equality-as-unity; equality by virtue of the shared membership of a unified whole, in this case that of the liberal-democratic state. In the rights debate, ETRF forward an interpretation of equality-as-parity, or equality in the sense of being sufficiently similar to be treated *on a par* with others. A final interpretation of equality is defended in the debate about interests, where the notion of equality appears, among other things, in the sense of equality-as-proportionality, or equality-

as-balance, with the notion of proportionality suggesting equality in the sense that interests are seen or treated in proportion to each other.

This theoretical reconstruction of a conflict between two abstract and opposing perspectives also made it possible to, in the terms of the research question, discern possible *shifts* between these views in the theoretical debate. A detailed analysis of the individual stances of individual authors revealed a wealth of inconsistencies, ambivalences, concessions, compromises and other nuances. Taken together, these findings strongly suggest a broader shift from a liberty- towards an equality-based perspective. Even the staunchest defenders of liberty-based views are often forced to admit, for example, that only the state can draw the boundaries of competence, that fundamental rights are equal and mutually limiting, or that claims which conflict with the interests of religious believers are not to be ignored or rejected from the outset, but rather ask for thorough and thoughtful balancing based on an egalitarian principle of proportionality. The fact that these liberty-leaning authors also actively take place in debates within egalitarian confines - taking a stance on matters like where the boundary between the public and private must be drawn, or how to resolve conflicts between equal rights - further supported the conclusions that there is a broad egalitarian consensus on how to approach the question of religious freedom. And the emergence of this consensus is facilitated, finally, by the fact that equality-leaning authors also nuance and sometimes soften their views, in their attempt to incorporate concerns that (also) drive liberty-based theorists. Cécile Laborde's complex, sophisticated theory arguably provides the best illustration of this broad but nuanced consensus.

But does this emerging consensus and these sophisticated theories bring us any closer to - in terms of the research question - truly *resolving* religious freedom disputes? From a critical analysis of the previously elaborated liberty- and equality-based theories, I concluded that they cannot bring about such a resolution on their own. To begin with, views on religion, competence, rights and interests - especially the first three - turn out to be inconclusive when it comes to reaching actual verdicts. What is more, I concluded that both liberty- and equality-based theories - also in their more nuanced and sophisticated forms - are inherently and fatally indeterminate. Their basic concepts, their main criteria and principles are all inherently indeterminate when it comes to their specific meaning and practical implications. In fact, I argued that when it comes to the decisive question of interests, the most viable and broadly supported approach, namely that of proportionality balancing, is also the most openly and thoroughly indeterminate. Even the theory of Cécile Laborde, who is already quite forthcoming when it comes to acknowledging the limits of

normative theory, turns out to be more fundamentally indeterminate than she herself would probably concede. She readily admits that her views on the questions of religion, competence and rights are by themselves insufficient to establish specific limits and guide concrete choices. But when her criteria regarding the question of interests are also shown to fall short, what remains of her approach is essentially an open-ended and unconditional process of proportionality balancing.

The upshot of all this indeterminacy, as many theorists also end up admitting to, was that the meaning and implications of central principles and criteria can only be worked out in specific contexts, and that it is not normative theories but contextual assessments that ultimately resolve religious exemption disputes. Theory can still contribute to structure and analyze these contextual assessments, however: it may not be able to ascertain the adequate balance between conflicting interests, for example, but it can help to distinguish between different types and categories of impact on these interests, thereby getting a better grip on (and understanding of) concrete acts of balancing. Partly in preparation of the ensuing case study, this thesis developed a moral classification of different categories of third-party harm. When we conceive the harm principle as a jurisdictional principle and not as a sole adjudicating principle, I concluded, it becomes possible to distinguish between various categories of harm caused by exemptions without having to draw a general, fixed line at either of these categories. Based on a thin moral theory of the good, and widely shared moral intuitions, the various categories of material harm I have distinguished were (from most to least severe): physical harm, safety harm, liberty harm, opportunity harm and economic harm. These material harms are complemented by a symbolic or dignitarian dimension of harm: dignity harm, in other words.

The theoretical part of this thesis did not only establish the limits of normative theory and the corresponding need for contextual assessments; it also yielded a rich conceptual framework which can be employed to analyze such practices. The basic distinctions between Liberty- and Equality-based Theories, the internal egalitarian disagreements, distinctions and binaries, and the various categories of harms elaborated in Chapter 4: taken together, they enable us to ascertain precisely how conflicts and shifts take place within specific contexts.

Applying the conceptual framework to historical Dutch church and state relations, I concluded that these have reflected typical - and arguably quintessential - elements of both Liberty- and Equality-based Theories of Religious Freedom in various configurations, and that the latter egalitarian

perspective is increasingly dominant. Distinguishing between the different interpretations of equality at work in debates about competence, rights and interests, I showed how the principles of, respectively, equality-as-unity, equality-as-parity and equality-as-proportionality have increasingly left their mark on Dutch church-state relations.

The conceptual framework was also employed for a more fine-grained analysis of conflicting and shifting views of religious freedom. Dutch parliamentary debates about the national Equal Treatment Act were shown to lend themselves especially well for such a detailed study, and so a methodological approach was developed that would be suitable for this parliamentary setting, namely one based on frame theory and applied through the method of qualitative content analysis. One of the main findings here was that liberty- and equality-based views on religious freedom can not only be conceived as fixed and unambiguous belief systems geared primarily at understanding, but also as more flexible, ambiguous and action-oriented frames.

The analysis of the debates of 1985, 1993 and 2014 showed that a shift towards the equality-based frame has undeniably taken place over these decades, in the sense that this frame became increasingly dominant. The contours of this dominance were already visible in 1985, regardless of the Cabinet's decision to postpone the introduction of a general anti-discrimination bill. The equality-based frame structured the debate to a large extent, from the repeated assertions of state competence (and *Kompetenz-Kompetenz*) to the wide shared endorsement of the equality of rights and the universal condemnation of discrimination. These egalitarian tenets were largely institutionalized in 1993 with the (imminent) establishment of the Equal Treatment Act, which in turn laid the ground for the further structuration of the debate along egalitarian lines: The secular majority pushed back against the remaining religious exemptions through the invocations of legal certainty (read: pleas for more competence for the liberal-democratic state and more attention to the plight of discriminated citizens), the liberal public-private divide and the egalitarian notion of equal human dignity. The last remaining traces of the bygone liberty-based era were erased in 2014, with the secular majorities pushing for legal amendments that further limited religious competence, establishing full parity between religious and non-religious organizations, and unapologetically prioritizing individual equal treatment over communal and associational freedoms. So, to summarize, if the 1985 debate charted an egalitarian course, and the 1993 debate found itself in firmly in egalitarian territory - including

its institutionalized (legal) borders -, the 2014 debate can be said to reach the final destination.

To gauge the true extent of a frame's dominance, frame theory teaches, we should also look at the shape and strength of the remaining resistance from the opposition. In 1985, the contributions of the orthodox Protestant factions showed that a distinctly liberty-based perspective was still available; what is more, it is this vocal liberty-based resistance that arguably made the CDA stop in its tracks and prevent the introduction of a bill. When the establishment of this law was imminent in 1993, this liberty-based resistance flared up even more, as the orthodox factions' outsider's perspective made them all too (painfully) aware of the growing dominance of the equality-based frame. Their sharp Calvinism-inspired liberty-based criticism thus provided the contrast to throw this egalitarian dominance into even sharper relief. At the same time, they saw themselves increasingly compelled to cloth their arguments in egalitarian garb, as the pull of the egalitarian slipstream slowly became irresistible. By 2014, they almost exclusively couched their complaints in equality-based terms, ceasing to allude to religion's uniqueness or religious freedom's distinctiveness, actively endorsing egalitarian tenets and forwarding only watered-down, non-sectarian (and even completely non-religious) interests to further their cause. And so, while the conflict between the liberty- and equality-based frame was still present during the standoff of 1985 and the egalitarian institutional advances in 1993, the only 'conflict' that remained in the new millennium took the shape of disagreement within egalitarian confines.

What facilitated this shift to discussion within equality-based frame is that frame's ambiguity. On the one hand, this ambiguity is all too obvious, given that liberty- and equality-based frames can be expected to be just as ambiguous as liberty- and equality-based theories were proven to be indeterminate. Only the analysis of the parliamentary debates truly showed the extent of this ambiguity, however, and the degree to which it can be taken advantage of by the competing parliamentary factions – in other words, the ways in which this ambiguity is also productive in the sense that it allows for flexibility and consensus-building. I concluded that the more dominant the equality-based frame became, the more this inherent ambiguity came to light. The orthodox factions' contestations of notions like discrimination in the eighties already carried a clear suggestion, but with the establishment of the Equal Treatment Act a tug of war broke out regarding the correct interpretation of tenets like the equality of rights, principles like equal treatment of similarly situated citizens (or non-discrimination) and values like human dignity. That such notions can be stretched to accommodate almost any position became clear when

egalitarian dominance culminated in the amendments of 2014, and the ensuing debate showed how the notion of balance was used to make even (apparently) contradicting stances like guaranteeing equality of rights and categorically prioritizing nondiscrimination commensurable.

The lessons learned in the theoretical part also proved to be applicable in practice: When principles of equality and liberty prove overly ambiguous, the eventual verdict about religious freedom and religious exemptions has to come from a weighing of competing interests – a balancing, in other words, of first-party burdens and third-party harms. But while theory ultimately remains incapable of steering such processes of proportionality balancing, the analysis of parliamentary debates showed which harms and burdens are considered (dis)proportional in a specific contextual practices, and how the views about what constitutes an adequate balance have shifted over time. Looking through the lens of the moral classification of harms developed in Chapter 4, I discerned a clear development where increasingly less severe third-party harms were considered to be disproportionate, and thus sufficiently weighty to overrule religious interests: safety and dignity harm in 1985, a wide range of dignity, liberty and opportunity harms in 1993, and a more indirect (and exclusively expressive) dignity harm in 2014. These views were primarily held by the parliamentary majority, and institutionalized through laws and amendments, but even the orthodox factions proved to be susceptible to recognizing the disproportionality of these harms. Their attempts to deny or ignore the harm inflicted on homosexual citizens from their 'vertical' perspective ultimately proved to be untenable, and the orthodox factions recognized more and more types of harm harms as ultimately outweighing religious interests.

Speaking of these religious interests: what tilted the balance even more to the side of these third-party harms is the fact that the orthodox Protestant opposition parties placed less and less severe burdens on the opposing scale. The very possibility of an anti-discrimination law in 1985 still raised specters of persecution and repression (including physical aggression) of the whole (Reformed) Christian community. With the imminent establishment of such a law in 1993, however, the belief became more prominent that this would put pressure on the conscientious commitments and integrity of religious individuals and associations. And in 2014, finally, it was 'merely' the intergenerational transfer of morals and values - religious as well as non-religious - that needed to be safeguarded, for the sake of maintaining a communal identity: What was at stake, in other words, were non-sectarian and identity-related commitments, which are generally deemed less ethically

salient as the obligation- or conscience-related claims of 1993 – let alone the threat of aggression and persecution.

Even though the weighing of these harms and burdens is ultimately decisive, the discussion did not stop there. The analysis revealed how the debate, especially in 1993, also centered on questions about what constituted (disproportionate) dignity, liberty and opportunity harm to begin with. In the discussion of these tipping points, yet other debates surfaced, and yet other questions imposed themselves. These were questions about the scope of the private sphere and the adequate interpretation of intimate relations or behavior – as the site and object of liberty harms, respectively. Questions about the meaning and implications of notions like scarcity and monopoly when it comes to providing basic opportunities. Questions, also, about the relative weight of different grounds of discrimination; about which (immutable) personal characteristics must be rightfully and equally associated with one's dignity. In the debates about these questions, we again saw the remaining orthodox Protestant opposition gradually edging towards the secular center of parliamentary gravity. The bar they set for curtailing religious freedom was lowered slowly but steadily, and sexual orientation gradually grew in esteem as an immutable personal characteristic that is inextricable tied to one's dignity, and that therefore has to be treated on a par with other prohibited grounds of discrimination.

Taking all the theoretical and empirical findings and conclusions into account, it is clear what the overall conclusion of this thesis should be. Using the terms of the main research question, disputes on religious exemptions can indeed be adequately explained in terms of liberty- and equality-based views on religious freedom. Conflicts between these views take the shape of fundamental disagreements about questions of religion, competence, rights and interests. And in both normative theory and the Dutch liberal democracy, a shift towards the equality-based view can be discerned, resulting in a broad but dynamic egalitarian consensus. As for the question how disputes about religious can be *resolved* in liberty- and equality-based terms: these views or perspectives structure the debate about religious freedom and exemptions, but the resolution of concrete disputes ultimately remains a matter of contextual assessments.

9.2 Limitations and suggestions for further research

The more you know, the more you know what you do not know. In the same vein, the more ground a thesis tries to cover, the more apparent its limitations become, and the more 'unknowns' present themselves as objects for further research. This is also the case in this rather ambitious study, where I have tried to combine various types of analysis in order to arrive at far-reaching conclusions about debates and developments in both normative theory and liberal democracies. And although the findings speak for themselves, it is worth reflecting on how the conclusions they point to may be further buttressed, and to make clear what they do not (or cannot) say anything about.

In some cases, clear caveats were already provided, either explicitly or implicitly. For example, the first chapter's aim to draw the sharpest contrast possible between two fundamentally opposing perspectives meant that these perspectives should not be interpreted as fully representing or completely coinciding with the theories of individual authors. And the second chapter's description of shifts in the theoretical debate did not involve a full-scale idea-historical research as is done, for example, in Katrina Forrester's study of the ascent and influence of Rawls' egalitarian philosophy.[1] As became clear, I did not employ the notion of shift in this historical sense, but rather pointed at ambivalences, concessions, and compromises that suggested a change relative to one's original or fundamental position. Taken together, these individual shifts do suggest a broader shift towards an egalitarian consensus, especially in the light of similar or parallel shifts towards an egalitarianism established by other authors. Still, a more in-depth (and perhaps broader ranging) historical study of predominant views on religious freedom could indeed be meaningful, which can also be remarked about my historical sketch about the Dutch church and state relations. This sketch was sufficiently thorough to identify broader conflicts and shifts between the liberty- and equality-based view, but a detailed historical study of the Dutch institutional arrangements - or focused, for example, on the various iterations of the Dutch Constitution - would provide a more complete and complementary picture of the historical influence of liberty- and equality-based views.

The limitations of my study of Dutch parliamentary debates are inherent to the methodological approach that was employed. As I described, qualitative content analysis is less systematic compared to various quantitative methods,

1 See Forrester's *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (2019).

and its sensitivity to context means that it cannot be easily applied on a large scale, across different national, institutional or even legislative contexts. I also made clear, however, that this context-sensitivity is indispensable, as much of the relevant information is shaped by its specific context, and is often present in a latent or implicit way. This is especially the case when it comes to the study of frames, which consist, among other things, of narratives, terms, catchphrases and other symbolic devices that are very much products of their environment. One of the consequences is that the findings of such an analysis have a limited generalizability. The findings of this case study therefore do not support conclusions about the dominance of the equality-based frame in the Dutch context as such, let alone liberal democracies in general. But again, when one analyzes the dominance of frames this is unavoidable, or at the very least demands many more similarly detailed studies. The case study does strongly *suggest* a broader shift towards an egalitarian perspective in the Dutch context, especially in conjunction with the broader historical sketch of Chapter 5. And in each case, it answers the research question to the extent that it provides an example of *how* conflicts and shifts can take place in the context of liberal democracies.

The above suggests many avenues for further research. The conceptual framework of liberty- and equality-based views can be used (and adapted) to study the prevalence of frames of religious freedom in other parliamentary debates, in the Netherlands but also in different national contexts. The framework can also be applied to the rulings and reasonings of courts. Given their preoccupation with weighing and balancing burdens and harms, the moral classification of such harms seems to be particularly useful. It has been established that courts do not always operationalize the principle of proportionality they themselves confess to, but perhaps the study of the conceptualization of different categories of (disproportionate) harms may help to uncover more implicit assessments of the relative weight of competing interests. A related avenue of further empirical research, finally, could focus on the moral weight ascribed to the various grounds of discrimination in (debates about) anti-discrimination laws, and the way they are interpreted. Such views, this research showed, may also reveal how personal characteristics like religion, gender and sexual orientation are valuated as such; whether they are to be treated on a par or whether there is some kind of underlying hierarchy, and whose interests need to be taken into account to begin with. Such views, in turn, are inextricably tied to conceptions of human dignity, and what counts as a violation of this dignity.

The critical analysis of the theoretical debate also left us with questions that may be further explored. One of the main insights here was how important contextual considerations are in reaching an ultimate verdict in religious exemption disputes, and that one ultimately has to rely on democratic deliberation or, in Laborde's terms, on fair democratic procedures to resolve these disputes. The question, however, is whether and how we can evaluate such procedures and deliberations. When can we say that democratic procedures are fair enough, or when deliberation is sufficiently thorough, broad or inclusive? If these criteria are specified in a more substantial way, for example by stating that a procedure is fair when fundamental rights are respected, then they are unavoidably circular, given that the whole reason for the procedure was to determine the scope of these rights to begin with. And if one instead adopts a purely procedural approach, that focuses on whether the deliberation has considered the broadest range of views, of affected interests, in the most thorough way possible, would this sufficiently ensure its fairness? Theory might not have the final say, but that does not mean it does not have anything to say.

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Appendix 1

From preparation to presentation: the steps of the analysis

Qualitative Content Analysis (QCA) can be done in different degrees of thoroughness and complexity, but always features a certain sequence of phases and steps. Carefully describing this sequence in a detailed and transparent way, moreover, is essential for the validity of the analysis. Based on several elaborations of this sequence[1], the QCA undertaken for this study distinguishes between six steps that can be found the box below. These steps, including specific choices that were made during these steps and potential objections against those choices, are described in more detail below.

Steps of the qualitative content analysis in this thesis

1. Determining the research question and unit of analysis
2. Selecting and making sense of the material
3. Creating a coding frame
4. Trial coding, evaluation and refining the coding frame
5. Coding of the whole text and quality check
6. Analyzing and presenting the findings

1. Determining the research question and the unit and focus of analysis

Like any such analysis, this study started with a research question from which all other steps followed. In the directed QCA of this thesis, whose theoretical foundations were laid down in the first four theoretical chapters, the research question was as follows: "how do conflicts and shifts between and within liberty- and equality-based views of religious freedom take place in parliamentary debates about Dutch general anti-discrimination legislation?"

The next fundamental decisions to make are about the unit and the type of content of the analysis. Given the research question of this thesis, the units that will be coded are not physical linguistic units such as words, sentences other paragraphs - as is often the case in quantitative studies -, but rather individual themes. What one is looking for when searching for themes is basically the expression of an idea; in this case a view, a statement or an argument regarding various aspects of religious freedom. And such a theme could be expressed in a single word, a phrase, a sentence, or a whole paragraph.

2. Selecting and making sense of the material

The natural next step of the analysis is gathering of the material. After the context and the case-study was selected - which has largely been discussed in

1 See Schreier 2012; Elo & Kyngäs 2008; Zhang & Wildemuth 2009.

sections 5.1 and 5.2 of this thesis - the localization of relevant data was done in three steps. Firstly, secondary literature about the topic and parliamentary debates in question helped singling out (potentially) relevant debates and the broader political developments surrounding this issue.[2] Secondly, through searches in the government's databases based in different keywords (such as "algemene wet gelijke behandeling" ('Equal Treatment Act')), reports of the parliamentary debates in question were localized and downloaded.[3] Thirdly, reading through these reports led to the identification of relevant official documents - such as cabinet letters, legislative proposals, reports of the Council of State - which were included in the material as background material, to the extent that they helped to make sense what were the concrete topics of the debate. This also touches on another important part of this second step: making sense of the material. Before developing the codes and starting the actual analysis, it is essential to understand what exactly is going on in the text; what is the topic of discussion, who are talking, when does it take place and how does it fit on the overall timeline? The principle aim of this exercise is to become immersed in the material, as no insights can be gained if the researcher is not completely familiar with the data.[4] This contextual information is incorporated in the empirical chapters, especially in the introductions to the separate chapters.

3. Creating a coding frame

The coding frame, or coding scheme, is at the heart of Qualitative Content Analysis.[5] These can vary in complexity, and feature a number of main categories and various subcategories. In this deductive QCA, the main categories and the initial sub-categories were developed based on the existing theory and the research question. These main categories reflected the general positions of the liberty- and equality-based view on the questions of religion, competence, rights and interests (as summarized in the table in Chapter 1). Within the equality-based frame, moreover, categories were created to reflect internal disagreements about issues like the public and private divide, and allocation of the burden of proof. Most notably, categories were made reflecting

2 This was literature such as Mulder 2017 and Post 2010, but also included various newspaper articles about the introduction of the Dutch Equal Treatment Act.

3 On the website https://zoek.officielebekendmakingen.nl recent (1995-present) and older (1814-1995) documents can be found.

4 Elo & Kyngäs 2008, 109.

5 Schreier 2012.

the various categories of harm developed in chapter four. All these categories fulfilled the requirements of unidimensionality and mutual exclusiveness.

As is characteristic of QCA - also its deductive version -, subcategories were also developed in a data-driven way, using the strategy of subsumption. As described by Schreier, this strategy involves going through the material in the following steps:[6]

1. Reading the material until a relevant concept is encountered.
2. Checking whether a subcategory that covers this concept has already been created.
3. If so, mentally 'subsuming' this under the respective subcategory.
4. If not, creating a new subcategory that covers this concept.
5. Continuing to read until the next relevant concept/passage is encountered.

This process continued until a point of saturation was reached. After this, the categories were properly defined, determining category names, a description of what is meant by that name - by way of a definition and indicators (such as specific words, terms and phrasings) that characterized the subcategories -, and examples that illustrated the categories.[7] In the end, the creation of decision rules - detailing how to code a text in case of potential overlap - were not necessary, as the aforementioned definitions and indicators made sure the categories did not overlap. By this time, the coding frame was ready was ready for the first actual (trial) coding.

4. Trial coding(s), evaluating and refining the coding scheme

In this step, the developed categories were applied to the text as a kind of pilot study. In this research, the software Atlas.ti was used for this coding process. Normally, only a sample of the text is used for such testing. In this case, however, the text was not excessively long, enabling trial coding on all the relevant documents. This trial run enabled an evaluation of the coding frame, in this study the main focus was on the validity of the coding frame. This comes down to checking whether the categories adequately cover the data, and whether these are linked to concepts that are part of the research question.[8] If relevant material was not adequately covered by the categories, or if categories covered multiple relevant themes, new subcategories were created. Existing

6 Schreier 2012, 176.
7 Schreier 2012.
8 Schreier 2012, 179; Elo & Kyngäs 2008, 112.

definitions and descriptions of the categories were altered where needed. No second tester was involved in this process, and no agreement-coefficients were used. In general, there are various opinions on whether seeking such agreement is necessary or desirable, as some point out that each researcher interprets the data in his or her own way, as a reflection of their own subjective position.[9] The reliability of this study is mainly increased by demonstrating the links between the results and the data, mainly through extensive citations (see also step 5).

As long as the trial runs resulted in the significant alteration of the coding frame, subsequent tests were needed. After three rounds of coding, a coding frame emerged that was ready to be applied for the final analysis. By this time, the coding frame had undergone several changes since its initial development. Some (sub)categories were deleted, when certain themes that figured prominently in the theoretical discussions were not reflected in the parliamentary debates. Examples of this are views on religion's uniqueness, or certain aspects of the debate on the question of competence (such as the prioritization of either religious or civic duties). On the other hand, new subcategories were created that added new dimensions and nuances. For example, new (sub)categories distinguished between different types of religious interests that were at stake, which largely coincided with the theoretical distinctions between the obligatory and identarian dimensions of religion discussed in the theoretical chapters.

5. Analyzing and reporting the findings

In the analysis phase, the material is coded once more with the final coding frame. As it also often the case in qualitative content analyses, the codes served as a starting point for further exploration, focused on uncovering relationships between categories, and patterns in time.[10] In this way, the findings made it possible to ascertain to which degree (and in which shape) a fundamental conflict took place between liberty- and equality-based views, or different views on the interests at stake. And it enabled the uncovering of shifts between such views, throughout the debates in 1985, 1993 and 2014.

The findings are reported mainly through the presentation and discussion of quotations, where a balance is sought between description and interpretation. In other words, the aim of this qualitative research is to "[provide] sufficient description to allow the reader to understand the basis for an interpretation,

9 Elo & Kyngäs 2008, 113.

10 Zhang & Wildemuth 2009, 312; Schreier 2012, 180.

and sufficient interpretation to allow the reader to understand the description".[11] No use is made of a quantitative style. QCA in general does not lend itself for statistical tests, and even reporting coding frequencies is not revealing in this current study. After all, it does not matter that much how many times a certain view on religious freedom is expressed, or how often certain arguments are used; this frequency could just as well be the result of irrelevant circumstances, such as the occurrence of accidental exchanges between specific parties, or the amount of speaking time allotted to different political representatives. Only in a few instances, when a view was especially rare or prevalent, comparative or semi-quantitative statements such as 'more', 'less', 'more prevalent', 'continued', 'repeatedly' are used loosely as a way to provide background information. But again, what matters in the end is who expresses the view, and how these views differ from that of other participants in the debate, or from representatives of the same party in earlier or later debates.

11 Patton 2002, 503-504.

Appendix 2

Overview of Dutch political parties

Party	Abbreviation	Ideology	1985	1993	2014
Secular parties					
Labour Party	PvdA	Social-democratic	x	x	x
People's party for Freedom and Democracy	VVD	Liberal-conservative	x	x	x
Democrats 66	D66	Liberal-democratic	x	x	x
Communist Party of the Netherlands	CPN	Communist	x		
Pacifist Socialist Party	PSP	Socialist	x		
Political Party of Radicals	PPR	Green and progressive Christian	x		
Centre Democrats	CD	Nationalist radical-right		x	
GroenLinks	GL	Green and progressive		x	x
Socialist Party	SP	Socialist			x
Party for Freedom	PVV	Nationalist radical-right			x
Christian parties					
Evangelical People's Party	EVP	Progressive Protestant	x		
Christian Democratic Appeal	CDA	Christian-democratic	x	x	x
Reformed Political Party	SGP	Orthodox Protestant	x	x	x
Reformatory Political Federation	RPF	Orthodox Protestant	x	x	
Reformed Political League	GPV	Orthodox Protestant	x	x	
Christian Union	CU	Orthodox Protestant			x

Summary in English

Liberal democracies have long cherished religious freedom as a central value and fundamental right, but the exact meaning and implications of this freedom have always been a matter of discussion – and subject to change. As the concerns of liberal-democratic states increasingly clash with the interests of religious citizens and their associations, the question of religious exemptions - and religious freedom more generally - has become particularly controversial. Both in theoretical and political debates, it is often suggested that this issue should be seen as a clash between views predicated on the values of liberty and equality, and that the egalitarian perspective has ultimately become dominant. Against this background, this thesis asks: How can disputes about religious exemptions be explained and resolved in terms of liberty- and equality-based views on religious freedom, and how do conflicts and shifts between these views take shape in both normative theory and contemporary liberal democracies?

Chapter 1 sets out to describe the theoretical debate about religious freedom in terms of liberty- and equality-based views. I argue that this debate can be broken down into four separate yet interrelated (sub)questions, and that Liberty- and Equality-based Theories of Religious Freedom (LTRF and ETRF) offer contrasting answers to each of these. First, on the issue of conceptualizing religion, LTRF argue that religion is a uniquely special phenomenon, while ETRF hold that at best religion is equally special compared to similar non-religious phenomena. On the issue of competence, secondly, LTRF stress that religious groups themselves primarily decide where the limits of their jurisdiction lie, invoking a specific theological or pluralist view to ground this religious sovereignty, while ETRF depart from a social contract perspective and argue that the ultimate holder of sovereignty can only be the liberal-democratic state. Thirdly, both approaches differ on the question of rights, with Liberty-based Theories holding religious freedom to be a distinctive, prioritized and primarily communal right, and Equality-based theories rather considering it to be part of a broader scheme of equal and primarily individual rights and liberties. The question of interests, finally, sees the opposing families of views prioritizing either religious interests (LTRF) or the interests protected by liberal-democratic laws (ETRF), and accordingly drawing fixed lines that are either (very) permissive or restrictive when it comes to granting (religious) exemptions. The (no-)harm principle is also a main bone of contention here, with ETRF rejecting exemptions to the extent that they result in (certain) harm to others' interests, and LTRF generally ignoring or relativizing this impact, arguing that such unavoidable costs are the 'bitter' that comes with the 'sweet' of religious freedom.

While the first chapter focuses on the contrasts between generalized and rather static families of views, thereby laying bare the fundamental *conflict* that characterizes debates on religious freedom, **Chapter 2** zooms in on the concrete stances of individual authors to get a better picture of the dynamics of the debate – including *shifts* between (and within) liberty- and equality-based views. I show that such shifts generally take place from the former towards the latter view: Even the staunchest defenders of liberty-based views are often forced to admit, for example, that only the state can draw the boundaries of competence, that fundamental rights are equal and mutually limiting, or that claims which conflict with the interests of religious believers are not to be ignored or rejected from the outset but rather ask for thorough and thoughtful balancing based on an egalitarian principle of proportionality. What is more, liberty-leaning authors also actively take part in debates within egalitarian confines, taking in stance on matters like where the boundary between the public and private must be drawn, or how to resolve conflicts between equal rights – thereby only reinforcing the egalitarian dominance. The picture that thus emerges from the analysis of this chapter is one of an egalitarian consensus that is broad, but also internally divided. There is much room left for disagreement, and equality-leaning authors also soften or nuance their views on a regular basis, in their attempts to incorporate concerns that drive liberty-based theorists. Cécile Laborde is arguably the most prominent and influential exponent of this nuanced egalitarian status quo, and her theory is briefly presented at the final part of this chapter to serve as a point of reference in remainder of the thesis.

With the theoretical conflicts and shifts in clear view, **Chapter 3** asks to which degree religious exemption disputes can actually be resolved in terms of liberty- and equality-based views on religious freedom. Its aim is therefore a critical one, and its conclusions are sobering. To start with, I show that the four main questions about religious freedom may be theoretically significant, but are also largely inconclusive when it comes to reaching actual verdicts about specific exemption claims. Whether religion is unique, or whether the state enjoys exclusive sovereignty, for example, does not tell us whether a specific claim ought to be rejected or not: only the question of interests proves to be decisive. But more damning than this inconclusiveness is the fundamental indeterminacy of the various theories of religious freedom, whether they are liberty- or equality-based. Their basic notions, their main criteria and principles are all inherently indeterminate when it comes to their specific meaning and practical implications. In fact, I argue that when it comes to the decisive question of interests, the most viable and broadly supported approach - namely that of proportionality balancing – is also the most openly and

thoroughly indeterminate. Even the theory of Cécile Laborde, who is already quite forthcoming when it comes to acknowledging the limits of normative theory, turns out to be more fundamentally indeterminate than Laborde herself would probably concede. The upshot of all this indeterminacy, as many theorists also end up admitting to, is that the meaning and implications of central principles and criteria can only be worked out in specific contexts, and that it is not normative theories but contextual assessments that ultimately resolve religious exemption disputes.

Before turning to such a contextual assessment, however, a glaring gap in the theoretical literature needs to be addressed. The previous chapters have identified proportionality balancing as the most viable route to resolving religious exemption disputes, but scarce attention has been paid to determining the moral weight of the burdens (borne by religious believers when the law restricts the practice of their belief) and harms (inflicted on third parties when an exemption to such a law is granted) on the opposing scales of the balance. The need for conceptualization seems especially pressing in the case of third-party harms, and so filling this gap would not only meet a theoretical need, but would also make grant a better view on precisely what weighing or balancing is deemed proportionate in specific contexts. **Chapter 4** therefore offers a theoretical innovation in the shape of a moral classification of harms resulting from exemptions, distinguishing (in diminishing degree of severity) between physical harm, safety harm, liberty harm, opportunity harm and economic harm as different types of harm in a material sense, which are then complemented by a symbolic or *dignitarian* dimension of harm.

This concludes the first theoretical part of this thesis. This part did not only establish the limits of normative theory and the corresponding need for contextual assessments; it also yielded a rich conceptual framework which can be employed to analyze such practices. The basic distinctions between liberty- and equality-based theories described in Chapter 1, the internal egalitarian disagreements detailed in Chapter 2, and the various categories of harms elaborated in Chapter 4: taken together, they enable us to ascertain precisely how conflicts and shifts take place within specific contexts. And this is the focus of the second part of the thesis.

Chapter 5 lays the foundations for the thesis' case study, a detailed reconstruction of conflicting and shifting views of religious freedom in Dutch parliamentary debates about a general anti-discrimination law. The chapter first sketches the broader context by describing the historical development of the Dutch regime of religious freedom, analyzing it through the prism of LTRF and ETRF. The picture that is painted, albeit in broad brushstrokes, shows

why the Dutch context is a particularly suitable setting for studying debates on religious freedom. Between the sixteenth century and the present, Dutch church-state relations have reflected typical elements of both Liberty- and Equality-based Theories of Religious Freedom in various configurations. In fact, in different periods they could even be said to amount to the quintessential liberty- or equality-based regime. Ultimately, however, the historical analysis of these relations reveals a clear shift towards a dominant egalitarian perspective. Distinguishing between the different interpretations of equality at work in debates about competence, rights and interests, I show how the principles of, respectively, equality-as-unity, equality-as-parity and equality-as-proportionality have increasingly left their mark on Dutch church-state relations.

Throughout this history of the Dutch regime, the issue of freedom of religious education has been one of the main divisive issues in a clash between liberty- and equality-based views. The second part of the chapter elaborates why specific parliamentary debates about this freedom - in the context of the development of the Dutch Equal Treatment Act - present such a good opportunity to conduct a more fine-grained analysis of contemporary conflicts and shifts in a liberal-democratic context. It also develops a methodological approach to trace conflicts and shifts in the three debates in question, which take place between 1985 and 2014. The conceptual framework developed in the theoretical chapters is translated to the parliamentary context by means of frame theory, which means that liberty- and equality-based views on religious freedom are not treated as fixed belief systems geared primarily at understanding, but rather as more flexible and action-oriented frames. An analytical perspective based on frame theory makes it possible to distinguish between different types of conflict, and to assess whether (and what kind of) shift between (dominant) views has taken place. In general, a frame's dominance can be inferred from the degree in which it *structures* the debate, granting legitimacy only to views which stay within its confines and thus forcing participants to adopt its perspective, and the degree in which it is *institutionalized*, for example in laws or other institutional arrangements.

Chapter 6 shows that, in spite of all the hesitance and trepidation that in 1985 made the Cabinet officially postpone the introduction of an anti-discrimination bill, the egalitarian perspective on religious freedom was already very vital during the ensuing parliamentary debate. The growing dominance of the equality-based frame is confirmed by the broad endorsement of multiple egalitarian tenets - from its assertion of state competence to the equality of rights to the protection of equal human dignity -, all held together

by a powerful narrative in which the prolonged suffering of discriminated citizens necessitates strong measures from the state. Even the hesitant Christian-democrats (CDA), who are responsible for the postponement and regularly rubbed shoulders with proponents of the liberty-based frame, found this storyline to be irresistible, and ultimately showed themselves to be among the most fervent supporters of anti-discrimination measures. The remaining reservations about the state's specific scope of competence and the impending curtailment of religious freedoms, however, did mean that the parliament ultimately refrained from institutionalizing the equality-based frame, or that parliamentary factions actively looked for ways of institutionalization that are less far-reaching than a general law. The small orthodox Protestant factions, finally, express their concerns from an unadulterated liberty-based perspective, and see the debate as a bad omen of things to come.

These factions indeed proved to be right, as a new legislative proposal would eventually be approved in 1993. As **Chapter 7** shows, this original Equal Treatment Act largely amounted to the institutionalization of the equality-based frame of religious freedom. The competence of the state in matters of religiously inspired discrimination was firmly asserted, and the new law in many ways amounted to the (further) institutionalization of the equality-based view on rights. Putting fundamental rights like religious freedom and non-discrimination on a collision course also forced the state - in this case, the Cabinet - to resolve new conflicts between interests. For this purpose, the Cabinet explicitly employed an egalitarian measure of proportionality, and identified the prevention of dignity- and liberty-harm as a main rationale for the law, and as an overruling factor in the clash with religious freedom. The equality-based frame also clearly structured the parliamentary debate. The institutionalization of various egalitarian precepts and principles provided ammunition for the secular opposition to target the bill's remaining traces of the liberty-based frame. Seemingly neutral terms like legal certainty, but also the egalitarian notions of human dignity and the liberal private-public binary were mobilized to criticize the bill's exemptions for religious organizations – in particular schools. The extent of the egalitarian dominance could also be gleaned from the remaining opposition. The orthodox Protestant factions' vehement liberty-based criticism provided a contrast that threw the egalitarian dominance in sharp relief, while this dominance at the same time also forced them to soften and nuance their stances, and compelled them to clothe their defense of religious freedom in egalitarian garb. As the orthodox factions increasingly invoked egalitarian terms and tenets, the struggle over de desired

interpretations of these notions also became more intense and pronounced, thus highlighting the inherent ambiguity of the equality-based frame.

Chapter 8 shows how the debate of 2014 marks the culmination of the egalitarian dominance. More than just stripping the controversial exemption for religious organizations, the proposed amendments under discussion exuded an egalitarian spirit that practically coincides with the precepts and principles of the equality-based frame. Much of the secular criticism that had been voiced in 1993 was incorporated in the bill, and the final traces of the liberty-based frame were all but purged. The bill's (secular) initiators, moreover, expressed a clear preference of the individual over the collective in their explanatory memorandum, and argued even more clearly than before that egalitarian notions of (equal) dignity overrides religious freedoms – even if the harm inflicted is solely symbolic, and not an insult added to material injuries like opportunity harms. Where the bill of 1993 had received its fair share of liberty-based criticism, the few remaining (orthodox Christian) opponents of the proposed amendments now almost exclusively couched their complaints in egalitarian terms, and slid even further down the egalitarian slope. In the meanwhile, the growing dominance of the egalitarian perspective only seemed to amplify the equality-based frame's ambiguity. In order to reconcile the categorical prioritization of non-discrimination with the equality of rights, secular factions interpreted the latter equality as a matter of *balance* – a balance, moreover, that can shift according to the context. The employment of a flexible notion of balance by the bill's initiators suggests that egalitarian notions like a fair scheme of equal rights could – in theory at least – be stretched to accommodate almost any weighing of competing rights and interests. And in this case, it is obviously the interests of the discriminated citizen that weighed heaviest.

The overall **Conclusion** that can be drawn is that, just like the theoretical debate, these parliamentary disputes can very well be explained in terms of liberty- and equality-based views. In both theory and practice, moreover, a clear shifts towards a dominant egalitarian perspective can be discerned. But although this perspective may structure the debate, and may incline towards a more critical assessment of religious exemption claims, it cannot deliver a verdict by itself. In the end, the frames in question turn out to be as ambiguous as the theories are indeterminate. An eventual decision on religious exemption claims ultimately depends on the particularly contextual process of weighing harms and burdens, and determining which balance between these is to be deemed proportional.

Nederlandse samenvatting

Liberale democratieën hebben godsdienstvrijheid altijd gekoesterd als een centrale waarde en een fundamenteel recht, maar de precieze betekenis en implicaties van deze vrijheid blijven immer een punt van discussie, en zijn continu aan verandering onderhevig. En aangezien de belangen van liberaal-democratische staten steeds vaker botsen met de belangen van religieuze burgers en hun organizaties, is de vraag naar de rechtvaardigheid van religieuze uitzonderingen - en religieuze vrijheid in het algemeen - alleen maar urgenter geworden. Zowel in theoretische als in politieke debatten wordt vaak gesuggereerd dat we de geschillen over dergelijke uitzonderingen moeten zien als botsingen tussen waarden van vrijheid en gelijkheid, en dat vooral het perspectief van gelijkheid in de huidige tijd dominant is geworden. Tegen deze achtergrond stelt deze dissertatie de volgende vraag: Hoe kunnen geschillen over religieuze vrijstellingen worden verklaard en opgelost in termen van op vrijheid en gelijkheid gebaseerde opvattingen over godsdienstvrijheid, en hoe krijgen conflicten en verschuivingen tussen deze opvattingen vorm in zowel normatieve theorie als hedendaagse liberale democratieën?

Hoofdstuk 1 beschrijft het theoretische debat over godsdienstvrijheid als een meningsverschil tussen op vrijheid en gelijk gebaseerde visies. Ik beargumenteer dat dit debat kan worden opgesplitst in vier afzonderlijke maar onderling verbonden (sub)kwesties, en dat Liberty- en Equality-based Theories of Religious Freedom (LTRF en ETRF) op elk van deze kwesties contrasterende opvattingen koesteren. Ten eerste, wat betreft de kwestie van de conceptualisering van *religie*, stellen LTRF dat religie een uniek fenomeen is, terwijl ETRF betogen dat religie niet bijzonderder is dan vergelijkbare niet-religieuze verschijnselen. Ten tweede, aangaande de kwestie van *bevoegdheid*, benadrukken LTRF dat religieuze groepen in eerste instantie zelf bepalen waar de grenzen van hun jurisdictie liggen, waarbij ze zich beroepen op een specifieke theologische of pluralistische visie om deze religieuze soevereiniteit te onderbouwen, terwijl ETRF vertrekken vanuit het perspectief van het sociaal contract en stellen dat uiteindelijk alleen de liberaal-democratische staat echt soeverein kan zijn. Ten derde verschillen beide benaderingen van mening over de kwestie van *rechten*, waarbij LTRF religieuze vrijheid beschouwen als een onderscheidend, geprioriteerd en primair gemeenschappelijk recht, terwijl ETRF het zien als onderdeel van een breder stelsel van gelijke en primair individuele rechten en vrijheden. Bij de kwestie van (onderliggende) *belangen*, ten slotte, zien we dat men voorrang geeft ofwel aan religieuze belangen (LTRF) ofwel aan belangen die worden beschermd door de wetten van de liberaal-democratische staat (ETRF). Dienovereenkomstig trekt men grenzen die ofwel zeer tolerant ofwel zeer restrictief zijn bij het verlenen van religieuze

uitzonderingen. Het schadebeginsel is hier ook een belangrijk twistpunt, waarbij ETRF uitzonderingen afwijst voor zover ze (een bepaalde) schade berokkenen aan andermans belangen, en LTRF deze impact over het algemeen negeert of relativeert met het argument dat dergelijke onvermijdelijke kosten het 'bitter' zijn dat bij het 'zoet' van religieuze vrijheid hoort.

Terwijl het eerste hoofdstuk zich richt op de contrasten tussen algemene en vrij statische visies, en daarmee het fundamentele *conflict van* debatten over godsdienstvrijheid blootlegt, zoomt **Hoofdstuk 2** in op de concrete standpunten van individuele auteurs om een beter beeld te krijgen van de dynamiek van het debat – inclusief *verschuivingen* tussen (en binnen) de vrijheids- en gelijkheidsvisie. Ik laat zien dat zulke verschuivingen meestal plaatsvinden van de eerstgenoemde naar de laatstgenoemde: Zelfs de meest fervente verdedigers van het vrijheidsperspectief voelen bijvoorbeeld gedwongen toe te geven dat alleen de staat grenzen van zijn eigen bevoegdheid kan stellen, dat grondrechten gelijk zijn en elkaar wederzijds beperken, of dat (wettelijke) belangen die botsen met de belangen van religieuze gelovigen niet bij voorbaat genegeerd of gerelativeerd moeten worden, maar juist vragen om een grondige en doordachte afweging op basis van een egalitair proportionaliteitsbeginsel. Bovendien nemen vrijheidsgezinde auteurs ook actief deel aan debatten binnen egalitaire grenzen: ze nemen bijvoorbeeld stelling over de vraag waar de grens tussen publiek en privaat getrokken moet worden, of hoe conflicten tussen gelijke rechten moeten worden opgelost – stellingnamen waarmee ze indirect ook de dominantie van het overkoepelende gelijkheidsperspectief bevestigen en versterken. Het beeld dat uit deze analyse oprijst is dat van egalitaire consensus die breed gedragen wordt, maar die ook de nodige interne verdeeldheid kent. Er is nog veel ruimte voor meningsverschillen, en ook gelijkheidsgezinde auteurs nuanceren hun standpunten regelmatig. Cécile Laborde is een van de meest prominente en invloedrijke exponenten van deze genuanceerde egalitaire status quo, en haar theorie wordt kort gepresenteerd in het laatste deel van dit hoofdstuk, ook zodat het als referentiepunt kan dienen in de rest van het proefschrift.

Met de theoretische conflicten en verschuivingen reeds in het vizier vraagt **Hoofdstuk 3** in hoeverre geschillen over religieuze vrijstellingen daadwerkelijk kunnen worden *opgelost* door theorieen die zich baseren op vrijheid dan wel gelijkheid. Het doel van het hoofdstuk is daarmee kritisch, en de conclusies zijn ontnuchterend. Om te beginnen laat het hoofdstuk zien dat de vier hoofdvragen over godsdienstvrijheid weliswaar theoretisch van belang zijn, maar ook weinig tot geen uitsluitsel (kunnen) geven over concrete uitzonderingskwesties. Of religie uniek is, of dat de staat exclusieve soevereiniteit geniet, zegt bijvoorbeeld

niet of een specifieke claim moet worden afgewezen of niet: alleen het vraagstuk van belangen blijkt in hoge mate doorslaggevend te zijn. Een nog groter probleem is echter de fundamentele *onbepaaldheid* van de verschillende theorieën over godsdienstvrijheid, of ze nu gebaseerd zijn op vrijheid of gelijkheid. Hun basisbegrippen, belangrijkste criteria en principes laten allemaal in het ongewisse hoe zij nu precies geïnterpreteerd moeten worden, en wat hun implicaties zijn. Sterker nog, als het aankomt op de beslissende kwestie van belangen, is de meest levensvatbare en breed gedragen benadering - namelijk die van de proportionaliteitsafweging - ook de meest onbepaalde. Zelfs de theorie van Cécile Laborde, die al heel openhartig is als het gaat om het erkennen van de grenzen van de normatieve theorie, blijkt fundamenteler onbepaald dan Laborde zelf waarschijnlijk zou toegeven. Het resultaat van al deze onbepaaldheid is dat de betekenis en implicaties van centrale principes en criteria alleen kunnen worden vastgesteld in specifieke contexten, en dat concrete geschillen over uitzonderingen uiteindelijk alleen opgelost kunnen worden in de praktijk, in specifieke contexten, en niet (enkel) aan de hand van de theorie.

Voordat de aandacht wordt gericht op een dergelijke contextuele beoordeling, moet er echter eerst een opvallende leemte in de theoretische literatuur worden opgevuld. In de voorgaande hoofdstukken is de proportionaliteitsafweging aangewezen als de meest geëigende route om geschillen over religieuze uitzonderingen op te lossen, maar er is in de literatuur nauwelijks aandacht besteed aan het bepalen van het morele gewicht van de lasten (die religieuze gelovigen moeten dragen wanneer de wet de beoefening van hun geloof beperkt) en de schade (die derden wordt berokkend wanneer een vrijstelling van zo'n wet wordt verleend) die tegen elkaar moeten worden afgewogen. De behoefte aan conceptualisering is vooral dringend bij het vaststellen van de schade aan derden. Het opvullen van deze leemte zou niet alleen voorzien in een theoretische behoefte, maar zou ook een beter zicht geven op welke weging of afweging precies proportioneel wordt geacht in specifieke contexten. **Hoofdstuk 4** biedt daarom een theoretische innovatie in de vorm van een morele classificatie van schade als gevolg van (religieuze) uitzonderingen, waarbij onderscheid wordt gemaakt tussen verschillende categorieën van dergelijke schade op basis van hun ernst. Dat zijn, in afnemende mate van ernst: fysieke schade, veiligheidsschade, vrijheidsschade, kansenschade en economische schade. Deze verschillende soorten tastbare schade worden daarbij aangevuld met een symbolische dimensie van schade, die waardigheidsschade ('dignity harm') genoemd kan worden.

Hiermee is het eerste theoretische deel van dit proefschrift afgerond. Dit deel heeft niet alleen de grenzen van normatieve theorie en de overeenkomstige behoefte aan contextuele beoordelingen vastgesteld; het heeft ook een rijk conceptueel kader opgeleverd dat kan worden gebruikt om dergelijke praktijken te analyseren: het basisonderscheid tussen op vrijheid en gelijkheid gebaseerde theorieën beschreven in Hoofdstuk 1, de interne egalitaire meningsverschillen en nuances beschreven in Hoofdstuk 2, en de verschillende categorieën van schade uitgewerkt in Hoofdstuk 4. Dit conceptuele gereedschap stelt ons in staat om precies vast te stellen hoe conflicten en verschuivingen plaatsvinden binnen specifieke contexten. En dit is de focus van het tweede deel van dit proefschrift.

Hoofdstuk 5 legt de basis voor de case study van dit proefschrift; een gedetailleerde reconstructie van conflicterende en verschuivende opvattingen over godsdienstvrijheid in Nederlandse parlementaire debatten over een algemene antidiscriminatiewet. Het hoofdstuk schetst eerst de bredere context door de historische ontwikkeling van het Nederlandse regime van godsdienstvrijheid te beschrijven en deze te analyseren door het prisma van LTRF en ETRF. Het beeld dat wordt geschetst, zij het in brede penseelstreken, laat zien waarom de Nederlandse context een bijzonder geschikte setting is om debatten over godsdienstvrijheid te bestuderen. Tussen de 16e eeuw en nu weerspiegelen de Nederlandse kerk-staat verhoudingen op uiteenlopende manieren typische elementen van zowel Liberty- als Equality-based Theories of Religious Freedom. Uiteindelijk laat de historische analyse van deze relaties echter een duidelijke verschuiving zien naar een dominant egalitair perspectief. Door onderscheid te maken tussen de verschillende interpretaties van gelijkheid in debatten over bevoegdheden, rechten en belangen, laat ik zien hoe de principes van respectievelijk equality-as-unity, equality-as-parity en equality-as-proportionality steeds meer hun stempel hebben gedrukt op de Nederlandse kerk-staat verhoudingen.

Gedurende deze geschiedenis van de Nederlandse kerk-staat verhoudingen is de kwestie van (de vrijheid van) godsdienstonderwijs een van de belangrijkste splijtzwammen geweest. In het tweede deel van het hoofdstuk wordt uitgewerkt waarom specifieke parlementaire debatten over deze vrijheid - in de context van de ontwikkeling van de Algemene wet gelijke behandeling (Awgb) - de mogelijkheid bieden om een fijnmazigere analyse te maken van hedendaagse conflicten en verschuivingen in een liberaal-democratische context. In het hoofdstuk ontwikkel ik ook een methodologische aanpak om conflicten en verschuivingen in de drie debatten in kwestie, die plaatsvinden tussen 1985 en 2014, te achterhalen. Het conceptuele kader dat in de theoretische hoofdstukken is ontwikkeld wordt vertaald naar de parlementaire context door middel van

frame- of framing-theorie, wat betekent dat op vrijheid en gelijkheid gebaseerde opvattingen over godsdienstvrijheid niet worden opgevat als ondubbelzinnige vaststaande ideeënstelsels, maar eerder als meer flexibele en actiegerichte *frames*. Een analytisch perspectief gebaseerd op frametheorie maakt het mogelijk om onderscheid te maken tussen verschillende soorten conflicten, en om te beoordelen of er verschuivingen tussen (dominante) opvattingen over godsdienstvrijheid hebben plaatsgevonden. In het algemeen kan de dominantie van een frame worden afgeleid uit de mate waarin het het debat *structureert*, door alleen legitimiteit te verlenen aan standpunten die binnen de grenzen van het frame blijven en deelnemers zo te dwingen het perspectief van het frame over te nemen, en uit de mate waarin het frame is *geïnstitutionaliseerd*, bijvoorbeeld in wetten of andere institutionele regelingen.

Hoofdstuk 6 laat zien dat, ondanks alle aarzeling en vrees die er in 1985 toe leidden dat het kabinet de invoering van een antidiscriminatiewet officieel uitstelde, het egalitaire perspectief op godsdienstvrijheid al zeer vitaal en dominant was tijdens het parlementaire debat in datzelfde jaar. De groeiende dominantie van het gelijkheidsframe werd bevestigd door de Kamerbrede ondersteuning van meerdere egalitaire grondbeginselen - van de bevestiging van de bevoegdheid van de staat tot de gelijkheid van rechten tot de bescherming van gelijke menselijke waardigheid -, die met elkaar werden verbonden door een overkoepelend verhaal waarin het langdurige lijden van gediscrimineerde burgers vraagt om krachtige maatregelen van de staat. Zelfs voor de aarzelende Christendemocraten (CDA), die verantwoordelijk waren voor het uitstel van de wet en regelmatig schouder aan schouder stonden met voorstanders van het vrijheidsframe, was deze verhaallijn onweerstaanbaar, en zij toonden zich uiteindelijk een van de meest fervente voorstanders van antidiscriminatiemaatregelen. Resterende bedenkingen over de specifieke bevoegdheden van de staat en de dreigende beknotting van religieuze vrijheden zorgden er echter wel voor dat het parlement niet overging tot de institutionalisering van het gelijkheidsframe, en dat parlementaire fracties actief op zoek gingen naar manieren van institutionalisering die minder ingrijpend waren dan een algemene wet. De kleine orthodox-protestantse fracties, ten slotte, uitten hun zorgen vanuit een onvervalst vrijzinnigheidsperspectief en zien het debat als een slecht voorteken.

Deze facties bleken inderdaad gelijk te hebben, want in 1993 werd een nieuw wetsvoorstel uiteindelijk goedgekeurd. Zoals **Hoofdstuk 7** laat zien, kwam deze oorspronkelijke Algemene wet gelijke behandeling (Awgb) grotendeels neer op de institutionalisering van het gelijkheidsframe. De bevoegdheid van de staat op het gebied van religieus geïnspireerde discriminatie werd duidelijk

bevestigd, en de nieuwe wet kwam in veel opzichten neer op de (verdere) institutionalisering van het gelijkheidsperspectief op rechten. Doordat grondrechten als godsdienstvrijheid en non-discriminatie op gespannen voet kwamen te staan, werd de staat - in dit geval het kabinet - ook gedwongen om nieuwe belangenconflicten op te lossen. Daartoe hanteerde het kabinet expliciet een egalitaire maatstaf van proportionaliteit, en wees naar het voorkomen van waardigheids- en vrijheidsschade als belangrijkste beweegreden voor de wet. Het gelijkheidsframe structureerde ook duidelijk het parlementaire debat. De institutionalisering van verschillende egalitaire leefregels en principes verschafte de seculiere oppositie munitie om de laatsten overblijfselen van het vrijheidsframe aan te vallen. Schijnbaar neutrale termen als rechtszekerheid, maar ook egalitaire noties als (gelijke) menselijke waardigheid en het liberale onderscheid tussen prive en publiek werden gemobiliseerd om de uitzonderingen van het wetsvoorstel voor religieuze organisaties - in het bijzonder scholen - te bekritiseren. De mate van egalitaire dominantie kon ook worden afgeleid uit de bijdragen van de resterende oppositie. De felle, op vrijheid gebaseerde kritiek van de orthodox-protestantse facties vormde het contrast dat de egalitaire dominantie zo duidelijk voor het voetlicht bracht, terwijl deze dominantie hen tegelijkertijd dwong hun standpunten te verzachten en te nuanceren – en zelfs om hun verdediging van de godsdienstvrijheid in egalitaire termen te formuleren. Terwijl de orthodoxe fracties zich in toenemende mate beriepen op egalitaire termen en leerstellingen, werd de strijd over de gewenste interpretaties van deze begrippen daarmee ook intenser en geprononceerder – en de inherente ambiguïteit van gelijkheidsframe des te duidelijker.

Hoofdstuk 8 laat zien hoe het debat van 2014 het hoogtepunt van de egalitaire dominantie markeerde. De amendementen behelsden niet enkel het schrappen van de controversiële enkele feitconstructie, maar ademden meer in het algemeen een sterke egalitaire geest die praktisch samenviel met de principes van het gelijkheidsframe. Veel van de seculiere kritiek die in 1993 was geuit werd nu verwerkt in de wet, en de laatste sporen van het vrijheidsframe werden vrijwel volledig uitgewist. De (seculiere) initiatiefnemers van het wetsvoorstel spraken in hun toelichting bovendien een duidelijke voorkeur uit voor het individu boven het collectief, en beargumenteerden nog duidelijker dan voorheen dat egalitaire noties van (gelijke) waardigheid zwaarder wegen dan religieuze vrijheden – zelfs als de toegebrachte schade puur symbolisch was. Waar het wetsvoorstel van 1993 de nodige vrijheidsgerelateerde kritiek had gekregen, formuleerden de weinige overgebleven (orthodox-christelijke) tegenstanders van de voorgestelde amendementen hun klachten nu bijna

uitsluitend in egalitaire termen – en werden ze binnen dit gelijkheidskader steeds meer in de richting de opvattingen van de seculier-progressieve meerderheid getrokken.

Ondertussen leek de groeiende dominantie van het egalitaire perspectief de ambiguïteit van het op gelijkheid gebaseerde frame alleen maar te versterken. Om de categorische prioriteit van non-discriminatie te verzoenen met de gelijkheid van rechten, interpreteerden seculiere facties de laatstgenoemde gelijkheid als een kwestie van *balans* – een balans die bovendien kan verschuiven afhankelijk van de context. Het gebruik van een dergelijke flexibele notie als balans suggereerde dat egalitaire noties als de gelijkheid van rechten zodanig opgerekt konden worden dat ze bijna elke weging van concurrerende rechten en belangen konden rechtvaardigen. En in deze context waren het duidelijk de belangen van de gediscrimineerde burger die het zwaarst wogen.

De algemene **conclusie** die kan worden getrokken is dat zowel deze parlementaire geschillen als het theoretische debat heel goed kunnen worden verklaard in termen van een vrijheids- en gelijkheidsperspectief op godsdienstvrijheid. Zowel in de theorie als in de praktijk is bovendien een duidelijke verschuiving naar een dominant egalitair perspectief waarneembaar. Maar hoewel dit perspectief kan neigen naar een kritischer beoordeling van religieuze uitzonderingsclaims, kan het op zichzelf geen uitsluitsel geven over concerete uitzonderingskwesties. De frames in kwestie blijken namelijk net zo ambigu en onbepaald als de theorieën waar ze op gebaseerd zijn. Een beslissend oordeel over religieuze uitzonderingsclaims is uiteindelijk altijd het resultaat van de contextuele weging van schade en lasten, waarbij iedere keer opnieuw moet worden bepaald welke balans als proportioneel kan worden beschouwd.

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