What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudeuce

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The one point on which all the participants in this Symposium agree is that current Supreme Court decisions interpreting the religion clause are heavily influeuced by equality considerations. The Court, with limited exception, has indicated that, for constitutional purposes, religion should be treated equally with nonreligion.[1] This means that religion will generally not be constitutionally entitled to benefits unavailable to nonreligion, nor will it be denied benefits that are generally available to nonreligion.

There has also been remarkable consensus, thus far, about the wisdom of the Court's approach. It has pleased absolutely no one. To some, the equality approach does not sufficiently protect religion, to others it is too deferential to religion, and to still others it assumes its own conclusions by facilely positing that religion and nonreligion can be meaningfully equated. Daniel Conkle's remarks may also refiect a general consensus when he argues that the equality approach is deficient because it devalues religion by not according it with the recognition that it is both "distinct and distinctly important."[2]

The Court's approach, accordingly, is in dire need of a defender, and it is in precisely that role that I intend to fill in this Article. I do so for two reasons. First, although I do not necessarily ascribe to every aspect of an equality approach, I believe that, at least in its current form, it sensibly furthers religious liberty interests. Second, and relatedly, I also believe that the Court's reliance on this approach has promoted a stability in the ease law that itself furthers religion clanse goals.

Part I of this Article will briefiy discuss the case law to show how equality concerns have influenced religion clanse decisions. Part II will utilize the example of free exercise to illustrate how substantive policy reasons may support the equality approach. Part III will present the juridical concerns with adjudicating religion as a distinct phenonienon that militate in favor of treating religion and nonreligion equally. Part IV will address how the equality approach may promote jurisprudential stability within the religion clauses. Part V will offer a brief conclusion.

Before proceeding further, however, three points need to be introduced to place the equality approach in perspective. One, the Supreme Court's tact in pursuing an equality approach is not new. Rather, as shall be discussed, it has pervaded modern

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1. Less controversially, the jurisprudence also reflects a principle of equality among religions—ineaning that the government must treat all religions equally. *See* Larson v. Valente, 456 U.S. 228, 244-45 (1982).

2. Daniel O. Conkle, *The Uncertain Future of Religious Liberty: Formal Neutrality and Little More?*, 75 IND. L.J. 1, 5 (2000).

religion clause jurisprudence virtually from its inception.[3] The only new development, if any, is that in some cases the role of equality has become more explicit. Two, the role of equality is not absolute. There are numerous areas within the religion clause jurisprudence where religion/nonreligion equality has no part at all.[4] Three, the role of equality in religion clause cases shonld not be exaggerated even in situations where it is in play. In some of these circumstances, for example, the use of equality as a rule of decision has bcen either explicitly or implicitly rejected.[5] The role of equality in religion clause cases, accordingly, is more accurately described as a vehicle that works as a center of gravity, assuriug that the constitutional status of religion does not veer too far in any one direction.[6]

I. THE ROLE OF EQUALITY IN RELIGION CLAUSE DECISIONS

A. Introduction

A superficial review of current religion clause jurisprudence wonld likely lead to the conclusion that the arca is in tumnlt. There is no underlying theory of religious freedom that has captured a majority of the Court, and the Court's commitment to its announced doctrines is tenuous at best. Every new case accepted for argument presents the very real possibility that the Court might totally abandon its previous efforts and start over.

As Kent Greenawalt observes, the tests applied by the United States Supreme Court in religion clause cases are "in nearly total disarray."[7] The compelling interest test that the Court initially set forth in *Sherbert v. Verner*[8] as applicable to free

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3. *See infra* text accompanying notes 26-50; *see also* PHILLIP KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT 17-18 (1962) (arguing that the religion clauses should be interpreted to prohibit the state from using religion as a basis of classification for governmental action). Kurland's position, in effect, was an earlier version of the equality approach—religion should not be constitutionally differentiated from nonreligion. *See also* Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712-13 (1986) (noting how the Court's religion clause jurisprudence has tended to follow either a "reduction" principle in which religion is seen as indistinguishable from other forms of belief, or a 'marginality' principle, in which religion is distinguished from nonreligion only to the extent that such distinction holds no siguificant consequences).

4. *See infra* text accompanying notes 51-60.

5. *See* Thomas v. Review Bd., 450 U.S. 707, 713 (1981) (holding that the Free Exercise Clause protects only religious and not moral or philosophical beliefs). *Thomas* remains good law. Although the compelling interest test under which *Thomas* was decided has since been held inapplicable to neutral laws of general application, *see* Employment Div. v. Smith, 494 U.S. 872, 884-85 (1990), the test still applies in cases like *Thomas*, in which the state has set up a system of individualized exemptions that does not allow for religious claims. Incidentally, even *Smith*, the case that rejected the continued use of the compelling interest test, did not do so in the name of promoting religion/nonreligion equality interests. *Id.* at 886.

6. For this reason, I shall use the term "equality approach" rather than "equality principle" throughout this Article.

7. Kent Greenawalt, Quo Vadis: *The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 323.

8. 374 U.S. 398, 406 (1963).

exercise challenges was overturned in *Employment Division v. Smith*,[9] at least in so far as that test was to be applied in assessing First Amendment attacks on neutrally applicable laws. *Smith*, in turn, has generated its own confusion as lower courts have struggled to determine the bounds of the various exceptions that the Court announced would still warrant compelling interest.[10]

Meanwhile, the Court's Establishment Clause test, while not suffering the indignity of being directly overruled, has not fared much better. The Court's test, originally set forth in *Lemon v. Kurtzman*,[11] has been weakened,[12] recharacterized,[13] or simply not applied[14] in recent decisions. Indeed, the test is so unpredictable that in a recent case the Court took the unprecedented step of overruling a decision that it had reached under *Lemon*[15] based on the grounds that its original holding had been undercut by later cases.[16] The Court took this step, morcover, while adhering to *Lemon* as still providing the applicable law.

Even amidst this doctrinal tumult, however, scholars have noted that there is more consistency in religion clause jurisprudence than meets the eye. For example, while virtually everybody agrees that *Smith*'s abandonment of the compelling interest test in free exercise cases was a major event in religion clause jurisprudence,[17] nobody argues that *Smith* signaled a major change in the results of free exercise cases. *Sherbert*'s compelling interest test had never been given much vitality by the Court,[18]

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9. 494 U.S. at 884-85.

10. The *Smith* Court held, for example, that strict scrutiny would continue to apply in so-called hybrid cases in which the free exercise interest was combined with another constitutional right. *Id.* at 881-82; *see also* Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972). It would also apply in cases in which the state has in place a system of individualized exemptions but refuses to extend that system to cases of religious hardship. *See Sherbert*, 374 U.S. at 404. Later cases have also had to interpret the meaning of what, under *Smith*, is a "neutrally applicable" law. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-34, 540-42 (1993).

11. 403 U.S. 602, 612-13 (1971). The *Lemon* test requires that in order to survive Establishment Clause scrutiny, a challenged enactment must: (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster excessive government entanglement with religion. *Id.*

12. *See* Agostini v. Felton, 521 U.S. 203, 218-36 (1997) (recognizing substantial changes in the Court's Establishment Clause case law which allowed for the lifting of a twelve-year-old injunction against New York City public schools).

13. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989) (characterizing *Lemon* as a non-endorsement test).

14. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840-42 (1995). Greenawalt also observes that "*Lemon* has ceased to operate as a general Establishment Clause test." Greenawalt, *supra* note 7, at 359.

15. *See* Aguilar v. Felton, 473 U.S. 402, 410-14 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

16. *See Agostini*, 521 U.S. at 237.

17. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110-11 (1990).

18. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992).

and its doctrinal abandonment in *Smith* simply echoed the actual results in the cases.[19]

Similarly, the Establishment Clause may yield more consistency than is popular to admit. Writing separately, Carl Esbeck[20] and Robert Sedler[21] have canvassed the cases and found enough consistency to conclude that a settled restatement of Establishment Clause law can be gleaned from the Court's decisions. The results of the religion clause cases, in sum, suggest an unexpected stability in the jurisprudence that would otherwise not be evident if one were to study only the tests and theories which the Court ostensibly used to reach those results.

This is not to say that religion clause cases are models of clarity. Free exercise jurisprudence, after all, is the area that gave us the rather unique and impenetrable notion of "hybrid rights."[22] Establishment jurisprudence, meanwhile, has been frustrating. The Court's establishment decisions, for example, have maintained that there is a constitutional difference between the state providing textbooks to parochial school children and the state providing maps to them[23] and that the constitutionality of nativity scenes at city hall depends on whether the display is accompanied by secular symbols or is free standing.[24] But, even if the religion clause cases have provided problematic and, at times, comical distinctions, the central observation is correct. There is a general, discernible pattern that emerges from the case law. This pattern suggests the Court has implicitly been guided by a general notion of equality—both equality between religions and between religion and nonreligion.

B. Religion/NonReligion Equality

The equality principle is straight-forward. On one side, the Court has been reluctant to grant (or to allow) religion greater benefit than that provided to nonreligion. On the other, the Court has been reluctant to disfavor religion vis-à-vis its secular counterparts.

The pervasiveness of the equality theme in religion clause jurisprudence is not a

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19. *See* Ira C. Lupu, *Where Rights Begin: The Problems of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 944 (1989) (noting that courts have not applied the compelling interest test with full rigor).

20. *See* Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581 (1995).

21. *See* Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317 (1997).

22. Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990). For a telling critique of the concept of hybrid rights as used in *Smith*, see James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 98-99 (1991).

23. The former, according to the Court, are permissible while the latter are not. *Compare* Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (upholding a state funded textbook loan program for parochial school students), *with* Meek v. Pittenger, 421 U.S. 349, 366, 372 (1975) (striking down a state funded program that loaned maps and other instructional materials to parochial school students).

24. This distinction has been referred to as "the two plastic reindeer rule." Richard S. Myers, *Reflections on the Teaching of Civic Virtue in the Pubic Schools*, 74 U. DET. MERCY L. REV. 63, 64 (1996).

new development. Consider the Free Exercise Clause. In the 1944 case *Prince v. Massachusetts*,[25] the Court faced a free exercise challenge from a Jehovah's Witness to an ordinance which restricted the rights of children to engage in door-to-door solicitation. The Witness acknowledged that she would not be entitled to relief from the ordinance under the Free Speech Clause but claimed that the religious nature of her claim entitled her to constitutional relief nevertheless. In equality-laden language, the Court rejected her claim:

> If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical . . . . But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.[26]

Prince was no anomaly. The free exercise record prior to *Sherbert v. Verner*[27] (of which *Prince* was a part) was clear. Religion would not be entitled to special rights in circumstances where comparable secular claims would be denied.[28]

Nor did the post-*Sherbert*, pre-*Smith* era mark a significant departure from this rule. Overall, the Court was not generons in granting religious exemptions.[29] In only two instances did the Court expressly approve the granting of special exemptions exclusively for religious adherents in circumstances where similar claims by nonreligious claimants would have been denied.[30] At the same time, the Court expressly utilized the Free Exercise Clause to vindicate an equality interest. In

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25. 321 U.S. 158 (1944).

26. *Id.* at 164-65 (citation omitted).

27. 374 U.S. 398 (1963).

28. The only exception to this rule is *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (holding that a tax on the sale of books could not be applied to a Jehovah's Witness who distributed religious materials door-to-door in exchange for contributions).

29. Religious claimants won a total of only five cases, and four of those five dealt with the exact same issue—whether a state could deny unemployment benefits to an applicant whose failure to be available for work was based upon religious belief. The unemployment cases are: *Sherbert*, 374 U.S. 398, *Thomas v. Review Board*, 450 U.S. 707 (1981), *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), and *Frazee v. Illinois Department of Employment Securities*, 489 U.S. 829 (1989). The non-employment insurance case is *Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972) (exempting the Amish from compulsory school requirements).

30. *See* Thomas v. Review Bd., 450 U.S. 707, 713-16 (1981) (holding that a person who objected to working in an armaments factory on religious grounds could not be denied unemployment compensation benefits, but one who opposed such work on philosophical or moral grounds could be denied benefits); *Yoder*, 406 U.S. at 234-36 (holding that an exemption from compulsory school requirements would be provided to the Amish on free exercise grounds but would not be available to secular groups seeking a similar exemption).

McDaniel v. Paty,[31] the Court held that a state could not exclude a member of the clergy from serving as a legislator or delegate to the state's constitutional convention.

Smith was simply the logical outgrowth of this history. In classic equal protection fashion, *Smith* held that claimants are not entitled to receive exemptions from neutral laws under the Free Exercise Clause.[32] However, religious claimants would be entitled to relief upon a showing that the government singled out religion for adverse treatment.[33]

The equality theme is not as pervasive in establishment cases, but even here seeds of the equality principle were present in the results (if not in the rhetoric) of the early decisions. The first modern Establishment Clause case, *Everson v. Board of Education*,[34] set the tone. *Everson* began with a flourish of separationist rhetoric:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'[35]

The Court's holding in the case, however, was far more equality oriented than the Court's rhetoric would suggest. The state would not be constitutionally prohibited from providing transportation to parochial school students on an equal basis with the transportation that it provided to children attending public schools. Undoubtedly, this aid to the religious school students would make attending parochial school more affordable, and this cost would indisputably be borne by the taxpayer—but at some point the equality principle triumphed over the separationist rhetoric.[36] As the *Everson* Court concluded, "[The First Amendment] requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[37]

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31. 435 U.S. 618, 626-27 (1978).

32. Employment Div. v. Smith, 494 U.S. 872, at 878-79 (1990).

33. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

34. 330 U.S. 1 (1947).

35. *Id.* at 15-16 (1947) (emphasis in original) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

36. *See id.* at 17.

37. *Id.* at 18. As Douglas Laycock notes, *Everson* reflects a tension between the two establishment approaches that has remained in the jurisprudence ever since. The first suggests that the state may provide no aid to religion (an approach that is reflected in the rhetoric of *Everson*); the second is that the state may not discriminate either in favor of or against religion (an approach that is reflected in the *Everson* result). *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 48 (1997).

Establishment Clause cases since *Everson* have struggled with essentially the same sorts of distinctions. On one hand, the Court has generally upheld laws which provide religion with benefits that are also available to a broad range of nonreligious entities. For example, in *Walz v. Tax Commission*,[38] the Court upheld church property tax exemptions that were a part of a broader legislative scheme affording similar tax benefits to other nonprofit organizations.

On the other hand, in the absence of a broad-based eligibility the Court has struck down programs that exclnsively or primarily benefitted religion, even though there would have been no constitutional infirmity had similar benefits been granted to a noureligious person or entity.[39] Thus, in the nativity scene cases, the Court has made clear that explicit government endorsement of religion would be unconstitutional.[40] This is so even though there would ostensibly be no constitutional problem if the government were to choose to endorse a nonreligious ideology—such as deciding to erect and maintain a monument to Adam Smith as a tribute to capitalism.[41]

The general prohibition against aid to parochial education also fits this model. The state may not support religious teaching—that would be singling out religion for special benefit. But aspects of the parochial aid cases also track equality concerns. While the Court has made clear that there are constitutional inhibitions on state-aid to parochial education, those inhibitions may be overeome if the state offers its aid in a form that treats religion equally with other beneficiaries.[42] For example, if the aid offered by the state is available to a wide class of beneficiaries that happens to include parochial students, the program is likely to be upheld (unless it is construed as supporting religious instruction).[43] In contrast, if the aid has only a narrow class of beneficiaries, primarily composed of parochial students, it will be struck down.[44] As Frederick Gedicks explains, the Court's pattern is that it will tend to find no constitutional violation when the state provides benefits to all school children, including those attending parochial schools, when the aid is directed to a "broad, secularly defined beneficiary class."[45]

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38. 397 U.S. 664, 672-73 (1970).

39. *But see* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) (upholding statutory exemption in the civil rights law which allows religious institutions to discriminate in employment decisions on the basis of religion).

40. *See* County of Allegheny v. ACLU, 492 U.S. 573, 591-94 (1989); Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

41. *Cf.* Fausto v. Diamond, 589 F. Supp. 451, 468-69 (D.R.I. 1984) (upholding the constitutionality of the government supporting and maintaining a memorial to the Unknown Child).

42. That indeed was the result in *Everson*, 330 U.S. at 16-18.

43. *See* Agostini v. Felton, 521 U.S. 203 (1997).

44. This was the basis of the Court's distinction between the tax credit program for children struck down by the Court in *Committee for Pubic Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973), and the tax deduction that was upheld in *Mueller v. Allen*, 463 U.S. 388, 397-99 (1983). The former program was available only to the parents of children attending nonpublic schools—a relatively limited class. The latter, however, was available to the parents of all school children.

45. FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 52 (1995).

Recently, of course, the parochial cases have been in especial disorder—with the Court taking the extraordinary step of reopening and reversing one of its previous decisions.[46] But even so, the Court has not deviated from its equality approach. The tumult in the cases has primarily arisen through the Court's readjusting its determination as to when a program is one of general availability and/or when it is one that furthers religious instruction.[47]

Equality, then, has held a major role within the Establishment Clause equation as well as in free exercise. While there may be special (and perhaps uuequal) limitations on the extent to which the state may provide specific forms of aid directed primarily to religious institutions, the state will not be forced to exclude religion from an otherwise broad category of beneficiaries.

Finally, the Court's commitment to equality (and the ability of the equality principle to trump establishment concerns) has become most explicit in the Free Speech Clause cases that have religious overtones. In this line of cases, the Court has consistently ruled that the state's interest in avoiding Establishment Clause violations or the appearance of improper state support of religion is not a sufficiently compelling justification to support the state's refusal to accommodate religious expression.[48] Thus, in *Capital Square Review & Advisory Board. v. Pinette*,[49] a Court plurality held on free speech grounds that the government could not deny the right of a private group to display a cross on government property, even though the presence of the cross on public property might crcate the appearance that the state was endorsing religion. Similarly, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court required the state to fund a religious student group on the sanie terms as it funded nonreligious student organizatious, even though the nionies provided might be nsed to further the group's religious tcachings.[50]

C. The Limits of Equality

The Court's commitment to the equality approach is not absolute. This is niost apparent in the simple fact that equality has not been used as an explicit rule of decision in religion clause cases (excepting the religious speech cases noted above).

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46. *See Agostini*, 521 U.S. at 208-09, *overruling* Aguilar v. Felton, 473 U.S. 402 (1985).

47. *Compare* Lemon v. Kurtzman, 403 U.S. 602, 615-21 (1971) (holding that a program which reimbursed nonpublic schools, including parochial schools, for salaries, textbooks, and instructional materials in secular courses promoted religious instruction), *with* Zobrest v. Catalima Foothills Sch. Dist., 509 U.S. 1, 13 (1993), *and Agostini*, 521 U.S. at 222-30 (rejecting the assumption that providing remedial educational services on parochial school grounds furthered religious instruction).

48. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 841-46 (1995); Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761-69 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95 (1993); Widmar v. Vincent, 454 U.S. 263, 276 (1981).

49. *Capital Square*, 515 U.S. 753.

50. *Rosenberger*, 515 U.S. 819.

Indeed, in many circumstances the Court has explicitly rejected the notion that religion and nonreligion are to be equated for the purposes of constitutional analysis.[51]

In fact, there are settled areas of religion clause jurisprudence in which there is no equivalency. Some have already been alluded to. The Establishment Clause's prohibition of state funding of institutions or organizations is unique to religion.[52] There is no comparable limitation on government funding of nonreligious groups and activities.[53]

Similarly, the Establishment Clause's nonendorsement principle recognized in the nativity scene cases is also a religion-only limitation. The state may endorse nonreligious institutions or ideologies if it so chooses.

Third, the nonentanglement principle recognized in *Larkin v. Grendel's Den*[54] and other cases is also religion-specific. In *Larkin*, the Court invalidated a provision which gave a church the right to veto the grant of a liquor license to an establishment within a five-hundred-foot radius on the grounds that the relationship between church and state generated by the statute amounted to impermissible entanglement.[55] There would be little constitutional objection, however, if a similar right was granted to a secular institution.

Fourth, religion is the unique beneficiary of the rule which limits how far the state may intrude into internal church doctrinal disputes.[56] Although the Court has not made clear whether the specific constitutional provision underlying the rule is the Free Exercise Clause, the Establishment Clause, or some combination of both, the Court has held that the state is not empowered to decide matters of church doctrine.[57] No similar rule bars the state intervention into the internal doctrine of nonreligious groups.[58]

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51. *See supra* text accompanying note 5.

52. The concern with state funding of religion may be traced back to James Madision's *Memorial and Remonstrance Against Religious Assessments* written in opposition to a proposed bill of the Virginia Assembly in 1786 for renewal of tax support for the state's established church. *See* Everson v. Board of Educ. 330 U.S. 1, 11-12 (1947).

53. *See* Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (holding there was no establishment limitation on government funding of political campaigns). The Establishment Clause's limitation on state funding of religious activity is not absolute. *See Rosenberger*, 515 U.S. at 837-46 (holding, over defendant's Establishment Clause objection, that the Free Speech Clause required a university to fund a student publication promoting religious belief according to the same terms it funded nonreligious student publications).

54. 459 U.S. 116 (1982).

55. *Id.* at 127.

56. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981).

57. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871).

58. The limitation on state power to resolve internal church matters has been more broadly described as a right of church autonomy and would include, for example, a limitation on the state's ability to regulate church employment decisions. *See* Laycock, *supra* note 56, at 1374. There is some question, however, as to whether this right is religion-specific or whether it is a more general right available to religious and nonreligious organizations under the First Amendment's protection of freedom of association. *See* Ira C. Lupu, *Free Exercise Exemption*

Finally, there are constitutional restrictions that inhibit the state's ability to determine the bona fides of particular religious claims that do not apply to nonreligious claims. In *United States v. Ballard*[59] the Court held that in a mail fraud prosecution in which the defendants had represented themselves as divine messengers, the jury could not decide that a fraud occurred based upon its own disbelief of the defendants' religious claims. The determination of whether the defendants' claims were true was held to be beyond the competence of the Court, because allowing judicial fact finders to engage in the determination of religious bona fides would threaten the abilities of persons to believe what they choose—no matter how incredulous those beliefs may be to others.[60]

II. WHEN ARE RELIGION AND NONRELIGION EQUAL?

A. The Equivalency of Religion and Nonreligion—The Example of Free Exercise

The conclusion that religion should be treated equally with nonreligion is neither inevitably correct nor inevitably false. As Stephen Smith noted, equality is not self-defining.[61] There are enough similarities between religion and nonreligion to support their equation, in certain circumstances,[62] and there are enough dissimilarities to justify differential treatment in other situations. As with other equality claims the question of whether religion should be treated as equal to nonreligion depends upon the existence (or nonexistence) of sound reason for doing so.[63] This Part will offer some of those reasons.

The policy considerations underlying the equality principle are most convincing in the context of free exercise claims;[64] so with that in mind, let us review the facts

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and Religious Institutions: The Case of Employment Discrimination, 67 B.U. L. REV. 391, 431-42 (1987).

59. 322 U.S. 78, 86 (1944).

60. *See id.* at 86-87. *Ballard* indicated that the trier of fact could only find fraud if it believed the religious claims of the defendants were made insincerely. As Justice Jackson argued in dissent, however, how could sincerity possibly be shown without reference to the believability of the defendants' claim? *See id.* at 92-95 (Jackson, J., dissenting).

61. *See* Steven Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 Ind. L.J. 61, 65-70 (2000); *see also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 995 (1990).

62. I have always been struck, for example, with the fact that even the most ardent free exercise advocates have acquiesced in the position that religious expression should not be treated more deferentially than nonreligious expression. If religion is truly different and more preferred than is nonreligion, then why shouldn't religious speech be entitled to special protection?

63. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

64. Despite my defense of the equality approach here, I have argued that there are sound reasons why religion and nonreligion should not always be treated as equal in the establishment context. *See* William P. Marshall, *The Inequality of Anti-Establishment*, 1993 BYU L. REV. 63, 68-71. As I make clear in that piece (or at least attempt to make clear) there are religion-specific matters at work in the anti-establishment context that have no play in free exercise. These matters relate to the specific problems that are created when religion attempts

in a pre-*Smith* free exercise case—*Thomas v. Review Board*.[65] In *Thomas*, the Court was faced with the claim of a Jehovah's Witness that he should be entitled to receive unemployment compensation benefits because his religious conviction made him unable to work in an armaments factory.[66] The Court granted him relief under the Free Exercise Clause. The Court made clear in the course of its holding, however, that the state could have justifiably withheld unemployment compensation benefits if Thomas's refusal to work in the armaments factory was based on philosophical or moral beliefs rather than on religious beliefs.[67] According to the *Thomas* Court, it was appropriate to treat the religious claimant and nonreligious claimant differently.

Does such a holding violate religion/nonreligion equality or does it simply stand for the proposition that religious and nonreligious claimants are not so similarly situated as to implicate equality concerns? The answer, of course, depends on how one views the underlying interests.

Arguments could be made (and I have made them frequently)[68] that a religious objection to working in an armaments factory and a philosophical or moral objection to working in an armaments factory are essentially indistinguishable. Religion and nonreligion simply present two alternative modes of ideology. The soundness of the position that it is wrong to work in factories that produce war machines does not depend upon whether the basis of that position is religious or secular. There is nothing in the substance of the beliefs that suggests that the religious and the secular objectious should be treated differently.

If the premise that religious and nonreligious objections to working in an armaments factory are equivalent is accepted, then a fair amount follows. First, from a First Amendment (speech) perspective, granting the religious believer exclusive benefit violates the equality of idcas principle that lies at the heart of the Free Speech Clause.[69] The equality of ideas principle posits that every idea has equal diguity in the competition for acceptance in the marketplace of idcas. Protecting only some ideas (those based on religion) is inappropriate because it improperly skews the marketplace of ideas in his favor by, in effect, shielding the religious beliefs from antagonistic social forces. The effect of religion, after all, is not confined to the mind of the believer. Rather, religion is a powerful social force that frames, shapes, and influences political responses to a wide range of issues. Specially protecting religious beliefs, therefore, could have real politieal consequence. Thomas's pacifism, if

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to use the political process to reinforce the purported truths of its own beliefs. For a fuller explanation of this rationale, see William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 860-63 (1993).

65. 450 U.S. 707 (1981).

66. *Id.* at 710-11.

67. *See id.* at 713.

68. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 320-21 (1991); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 361 (1990).

69. *See* Police Dept. v. Mosely, 408 U.S. 92, 96 (1972); Elena Kagan, *The Changing Faces of First Amendment Neutrality*, 1992 SUP. CT. REV. 29, 34-35; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 25 (1975); Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

accepted by a wide range of people, would have as dramatic an effect on the political landscape as would the religious beliefs of groups such as those who claim their religious beliefs forbid their children from being exposed to humanistic material[70] or the claim that traditional tribal lands should not be developed.[71]

Second, from an Establishment Clause perspective, protecting ouly the religious objection places an official imprimatur on the religious belief that may violate establishment concerns against impermissible government endorsement of religion.[72] The conclusion that a particular belief is entitled to unique constitutional protection, after all, would bestow upon that belief a Supreme Court sanctioned credibility and legitimacy.

The equivalence of the workplace objections of Thomas and his nonreligious counterpart, moreover, extends beyond their similarity as articulated ideas. Frce exercise exemptions of the kind granted by the Court in *Thomas*, for example, have been justified on such grounds as promoting pluralism,[73] protecting conscience,[74] preserving the self-identity of the adherent,[75] or saving the believer from the purported special hardship that occurs when one is forced to violate religious principles.[76] All of these rationales, however, would also serve to equate Thomas with his secular counterpart rather than distinguish him.[77]

Consider pluralism. There is no doubt that the values associated with pluralism are substantial. Intermediate communities such as those fostered by religion provide a valuable buffer between the state and the iudividual.[78] They allow and advance the flourishing of moral principles,[79] and they promote cultural diversity. Pluralism's attributes, however, do not inhere exclusively within the domain of religious groups. Secular ethnic, social, or political groups can, and do, serve to further many of the values associated with pluralism.[80] Moreover, if the goal is promoting pluralism, protecting religious belief is overiuclusive. Not all religious belief derives from religious communities. Many times religion is highly individualistic.[81] Indeed, the

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70. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1063-65 (6th Cir. 1987).

71. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

72. *See* Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 769 (1986) ("Free exercise exemptions from general regulatory statutes are a form of constitutional tribute to individual acts of faith.").

73. *See* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 369 (1984).

74. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15.

75. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164-65 (1988).

76. *See* John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 792 (1986).

77. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 202-18 (1991).

78. *See* Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984).

79. *See* Frederick M. Gedicks, *Towards a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 116.

80. *See Roberts*, 468 U.S. at 619.

81. In *Frazee v. Illinois Department of Employment Securities*, 489 U.S. 829, 831 (1989) (one of the successful employment insurance cases), the religious belief at issue was wholly idiosyncratic. Frazee was not a member of any religious sect or church that might serve as his

believer's objection in the *Thomas* case itself was not tied to his intermediate religious community. Evidence in the case established that Thomas's belief that it was against his religion to work in an armaments factory was based npon his own particular religious belief and not one that he shared with his faith community. Indeed, if the nonreligious objector to working in an armaments factory belonged to a peace group, the vindication of his claim would have furthered pluralism interests to a greater extent than would the claim of the actual Thomas.

Conscience, as well, is not a uniquely religious concern.[82] The objections to war of a moral opponent and a religious opponent can not be distinguished on the grounds that the latter is based on conscience while the former is not.[83] Similarly, religion is not a unique aspect of self-identity. Social affiliations, personal relationships, and family also play critical roles in the individnal's development of her sense of self. Finally, the conclnsion that violations of religious precepts cause special suffering is both overinclusive and underinclusive. A secular belief that it is immoral to kill in war may be far more deeply felt than the belief of a religious adherent that she should not work on Saturdays—and the violation of the moral belief may be far more excruciating to the secular believer than a violation of the sectarian principle is to the religious devotce.

B. Does Equivalency Equal Equality?

Note that to this point, I have not made the argument that religious and nonreligious claims for exemption are equal. Stephen Smith is right. Claiming that two matters are equal does not make it so.[84] My claim to this point is only that, in the free exercise area, religion and nonreligion are arguably functionally equivalent, and not treating religion and nonreligion eqnally in certain circumstances also raises its own set of policy and constitutional concerns. On this basis, I conclude that there are sensible reasons for treating religion and nonreligion alike—at least in free exercise exemption cases such as *Thomas*.

Others disagree. Indeed, there is a growing body of scholarship that, while conceding that religion and nonreligion can be equated based upon the secular, functional arguments offered above,[85] strenuously argues that religion and nonreligion are different nonetheless.[86] The position taken in this scholarship, straightforwardly enough, is that religion must be understood as being different

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intermediate community.

82. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Bases for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1295 (1994); Laura S. Underkuffler-Freund, Yoder *and the Question of Equality*, 25 CAP. U. L. REV. 789, 796 (1996).

83. *See* Welsh v. United States, 398 U.S. 333, 340 (1970).

84. *See* Smith, *supra* note 61, at 61-75. There are arguments, however, which do support this conclusion. *See, e.g., infra* note 97.

85. *See supra* text accompanying notes 73-76.

86. *See* McConnell, *supra* note 17, at 1151-52; Smith, *supra* note 77, at 154-55.

because of distinctly religious concerns—specifically that humanity's relationship with God should be understood to transcend all other allegiances or activities.[87] For the rest of this discussion, I shall refer to this argument as the "sectarian claim."

On one hand, it is difficult to dispute the logic of the sectarian claim. If God does exist and is knowable, then presumably humanity's obligation and allegiance to him would be primary.[88] This, as Soren Kierkegaard teaches us, is the lesson of the story of Abraham and Isaac.[89] Because Abraham was ordered by God to kill Isaac, he was compelled to suspend the secular strictures against murder. Abraham's religious obligation, in short, transcended his temporal duties. Translated into constitutional law, this means that the state's interest in preventing murder, no matter how compelling, would be obligated to give way to the divine command.[90]

Closely examined, however, the applicability of the sectarian claim is an extraordinarily limited assertion. It directly applies only upon a showing that the religious belief in question is True. The importance of the state's accommodating Abraham is not because Abraham believes he mnst kill Isaac; it is because of the Truth of the command (that he must kill Isaac). If Abraham is misguided, there is no value in protecting his belief. As Larry Alexander explains, the essence of the sectarian claim is not that religion is good—it is that "*True* religion is good."[91] But how is one to know what is True? More importantly, how is the state to accept that one has found True religion? In this respect, the sectarian claim runs up against the first amendment prohibition against the states declaring what is religionsly True.[92] Given these concerns, it would seem that the sectarian claim has simply led us down a blind alley.

There is a response. Defenders of the sectarian claim might argue that it is unnecessary to show that a particular religious claim is True. All they need to show is that a religious claim *might* be True. As Michael McConnell has argued, "the liberal state . . . cannot reject in principle the possibility that a religion may be true. . . ."[93] But the problem with this approach is that a jurisprudence which must act on the basis that any sincere, religious belief is True wonld quickly prove unworkable. The claim that a matter is compelled by Divine Law admits no

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87. *See* John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996); Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1611 (1997).

88. *See* McConnell, *supra* note 74, at 15.

89. *See* SOREN KIERKEGAARD, FEAR AND TREMBLING (Howard V. Hong & Edna H. Hong eds. and trans., Princeton 1983).

90. Some theologians would argue, however, that state strictures need not necessarily give way even in the face of divine command. According to Stanley Hauerwas, for example, the meaning and commitment of religious belief is ouly most fully tested when it is opposed to secular obligation. *See* Stanley M. Hauerwas, *Freedom of Religion: A Subtle Temptation*, 72 SOUNDINGS 317, 319, 337 (1989).

91. Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35, 41 (1998) (emphasis in original).

92. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

93. McConnell, *supra* note 74, at 15.

possibility of an overriding secular interest. The state, however, cannot suspend the operations of its laws any time an adherent asserts her religious beliefs are True. Snch an approach truly would create a rule which, as Justice Scalia warned, would allow every person to be a law unto herself.[94]

Undoubtedly, the effects of such an approach could be watered down by a jurisprudential device such as the compelling interest test[95] (Abraham could still be arrested for murder); but would this meet the concerns of the sectarian claim? As Alexander argues, "why should a compelling secular (state) interest *ever* override the interest in satisfying God's commands? From the believer's perspective, God's commands trump those of the state, however 'compelling' the latter might seem to nonbelievers."[96]

There is a final argument that could be made on behalf of the sectarian claim. Religion might be distinguished from nonreligion on the conclusory assertion that religion is different because religion is different. This is not a facetious argument, nor is it a straw man. Nothing requires that matters that are at times functional equivalents always be treated as equals. Accordingly, those who believe in the primacy of religion for its own sake may equally believe that no further justification of religion's distinctiveness is required. That being so, the position that granting religious exemptions offends the principle of the equality of ideas would necessarily fail because, to those who believe in the primacy of religion, there is no equality of ideas in the first place. To those who assert the iunate distinctiveness of religion, the result of the previous analysis equating religion and nonreligion is unlikely to be persuasive.[97]

III. THE INEQUALITY PREMISE UNDERLYING EQUALITY

There is, however, another line of argument. As noted previously, there are some areas in which religion and nonreligion are not treated equally. The state is precluded, for example, from resolving intrachurch theological disputes[98] and/or determining religious sincerity (by reference to the believability of the religious claim).[99] As shall be discussed, the religion-specific policies underlying these limitations may also support treating religious claims as equal to noureligious

94. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990).

95. *See* Paulsen, *supra* note 87, at 1623.

96. Alexander, *supra* note 91, at 42.

97. The constitutional basis underlying the application of the equality principle in free exercise cases may be stronger than this passage admits. Not only do anti-establishment and Free Speech Clause policies argue against according religion special treatment but the contention that there is an innate distinctiveness in religion may also be undercut by the fact that there is a common historical rationale underlying both the speech and religion guarantees. Freedom of speech and freedom of religion were both seen as deserving protection because of the part they played in the search for truth. *See* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 12-19 (1995); *see also* Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J.L. & REL. 337, 354 (1995-96).

98. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976).

99. *See* United States v. Ballard, 322 U.S. 78, 86 (1944).

claims. It is the distinctiveness of religion that arguably counsels that it be treated as equal with nonreligion. This Part will investigate this position.

Both the limitation on civil court adjudication of intrachurch disputes and upon the determination of religious sincerity reflect the special sensitivity that is required whenever the state adjudicates matters involving religion. Some of these concerns are constitutionally based. Adjudieating religious sincerity on the basis of whether the asserted religious belief is True, for example, would place the state in the position of declariug what is religious Truth—a power that both inserts the state in the quintessential religious role, in violation of Establishment Clause principles, and that usurps the church's own essential function, in derogation of frce exercise concerns.[100]

Concern about the competency of civil courts to resolve issues with religious implications is also a factor.[101] In the intrachurch dispute context, for example, the Court as early as 1871 expressed the concern that civil courts resolving religious matters would in effect permit an appeal "from the more learned tribunal in the law which should decide the case, to one which is less so."[102] But the competency concern is not simply with getting a doctrinal issue right. After all, civil courts are frequently ealled upon to decide matters of foreign law with which thcy have no particular expertise.[103] Rather the competing concern is that adjudicating religious matters, unlike foreign law, involves a series of interpretive decisions that are generally bcyond the ken, or at least beyond the common experience, of the civil tribunals.[104]

A. Free Exercise

Consider, for example, what a frce exercise regime that treated religion distinctively would require of adjudicating courts. The court would need to determine (1) whether the alleged belief was religious; (2) whether the believer was sincere in

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100. The objection to state declarations of religious Truth also lies at the heart of Thomas Jefferson's seminal and influential *A Bill for Establishing Religious Freedom.* The Bill asserts that allowing states the power to proclaim true beliefs leads to the maintenance of false religions and interferes with the individual's right to pursue religious truth on her own accord. Thomas Jefferson, *A Bill for Establishing Religious Freedom, in* 2 THE PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd & Lyman H. Butterfield eds., 1950).

101. Part of this problem stems with the nature of religion. Religion is boundless in the sense that there are no human activities that caimot be claimed to be religious exercise or religiously motivated. As Mircea Eliade has argued, "we cannot be sure that there is *anything*—object, movement, psychological function, beiug or even game—that has not at some time in human history been transformed into a hierophany [expression of the sacred]." MIRCEA ELIADE, PATTERNS IN COMPARATIVE RELIGION 11-12 (Rosemary Sheed trans., University of Neb. Press 1996) (1958) (emphasis in original); *see also* State v. Hodges, 695 S.W.2d 171, 171-72 (Tenn. 1985) (claimant asserted that religious conviction required him to dress like a chicken when going to work); E. WASHBURN HOPKINS, ORIGIN AND EVOLUTION OF RELIGION 13 (1923) ("Man has worshipped everything on earth . . . .").

102. Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871).

103. *See* LEA BRILMAYER, CONFLICTS OF LAWS 13-17 (2d ed. 1995).

104. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 593 (1998).

her religious claim (an inquiry which we have seen must be limited by constitutional concerns);[105] (3) what role the particular religious belief has in the believer's religious order;[106] (4) whether the religious exercise was burdened by the state enactment;[107] and (5) what the religious effect that violating the religious norm will have on the believer. These are extraordinarily difficult questions with no easily ascertainable standards available for application.[108] Indeed, the notion that such inquiries could be standardized across religious traditions may itself offend religious liberty concerns by placing religious belief and practice into cookie-cutter modes.[109] There is, after all, no religion archetype. The importance of doctrine, the sources of religious obligation, and the consequence of violating religious norms, to name but some indicia of belief, all vary among religions and religious traditions. Addressing religious claims on religious terms, in short, would ultimately require developing a separate set of standards with respect to each religion. Indeed if the Supreme Court is to be taken at its word, that it is the personal beliefs of the individual that trigger free exercise protection and not the formal doctrine of the religion to which the believer adheres,[110] then a separate set of standards would need to be applied to each believer.

Morcover, it is not only that the judicial task is so difficult, it is also that the implications of error are so great. Defining religion incorrectly, for example, can raise its own establishment and free exercise concerns.[111] It is therefore no wonder

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105. *See supra* text accompanying notes 59–60.

106. Whether a particular belief was central to a claimant's belief system was never an announced part of the compelling interest test but it in fact became a part of the jurisprudence. Accordingly, Justice Scalia in *Smith* relied on the difficulty in applying a centrality analysis as one of the reasons militating against the continuing application of the *Sherbert* test. Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990); *see also* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 16 n.42 (1995).

107. *See generally* Lupu, *supra* note 19, at 959 (arguing that the concept of "burden" as a threshold is an easy way out for courts that do not want to delve into theological or spiritual constructs).

108. *See id.* at 957 ("Theologians, sociologists, and others have struggled . . . with definitional questions, but have hardly approached anything resembling agreement on what constitutes religion or religious belief.").

109. *See* ELIADE, *supra* note 101, at 1-2 ("[A]s soon as you start to fix limits to the notion of sacred you come upon difficulties—difficulties both theoretical and practical . . . . We are faced with rites, myths, divine forms, sacred and venerated objects, symbols, cosmologies, theologumena, consecrated men, animals and plants, sacred places, and more . . . . We have to deal with a vast and ill-sorted mass of material . . . .").

110. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 832-35 (1989); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981).

111. Free exercise concerns, for example, are created if the religious claimant is improperly adjudicated to be nonreligious, and establishment issues generated by improperly granting, or denying, the official imprimatur of the courts on whether a religion is bona fide. *See generally* United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring).

that Justice Scalia in *Smith* relied upon judicial competency concerns in holding that the Free Exercise Clause did not demand constitutionally compelled exemptions from neutral laws for religious believers.[112]

Additionally, even if the courts are in some seuse competent to address religion related issues, there is considerable doubt as to whether they are likely to do so in a way that serves (or at least fairly serves) religious liberty values. First, minority belief systems will undoubtedly be the worse for wear. A court is far more likely to be sympathetic to claims that are consistent with dominant cultural norms than with religious claims that seem bizarre or incredulons.[113] Second, as the pre-*Smith* free exercise[114] and the Religious Freedom and Restoration Act ("RFRA")[115] cases attest, courts will be likely to under-enforce religious exemption claims because of the difficult interpretive steps that religion claims require.[116]

Finally, even if the courts do all in their power to factor away cultural preferences and guard against under-enforcement the resulting jurisprudence will likely still appear jumbled. This is because of the range of differences among and between religions and religious beliefs. Let me offer an illustration.

Assume for the moment that there are five different religious landlords all of whom object to having to rent to unmarried couples under an equal housing ordinance. Claimant A's objection is central to her religion and has doctriual support; Claimant B's objection is based upon a principle in her faith that unmarried pcople should not live together, but the religion is silent on the question of whether

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112. Employment Div. v. Smith, 494 U.S. 872, 886-87 & n.4. (1990). For an excellent account of the significance of the judicial competency concern in the *Smith* decision, see Brant, *supra* note 106.

113. *See* Lupu, *supra* note 19, at 92-95 (arguing that decisionmakers may doubt the sincerity of an unusual or bizarre belief leading to the result that those religions most needing constitutional protection may be most disadvantaged); *see also* United States v. Ballard, 322 U.S. 78, 92-95 (1944) (Jackson, J., dissenting) (expressing concern that fact finders will tend to judge the believability of a religious belief when asked to determine whether a belief is sincerely held); Christopher L. Eisgruber & Lawrence G. Sager, *supra* note 82, at 1283-84 (noting the difficulties inherent in asking members of one faith to understand the religious beliefs and practices of those of other faiths).

114. *See* Ryan, *supra* note 18, at 1416-37.

115. *See* Lupu, *supra* note 104, at 593.

116. Professor Lupu presents a number of reasons why claims for religious exemptions are likely to fail. As he states:

> Religion cases may be different [from other exemption cases] for a variety of reasons. First, judges drawn from America's highly educated elite, may be skeptical about intensely held religious commitments. Second, they may be sensitive to the possibility of religious fraud, difficult for government to uncover without using intrusive mcasures. Third, some judges perceive a danger of Establishment Clause violations hanging over the project of religious exemptions. Fourth (and related to the first three), judges may sense the dangers of bias in whatever they do . . . and they will know that it is very difficult to separate those biases from the project of judging exemption claims. Better no exemptions, they might well say, than a pattern of exemptions riddled by religious favoritism.

Id.

renting to such couples is a religious violation; Claimant C's objection is based upon an idiosyncratic belief that the claimant adopted at the time the unmarried couple applied for an apartment; Claimant D's objection is based upon religious tenet, but her religion does not indicate that there are any adverse religious consequences for violating the belief; and Claimant E's objection is based upon discussions she has had with other members of her religious community. Assume that the state's interest is found to be significant but not so "compelling" that it would outweigh all challenges. In this circumstance, courts evaluating the factors of religiosity, sincerity, centrality, burden, and effect could, and likely should, come out differently in these cases. But how the cases would result is not predictable. As we have seen, the nature of religious belief and conviction is not easily universalized and there is no common (or at least readily apparent) baseline from which courts could promote a consistent approach that accoants for the myriad forms of religious belief and attachment. Moreover, as if this were not enough, the inconsistency created by the inherent variability within religious belief would be compounded by litigation factors such as the nature of the evidence proffered and the identity of the trier of fact.

But even if all variables were eliminated to the fullest extent possible, imagine the resulting case law, in which some of the religious landlord claimants win while others fail. Should the same religious belief (or what appears to be the same religious belief) be treated differently? And if so, would not the resulting appearance of sect preference create its own set of concerns?

Treating religion as distinct, at least in the context of frce exercise claims for exemption, in short, is a recipe for instability. It demands inquiries that are fraught with constitutional peril, it places extraordinary demands on civil tribunals, it leads to a jurisprudence that would likely favor mainstream beliefs, and it would create the appearance of sect favoritism. The equality approach, on the other hand, avoids these pitfalls.

B. Establishment

Institutional concerns play a more limited role in supporting the nse of the equality approach in establishmeut cases. After all, establishment cases ouly rarely raise the need for defiuing religion[117] and virtually never require investigations into sincerity, centrality, burden, and effect. Nevertheless, the interest in avoiding sensitive religious determinations can, and has, had some role in establishment cases.

The best example of this may be found in *Widmar v. Vincent*.[118] In *Widmar* a religious group was denied permission to engage in prayer meetings in university buildings, although nonreligious organizations were allowed access to the university facilities. The university defended its actions on anti-establishment grounds, contending that its decision to exclude the prayer meetings was compelled by the Establishment Clause. The Court found for the religious organization holding that the university restriction was a classic form of content discrimination and therefore

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117. *See* Malnak v. Yogi, 592 F.2d 197, 199-200 (3d Cir. 1979) (holding that the teaching of Transcendental Meditation in public schools violated the Establishment Clause by inculcating *religion*).

118. 454 U.S. 263, 275-77 (1981).

prohibited by the Free Speech Clause.[119] But it is the Court's particular treatment of prayer that, for our purposes, is most interesting. In a dramatic example of the equality approach, the Court refused to accept the argument that prayer was different than any other form of speech.[120]

From a religious perspective, however, worship is different than speech. To believers, worship is less a verbal activity than it is a most sacred and profound religious act. As Mark Tushnet explains, worship is a "means by which believers affirm to each other and to their god their participation in a community set apart from others."[121] As such, worship is not as much an act of communication to the outside world as it is an act of "commitment to a community."[122]

Worship thus "captures something deeply important about religion" that the *Widmar* Court chose to ignore.[123] But how could the Court do otherwise coherently? As the Court explained, the question of whether a particular action, such as reading from the Bible, should be characterized as speech or worship was not a determination that could be made intelligibly.[124] Accordingly, the Court faced the alternative of either reflexively treating worship as speech or inserting itself (and the lower courts to follow) in the tasks of providing secular interpretation and secular appraisals of religious significance to a fundamentally religious act. As in the free exercise area, the equality approach allowed the Court to avoid the type of perilous inquiry for which it was ill-equipped.

The decision in *Widmar* not to employ religion-specific analysis is also consistent with the Court's approach in *McDaniel v. Paty*.[125] In *McDaniel* the Court addressed the constitutionality of a Tennessee provision disqualifying clergy from holding public office. Tennessee defended the statute on establishment policy grounds, arguing that the disqualification statute would assure the separation of church and state because clergy would not be able to disassociate their religious conviction from their secular obligations.[126] The Court rejected the defense. As it stated: "[T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts."[127] Clergy office-holders and lay office-holders were to be treated equally.

The *McDaniel* approach, however, should be contrasted with the Court's ill-fated effort in *Aguilar v. Felton*.[128] In *Aguilar*, the Court addressed the constitutionality of New York City's implementation of a program authorizing federal remedial assistance to low-income, educationally needy students. The challenged program provided remedial serviees to parochial school students by sending public employees

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119. *See id.* at 270-75.

120. Only Justice White dissented on this point. White argued that "verbal acts of worship" were not the same as other "verbal acts." *Id.* at 285 (White, J., dissenting).

121. Tushnet, *supra* note 3, at 719.

122. *Id.*

123. *Id.*

124. *See Widmar*, 454 U.S. at 269 n.6.

125. 435 U.S. 618 (1978).

126. *See id.* at 628.

127. *Id.* at 629.

128. 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

on to the grounds of the parochial schools. Utilizing a religion-specific approach, the *Aguilar* Court held that the program was unconstitutional because the pervasive religious atmosphere in parochial schools meant that any instruction within the school might become imbued with religious overtones.[129] This, accordingly, would violate the Establishment Clause's prohibition against funding religious instruction.

There was at least one obvious problem with the *Aguilar* Court's conclusiou, however. The record in the case indicated that, in the nineteen years of the program's existence, there had been no instance in which the instructors funded under the program actually engaged in religious teaching.[130] The Court's religion-specific assumption, therefore, was not grounded in reality, but was instead based upon a misbegotten appraisal of religion's effects on secular trained professionals working within a religion institution—an appraisal which, as Douglas Laycock has argued, may have been influenced by a latent suspicion of Catholic schools.[131] *Aguilar*, in effect, is a case study in favor of the equality approach. When secular courts attempt to understand religion and religion's effects there is both the risk of objective error and the risk of error caused by bias and misconceptions.[132]

IV. THE PRESUMPTION OF EQUALITY

Thus far, two separate lines of defense have been offered in support of the equality approach. The first is substantive. There are sound constitutional and policy justifications that support equating religion with nonreligion.[133] The second is juridical. Concerns with adjudicating religion as a distinct phenomenon mitigate in favor of the equality approach, because the equality approach necessarily avoids the intractable problems inherent in differentiating between religion and nonreligion.[134]

Both of these lines of defense are admittedly limited. Neither support the use of religion/nonreligion equality as a universal rule for the religion clause cases. The substantive line of defense, quite obviously, depends upon the existence of sound ratiouales for equating religion and nonreligion; but the same rationales do not apply in all religion clause controversies. The fact that there are reasons to equate religion and nonreligion in one context does not mean those same reasons exist in another.[135] The substantive argument, thus, requires that the use of equality be justified in each

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129. The assumption that the atmosphere within religious schools would affect the ability of state-paid personnel to provide secular services without religious overtones did not begin with *Aguilar*. *See* Wolman v. Walter, 433 U.S. 229, 247 (1977).

130. *See Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting).

131. *See* Laycock, *supra* note 37, at 58.

132. Twelve years later, in *Agostini v. Felton*, the Court, applying the equality approach, reversed *Aguilar*. 521 U.S. 203, 234-38 (1997). Abandoning its religion-specific assumptions regarding instruction within religious school buildings, the Court held that state-funded remedial instruction to parochial school children on parochial school gronnds was permissible because it was part of a larger program which provided remedial education to disadvantaged children in all schools—public, private, and parochial. *Id.* at 234-35.

133. *See supra* Part II.A.

134. *See supra* Part III.

135. *See supra* note 64 (contrasting the role of equality in free exercise and establishment).

case and explicitly concedes that the equality approach should not apply when substantive policies lead otherwise.

The juridical concern is also not universal. First, not every religion clause case presents adjudication problems. If a state were to declare Presbyterianism as the state religion, for example, there would be no problem in religious definition. Second, although the juridical concern is significant, its role should not be overstated. For better or worse, sensitive inquiries into the sincerity and nature of an individual's religious belief cannot be totally avoided,[136] and creating a jurisprudence designed to eliminate this concern would be futile. The recognition of the juridical concerns inherent in religion-specific adjudieation, accordingly, may be useful in guiding the construction of religion clause jurisprudence but it should not serve as its foundation.[137]

Is there, then, a broader defense for the equality approach? Let me tentatively suggest that there may be. Earlier I agreed with Steven Smith's point that assuming religion and nonreligion should be treated equally, without offering sound rationales as to *why* they should be treated equally, would create a hollow jurisprudence.[138] The equality claim, in short, must have content.

The reverse, however, is also true. Claiming that religion and nonreligion should *not* be treated equally is hollow unless that claim also is supported by sound justification. The inequality claim must have content as well.

But what about the case in which there are sound policy arguments behind each position—that is, where strong arguments exist both supporting, and opposing, the equality claim? What role should the equality approach have in those cases?

The Court may already have answered this question, at least if *Rosenberger v. Rector & Visitors of the University of Virginia*[139] is any indication. At issue in *Rosenberger* was the constitutionality of a University of Virginia policy authorizing student funds to be allocated to cover the printing costs of student publications except for those publications that promoted religious belief. The plaintiffs argued that the failure of the University to fund the religious publication on the same terms that it funded nonreligious student publications violated the Free Specch Clause's prohibition against content based discrimination.[140] The defendant University, in turn, argued that its policy was mandated by the Establishment Clause's prohibition on government funding of core religious activity.[141]

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136. *See* United States v. Seeger, 380 U.S. 163 (1965) (religious definition required by statutory exemption); *see also* Williams v. Bright, 658 N.Y.S.2d 910, 912 (1997) (allowing judicial inquiry into religious belief necessitated by mitigation claim in tort case).

137. *See generally* Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693 (1997) (criticizing religion clause commentary that would abandon efforts to construct a coherent approach to religion clause issues because of the apparent insolubility of religion clause issues).

138. *See* Smith, *supra* note 77, at 180-96.

139. 515 U.S. 819 (1995).

140. *See id.* at 827.

141. *See id.* at 863 (Souter, J., dissenting).

Both sides had powerful arguments at their disposal.[142] The plaintiffs contended that by excluding from funding only those publications that promoted religious belief, the University had skewed the marketplace of ideas in a manner that favored nonreligious and irreligious speech.[143] In contrast, the University asserted that, because the religious publication served no secular educational function, its speech conld not be construed as equal to the speech presented in other publications[144] and that, in any event, from a historical perspective, the direct funding of religious preaching was at the core of establishment prohibition.[145] Funding religious speech was not the same as funding nonreligious speech.

The Court in a five-to-four decision ruled for the plaintiffs. Given the strength of the arguments on both sides of the case, however, the real significance of the decision may be in revealing that in the equality/inequality debate, close cases will be decided in favor of equal treatment.[146] Accordingly, *Rosenberger* may reflect that the Court maintains an implicit presumption in favor of the equality approach.

The question is whether this presumption (if it does indeed exist[147]) is defensible. I believe it is for one salient reason. It promotes doctrinal stability. As has been noted by others, the problems inherent in achieving a coherent religion clause

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142. *See* Laycock, *supra* note 37, at 65 (observing that *Rosenberger* presented a controversy at the core of both the non-aid and nondiscrimination theories of the Establishment Clause that had been in tension since *Everson*).

143. *See Rosenberger*, 515 U.S. at 831.

144. In accord with Free Speech Clause terminology, the University described its policy as a subject matter distinction and not as a viewpoint distinction. *See id.* at 830-31.

145. In the words of the dissent: "Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money." *Id.* at 868 (Souter, J., dissenting) (citing James Madison's *Memorial and Remonstrance Against Religious Assessments* to support bar on "use[] of public funds for religious purposes").

146. The Court did attempt to narrow its holding by suggesting that the Establishment Clause's policy against state funding of religious activity was not fully implicated in the case because (1) the funds were paid to the publication's printer and not to the religious group and (2) that the funds came from student activity fees rather than the state's general tax assessments. The relevance of these two factors, however, may not be apparent to anybody. *See, e.g.*, Laycock, *supra* note 37, at 67.

147. A review of the cases might suggest some ambiguity on this point. The Court has clearly allowed equality concerns to trump religion-specific considerations. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983); Widmar v. Vincent, 454 U.S. 263 (1981); McDaniel v. Paty, 435 U.S. 618 (1978); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Everson v. Board. of Educ., 330 U.S. 1 (1947). But the Court has not followed the equality approach in other instances. *See* Thomas v. Review Bd, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972). It is unclear whether the Court viewed any of these cases as instances where the policies underlying the prevailing position were seen as stronger than the competing claim or whether the Court viewed the strength of the policies on both sides as being commensurate and allowed the use of equality presumption as a tie-breaker. More likely, the Court has not explicitly focused on the issue in these terms.

jurisprudence are extraordinarily difficult and pervasive. The problems, moreover, extend beyond the juridical concerns with adjudicating religion as a distinct phenomenon noted in the previous Part (although those certainly play a part). They also include, for example, the fact that constitutional law is individualistic while religion is often communitarian,[148] thus raising the square peg/round hole dilemma. And there is the inescapable dilemma of the religion clauses: that complete neutrality towards religion is impossible. The act of deciding religion clause cases necessarily requires the adoption of a posture towards religion that will itself hold inhereut religious implication.[149]

In these circumstances, some connection to less problematic inquiries may be both desirable and appropriate. Enter equality. The advantage of the equality approach is that it provides a baseline from which the constitutionality of the treatment of religion can be adjudged—the baseline of nonreligion. Although the treatment of religion and nonreligion may vary when policies demand, the equality approach provides a center of gravity, assuring that the inherent vagaries in religion clause jurisprudence do not take the case law beyond accessible standards.

V. CONCLUSION—RELIGIOUS LIBERTY AT THE DAWN OF A NEW MILLENNIUM

If the purpose of entitling this Symposium "Religious Liberty at the Dawn of a New Millennium" was to prod the participants into evaluating the current state of religious liberty in the United States, then the consensus among us should be that the state of religious liberty is strong. As Professor Stein has shown us, religion in the United States is thriving.[150] The United States remains one of the most religious countries in the world[151] and there is little of the sectarian strife that plagues much of the rest of the world. Diverse religions are flourishing and, as Professor Stein observes, the pace of this religious flourishing is accelerating.[152]

Interestingly, most of this religious prospering has occurred under a jurisprudential regime that has tended to minimize religion's distinctiveness and

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148. *See* Tushnet, *supra* note 3, at 734-35 (arguing that the reason underlying the "incoherence in the constitutional law of religion [is that it] is founded on a tradition we no longer fully understand").

149. *See* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 792-94 (1993); *see also* Nomi M. Stolzenberg, *"He Drew A Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 582, 627 (1993) (noting that to religious fundamentalists, the secular position that religion should be excluded from the pubic schools is religiously-laden). *But see* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 221 (1992) (arguing there is no dilemma in a liberal, secular understanding of religion).

150. *See* Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 52-54 (2000); *see also* PRINCETON RELIGION RESEARCH CTR., RELIGION IN AMERICA (1996) (90% of Americans believe that religion is either very important or fairly important in their own lives); A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE (1985); Frank McCourt, *God in America; When You Think of God What Do You See*, LIFE, Dec. 1998, at 60 (96% of Americans believe in God).

151. *See* Stein, *supra* note 150, at 41

152. *See id.*

importance. As we have seen, the Court has only weakly recognized religion as distinctive under the Establishment Clause and has virtually eliminated a distinctive accord for religion under the Free Exercise Clause. Accordingly, there may yet be one remaining argument in defense of the equality approach—it works. Causal relationships should not be too easily claimed; but given the robust state of religion at the dawn of the new millennium, the question posed by this Article, deserves some consideration. What is the matter with equality?