The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future†

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"'Tell us, then, what you think,'" the Pharisees said to Jesus, "'Is it lawful to pay taxes to Caesar, or not?'"[1] "'Show me the money for the tax,'" Jesus responded.[2]

> And they brought him a coin. And Jesus said to them, "Whose likeness and inscription is this?" They said, "Caesar's." Then he said to them, "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's." When they heard it, they marveled; and they left him and went away.[3]

Even now, some two thousand years later, we may marvel at the simplicity and profundity of Jesus's response to the Pharisees. Standing at the dawn of a third millennium, we also may marvel at the continuing relevance and importance of the basic question that Jesus was addressing. Even today, the question remains: what is the proper relationship between religion and government? But Jesus's answer—render to Caesar the things that are Caesar's, and to God the things that are God's—leaves a number of questions open. What things are Caesar's? What things are God's? What things are matters for civil government, and what things are matters of religious obligation or choice? How should religions citizens relate to and interact with civil government, and how should civil government relate to and interact with them? Where does religious liberty begin and where does it end? Through the ages, and still today, various religions and various governments have embraced divergent responses to these questions.

In the United States, the basic principle of religious liberty emerged in the founding period, and, in one form or another, it has prevailed ever since. Symbolized by the First Amendment,[4] this legal principle protects the free exercise of religion and, through disestablishment, it also precludes more indirect encroachments on

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The articles in this Symposium appear in the order in which they originally were presented orally.

1. *Matthew* 22:17 (Revised Standard Version).

2. *Id.* 22:19.

3. *Id.* 22:19-22.

4. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

religious liberty. The principle of religious liberty, however, has been and remains a contested concept. Its meaning has evolved over time, and there is no reason to believe that this evolution will not continue.

In this Article, I will sketch the history of religious liberty in the United States and speculate on its future. As I will explain, the American understanding of religious liberty once assumed that religion is both distinct and distinctly important.[5] It also assumed the primacy of Christianity over other religions. Today, the second assumption, the primacy of Christianity, has given way to a strong requirement of equal treatment between and among religions, a requirement that I will call the requirement of denominational equality.[6] The first assumption, that religion is distinct and distinctly important, has not yet been abandoned, but it has been placed in serious question. Thus, just as the law no longer gives preferential or special treatment to Christianity, many would argue that it should no longer give preferential or special treatment to obligations or choices that are religious as opposed to nonreligious. More generally, many would argue that just like Christianity and other religions, religion and nonreligion should be treated equally under the law—that religion should receive neither preference nor disadvantage.[7] As we will see, the principle of equal treatment for religion and nonreligion—more specifically, equal treatment in the sense of "formal neutrality," to use the terminology of Professor Douglas Laycock[8]—has played an increasingly prominent role under both the Free Exercise and the Establishment Clauses.[9]

Looking toward the future, moreover, various philosophical, religious, and jurisprudential forces would appear to support the continued and perhaps increasing importance of formal neutrality as a governing principle of religious liberty in the United States.[10] This notion of formal neutrality—equal, not special, treatment for religion—tends to belie the claim that religion is distinct and distinctly important. As a result, it has significant, and potentially troublesome, implications for the future of religious liberty.

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5. *See infra* Part I.

6. *See infra* Part II.A.

7. In the current Symposium, Professor William P. Marshall advances an argument that points generally in this direction. *See* William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000).

8. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999-1001 (1990).

9. *See infra* Part II.B.

10. *See infra* Part III.

I. THE ORIGINAL THEOLOGY OF AMERICAN RELIGIOUS LIBERTY

A. Religion as Distinct and Distinctly Important

Various policies supported the adoption of the First Amendment's religion clauses.[11] One important policy, that of federalism, was not directly related to the substance of religious liberty. Instead, this policy suggested simply that issues of religious liberty should be beyond the control of the newly formed *national* government—that they should continue to be resolved by the states.[12] But to one degree or another, the various states themselves embraced religious liberty as a substantive principle, and there is evidence that the framers and ratifiers of the First Amendment likewise supported the substantive idea of religious liberty.[13]

Whether or not embodied in the First Amendment as originally understood, the substantive idea of religious liberty was firmly rooted in the founding period, and it was firmly rooted not in secular philosophy, but rather in theology. Thus, for the Founders, the central justification for religious liberty was distinctly religious. As Professor Steven D. Smith has explained, this justification was based on the combination of two theological principles: first, that religious duties are more important than secular duties, and second, that individuals must undertake their religious duties voluntarily, not under legal compulsion.[14] During the founding period, this religious justification for religious liberty—a justification that assumes that religion is both distinct and distinctly important—was prominent in the arguments "not only of ministers and religious leaders, but also of political leaders such as Madison and Jefferson."[15] In particular, Madison relied on this justification in his *Memorial and Remonstrance Against Religious Assessments*.[16] And Jefferson advanced this argument in support of his celebrated Virginia Act for Religious

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11. *See* William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 772-80 (suggesting that these policies included federalism, religious voluntarism, and separatism).

12. I have argued elsewhere that the Establishment Clause, as originally understood, did not reflect a generally applicable principle of religious liberty, but instead was animated by the policy of federalism. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1132-35 (1988); *see also, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-42 (1998); Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1 (1996). Other scholars have extended this argument to the religion clauses generally. *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-43 (1995); Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1088-1143 (1998).

13. *See, e.g.*, Van Alstyne, *supra* note 11, at 772-80; *cf.* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 908 (1986) (arguing that "when the Framers debated the details of the religion clauses, their views on religious liberty were more salient than their views on federalism").

14. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 154-66 (1991).

15. *Id.* at 162; *see id.* at 153-66. *See generally* Symposium, *Religious Dimensions of American Constitutionalism*, 39 EMORY L.J. 1 (1990).

16. For a discussion of Madison's arguments, see Smith, *supra* note 14, at 161.

Freedom. Thus, in its preamble, the Virginia Act declares that "Almighty God hath created the mind free" and that compelled religion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do."[17]

B. The Primacy of Christianity[18]

In important respects, the history of the Western world is the history of Christianity. (We are reaching the third millennium, it bears noting, only because our Western calendar dates from the time of Christ.) The history of America is no exception. Thus, from the colonial period forward, Christianity has played a prominent and leading role, both socially and politically. Indeed, throughout most of our country's history, there has been an overt Christian, and primarily Protestant, dominance in American law and public life. Until relatively recent times, this Christian dominance has informed and refined the American understanding of religious liberty.

The Founders' religious justification for religious liberty, complete with its emphasis on religious voluntarism, was grounded in (Protestant) Christian thought.[19] More generally, Christian values and insights were intrinsically connected to the political culture of the new nation. As Professors Richard Vetterli and Gary C. Bryner have explained:

> The general Judeo-Christian tradition permeated American life. There were strong sentiments of mission, a belief that this pristine land had been set apart and preserved for a chosen people, and faith that America "was not only a destined nation, but a redeeming nation." There was a general consensus that Christian values provided the basis for civil society. Religious leaders had contributed to the political discourse of the Revolution, and the Bible was the most widely read and cited text. Religion, the Founders believed, fostered republicanism and was therefore central to the life of the new nation.[20]

Christianity thus supported the public life of the newly formed nation. In return, it was entitled to political and legal support as the favored, if not established, American

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17. Virginia Act for Religious Freedom, VA. CODE ANN. § 57-1 (Michie 1995) (enacted Jan. 16, 1786); *see* Smith, *supra* note 14, at 162.

18. Portions of Parts I.B and II.A are derived from Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1, 4-9 (1993-94).

19. As Professor Smith writes in the current Symposium, Madison's influential *Memorial and Remonstrance* was informed by beliefs that were "not merely theistic but Christian, and not merely Christian but Protestant, and not merely Protestant but reflective of a sort of non-statist voluntaristic Protestantism." Steven D. Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 IND. L.J. 61, 66 (2000).

20. Richard Vetterli & Gary C. Bryner, *Religion, Public Virtue, and the Founding of the American Republic*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 91, 92 (Neil L. York ed., 1988) (footnote omitted); *see id.* at 91-117; *see also* RICHARD VETTERLI & GARY C. BRYNER, IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT (1987).

religion. According to Justice Story, it was widely understood "that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship."[21] "An attempt to level all religions," he added, "would have created universal disapprobation, if not universal indignation."[22]

Justice Story was describing the founding period, but a similar understanding prevailed throughout the nineteenth century and well into the twentieth. In 1892, for example, based upon its survey of American law and culture, the Supreme Court declared that "this is a Christian nation."[23] And some forty years later, in 1931, the Court officially reaffirmed that "[w]e are a Christian people."[24] This sort of language was soon to disappear from judicial opinions, but the legal favoritism of Christianity continued for some time. In the public schools, for example, Christian prayers and Bible readings remained common for another thirty years—until the Supreme Court banned them in its 1962 and 1963 decisions.[25]

II. THE EROSION OF THE ORIGINAL THEOLOGY: THE EMERGENCE AND GROWTH OF DENOMINATIONAL EQUALITY AND FORMAL NEUTRALITY

Having sustained American religious liberty for most of the nation's history, the original theology began to erode in the latter half of the twentieth century. First, the legal and public culture adopted a strong requirement of denominational equality, thereby rejecting the notion of Christian dominance. Second, and more recently, the law has increasingly embraced the concept of formal neutrality between religion and nonreligion, a concept that tends to undermine the original theology's first and most fundamental precept—that religion is both distinct and distinctly important.

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21. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874, at 630-31 (Melville M. Bigelow ed., Boston, Little, Brown, & Co. 5th ed. 1891).

22. *Id.* at 631; *see also id.* § 1871, at 628 ("[I]t is impossible for those who believe in the truth of Christianity as a divine revelation to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects."). This is not to deny that the rhetoric of equality also was present in the founding period. *See* Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 2-3 (1992); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 928-29, 947-49 (1995) [hereinafter Underkuffler-Freund, *Foundational Challenge*]; *see also* Smith, *supra* note 19, at 62 ("Madison was ahead of his time in emphasizing—again and again—that all religions should be treated equally.").

23. Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

24. United States v. MacIntosh, 283 U.S. 605, 625 (1931); *cf.* Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 779 (1986) (suggesting that prior to World War I, the United States thought of itself "as a Protestant Christian country").

25. *See* Engel v. Vitale, 370 U.S. 421 (1962); School Dist. v. Schempp, 374 U.S. 203 (1963).

A. Denominational Equality and Its Implications

The 1960s marked an important turn in the development of American religious liberty. Although the Supreme Court had foreshadowed this shift in earlier decisions,[26] it was only in the 1960s that the American understanding of religious liberty firmly rejected the idea of legally sanctioned Christian dominance and firmly embraced a vigorous requirement of denominational equality. The Supreme Court's school prayer decisions were momentous steps in this direction. Also important was the Court's 1968 invalidation of a law that banned the teaching of human evolution in the public schools—a law that had been grounded in (a prominent form of) Christian thinking concerning the origins of the human race.[27] Although the school prayer and evolution decisions were (and remain) unpopular in many quarters, the Court's underlying principle of denominational equality was championed in the 1960s not only by the Court, but also by Congress. Thus, in the Civil Rights Acts of 1964 and 1968, Congress broadly prohibited religious discrimination in various arenas, including public accommodations, employment, and housing.[28] Under the Supreme Court's decisions, the law could no longer provide overt favoritism for Christianity, and under the legislation enacted by Congress, even nongovernmental favoritism was forbidden in the quasi-public arenas addressed by the Civil Rights Acts. Clearly, the legal culture, and with it the public culture, was shifting decidedly from Christian dominance to denominational equality.

Today, the requirement of denominational equality forms a critical part of our understanding of religious liberty. Not ouly is this requirement embodied in the Civil Rights Acts, but it also lies at the core of the Supreme Court's First Amendment doctrine. Thus, the Court has renounced the Christian dominance that prevailed "[a]t one time,"[29] and it has interpreted the religion clauses to reflect a strong constitutional commitment to equal treatment for all religions, Christian and non-Christian alike. According to current interpretations, the Establishment Clause forbids the government to "prefer one religion over another."[30] Even the Court's critics have applauded this "no preference" requirement,[31] which the Court has called

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26. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (declaring that government cannot "prefer one religion over another").

27. *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

28. *See* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994) (public accommodations); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994) (employment); Fair Housing Act of 1968, 42 U.S.C. § 3604 (1994).

29. Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985).

30. *Everson*, 330 U.S. at 15. Based on this principle, the Court has ruled that governmental action preferring certain religions over others should be subjected to strict judicial scrutiny. *See* Larson v. Valente, 456 U.S. 228, 244-55 (1982).

31. *See, e.g.*, *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting) (stating that the government is precluded "from asserting a preference for one religious denomination or sect over others"); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982). *See generally* Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245 (1991) (discussing possible variants of "no preference" notion).

"[t]he clearest command of the Establishment Clause."[32] The requirement of denominational eqnality also has played a powerful role in the Court's interpretation of the Free Exercise Clause. When it extended free exercise protection to Saturday Sabbatarians, for example, the Court emphasized that its ruling would put these religious believers on a par with Sunday worshippers.[33] The requirement of denominational eqnality also helps explain the Court's controversial interpretation of the Free Exercise Clause in *Employment Division v. Smith*,[34] which heralded a broad retreat from the granting of religions exemptions from laws of general application.[35] Whatever the Court's other justifications, *Smith* rested in part on a belief that the granting of such exemptions creates an undue risk of discrimination between or among religions, a risk that cannot be reconciled with the paramount requirement of denominational equality.[36]

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32. *Larson*, 456 U.S. at 244. *See generally* John H. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193 (finding an equality principle inherent in the Establishment Clause); Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 741-55 (1986) (reading the Establishment Clause to embody the principle of "equal religious liberty"); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986) (elaborating a similar argument).

33. *See* Sherbert v. Verner, 374 U.S. 398, 409 (1963) ("[T]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences.").

34. 494 U.S. 872 (1990).

35. *Id.* For criticisms of *Smith*, see, for example, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7; Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991). For scholarly commentary supporting the basic approach of *Smith*, if not the Court's rationale, see, for example, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117.

36. Justice Scalia's majority opinion in *Smith* contained conflicting statements on this point. On the one hand, Scalia apologetically stated that by leaving religious freedom largely to the political process, the Court's decision might actually engender a type of religious discrimination by "plac[ing] at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890. At the same time, however, he suggested that Free Exercise exemptions were "a constitutional anomaly," unlike the "constitutional norm" of "equality of treatment," *id.* at 886, and that the Court would continue to "strictly scrutinize governmental classifications based on religion," *id.* at 886 n.3.

Whatever the ambiguities in Scalia's rationale, his broad retreat from the granting of Free Exercise exemptions was joined by Justice Stevens, who provided a critical fifth vote for the majority opinion. In joining the Court's general renunciation of free exercise exemptions, Justice Stevens clearly was influenced by the principle of denominational equality, on which he consistently has relied in arguing against such exemptions. *See, e.g.*, United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment) ("[T]he principal reason for adopting a strong presumption against [claims for religious exemptions] . . . is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims,"

The requirement of denominational equality is designed to enhance the freedom and dignity of all religious believers, and it has achieved a significant measure of success toward this end. It has accorded legal respect to religious believers and—although religious bigotry has not disappeared—it has helped encourage a societal norm of religious toleration. As a result, the requirement of denominational equality generally has supported and nurtured the diversity and vitality of the American religious experience.[37] But we dare not miss the underlying predicate for this requirement: that according to the law, the particular content of religion does not matter. Any one religion, whatever its substance, is equal to any other. "[A]ny form of religious discrimination," writes one scholar, "needs to be seen as incompatible with religious liberty and should be viewed as no less a violation of the human person than discrimination that is based on race, national origin, or sex."[38] Religious liberty now means that religious differences are matters of legal indifference. Contrary to Justice Story's expectation, we have "level[ed] all religions"[39] as a matter of law, and this leveling—this belief that religious differences do not matter—has increasingly saturated the public culture generally. Among other consequences, this leveling has contributed to the view that religion is nothing more than a matter of taste—a matter of private and individual taste—and that it therefore should play little if any role in the political or public life of contemporary America.[40]

B. Formal Neutrality and Its Implications

The requirement of denominational equality demands that all religions be treated equally. The broader notion of religious neutrality includes the requirement of denominational equality, but it also goes one step further, demanding that the government neither favor nor disfavor religion in general, as compared to nonreligion. In the same judicial decisious that signaled the end of Christian

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which can create the appearance of "favoring one religion over another."); Goldman v. Weinberger, 475 U.S. 503, 512 (1986) (Stevens, J., concurring) (reiterating the discriminatory potential of religious exemptions and noting "the interest in uniform treatment for the members of all religious faiths").

Justice O'Connor provided a sixth vote for the Court's judgment in *Smith*, but she wrote a separate opinion that rejected the majority's dramatic reconstruction of free exercise doctrine. *Smith*, 494 U.S. at 891-907 (O'Connor, J., concurring in the judgment).

37. The Supreme Court's decision in *Smith*, grounded in part on the requirement of denominational equality, suggests that this requirement may not always support religious diversity and vitality.

38. James E. Wood, Jr., *Religious Pluralism and Religious Freedom*, 31 J. CHURCH & STATE 7, 12 (1989). "This is not to ignore the profound differences in teachings and practices that divide religions from one another," the author continues, "but these differences are no basis for any form of legal discrimination between the various religions." *Id. But cf.* McConnell, *supra* note 35, at 1139-41 (arguing that religious differences are important and should be legally accommodated by treating religion more like handicap than like race).

39. *See supra* text accompanying note 22.

40. For an elaboration of this point, see Conkle, *supra* note 18, at 8-11. For additional commentary in this Symposium on the role of religion in politics and public life, see Robert Audi, *Religious Values, Political Action, and Civic Discourse*, 75 IND. L.J. 273 (2000).

dominance in American law,[41] the Supreme Court also embraced this broader concept of religious nentrality. In its school prayer decisions, for example, the Court ruled that the nondenominational content of a state-composed prayer did not remove its constitutional infirmity,[42] and it further declared, more generally, that the First Amendment precluded governmental action that had the purpose or primary effect of either advancing religion or inhibiting it.[43] In these and subsequent decisions, the Court has consistently endorsed the general concept of religious neutrality—of neutrality not only between and among religions, but also between religion and nonreligion. But its particular understanding of this concept has evolved over time.

As Professor Douglas Laycock has explained, the concept of neutrality, like that of equality, has various potential meanings.[44] At their most basic, however, the requirements of denominational equality and religious neutrality would preclude formal or deliberate discrimination, either between or among religions or between religion and nonreligion. Taken together, and including denominational equality as part of the broader concept of religious neutrality, these rules of nondiscrimination might be seen to reflect a single principle, a principle that Professor Laycock calls "formal neutrality."[45] Thus, formal neutrality would "'prohibit classification in terms of religion either to confer a benefit or to impose a bnrden.'"[46] It would preclude formal or deliberate discrimination not ouly between or among religious, but also, and more broadly, between religion and nonreligion.[47]

Professor Laycock rejects formal neutrality as unduly simplistic.[48] What matters, he argues, is not whether the government formally discriminates on the basis of religion, but whether its action has the actual effect of promoting or discouragiug religion. Thus, writes Laycock, the test of neutrality should be one of "substantive neutrality,"[49] according to which the government must "minimize the extent to

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41. *See supra* Part II.A.

42. *See* Engel v. Vitale, 370 U.S. 421, 430 (1962).

43. *See* School Dist. v. Schempp, 374 U.S. 203, 222 (1963). The principle of religious neutrality was supported in earlier opinions as well. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (declaring that the First Amendment requires government "to be neutral in its relations with groups of religious believers and nonbelievers"). But there also were contrary indications. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 314 (1952) (holding that the state could "encourage[] religious instruction" and "cooperate[] with religious authorities" through a religious released-time program for public school students). *See generally* Marshall, *supra* note 7, at 196-200 (arguing that the notion of religious neutrality is not new, but rather is deeply embedded in the Supreme Court's constitutional doctrine).

44. *See* Laycock, *supra* note 8, at 995.

45. *Id.* at 999.

46. *Id.* (quoting Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961)); *see also* Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373.

47. *See* Laycock, *supra* note 8, at 999-1001.

48. *See id.*

49. *Id.* at 1001-06.

which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance,"[50] leaving religion "as wholly to private choice as anything can be."[51]

As Laycock contends, substantive neutrality is an attractive normative concept, and, from a descriptive point of view, it helps explain a variety of Supreme Court decisions that have found formal neutrality unnecessary in certain contexts and insufficient in others. But substantive neutrality requires difficult and sophisticated legal judgments of a sort that formal neutrality avoids.[52] Relatedly, it requires special treatment for religion, and to that extent it departs from the most basic, and the most common, constitutional understanding of equality.[53] Formal neutrality, by contrast, makes religion irrelevant to government policymaking, arguably ensuring a nondiscriminatory distribution of benefits and burdens. Thus, formal neutrality may be the purest, and is certainly the simplest, means of implementing a policy of equal treatment for religion and nonreligion.

In any event, and notwithstanding Laycock's arguments, formal neutrality has become the dominant theme under both the Free Exercise and the Establishment Clauses. As Professor Ira C. Lupu explained in his persuasive 1994 account, a trend leading generally in this direction emerged and grew in the 1980s and early 1990s.[54] Since the time of Lupu's writing, moreover, this trend has accelerated, and the overriding importance of formal neutrality has become even more pronounced.

1. Free Exercise Clause

Under the Supreme Court's 1878 decision in *Reynolds v. United States*,[55] the Free Exercise Clause provided very little protection for religious conduct.[56] By the 1960s and 1970s, however, the Supreme Court's doctrine had evolved to provide significant

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50. *Id.* at 1001.

51. *Id.* at 1002.

52. As Laycock concedes, "substantive neutrality is harder to apply than formal neutrality. It requires judgments about the relative significance of various encouragements and discouragements to religion." *Id.* at 1004.

53. Notably, the Equal Protection Clause of the Fourteenth Amendment operates primarily to preclude or discourage formal or deliberate discrimination on the basis of particular criteria, such as race or gender. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Craig v. Boren, 429 U.S. 190 (1976); Hunter v. Underwood, 471 U.S. 222 (1985); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); United States v. Virginia, 518 U.S. 515 (1996).

54. *See* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994). Lupu maintains that this trend tends to undermine separationism as a structural principle, thereby shifting the focus to more individually oriented norms. *See id.* For a different perspective on the Supreme Court's evolving doctrine, see Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).

55. 98 U.S. 145 (1878).

56. *Reynolds*, holding that Mormons were not exempt from a federal ban on polygamy, was decided during the heyday of (Protestant) Christian dominance in American law and public life. *See supra* Part I.B. During this period, mainstream Christianity required little protection from the law, and non-mainstream religions, including Mormonism, were unlikely to receive any.

protection for such conduct, even from general laws that were nondiscriminatory and therefore formally neutral. Thus, under *Sherbert v. Verner*[57] and *Wisconsin v. Yoder*,[58] general laws that had the effect of burdening religious practices were subjected to serious judicial scrutiny, and if the government could not justify the application of a law to religiously motivated conduct, an exemption from the law was constitutionally required.[59] Formal neutrality was not enough. Rather, the Court's doctrine gave religious conduct at least some protection from the adverse and discouraging effects of general and nondiscriminatory laws, to that extent advancing the policy of substantive neutrality.

In the 1980s, the Supreme Court continued to apply the doctrinal framework of *Sherbert* and *Yoder*, but, at least in hindsight, the Court's rejection of a series of religious-exemption claims[60] pointed toward a shift from substantive neutrality to formal neutrality, a shift that culminated in the Court's landmark decision of 1990, *Employment Division v. Smith*.[61] In *Smith*, the Court was asked to recognize a religious exemption for the sacramental use of an otherwise illegal drug, peyote, by members of the Native American Church. Not only did the Court refuse to do so, but it also declined to apply the scrutiny that *Sherbert* and *Yoder* appeared to require.[62] Feinting in the direction of precedent, the Court in *Smith* purported to distinguish and preserve its particular holdings in *Sherbert* and closely similar cases,[63] as well as in *Yoder*,[64] but the Court in fact rejected the fundamental teaching of those cases.

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57. 374 U.S. 398 (1963).

58. 406 U.S. 205 (1972).

59. In *Sherbert*, the Court stated that only a "'compelling state interest'" could justify a burden on religious practices. *Sherbert*, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). In *Yoder*, the Court wrote that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

60. In some cases, the Court articulated a standard of strict judicial scrutiny, but applied the standard in a manner suggesting that its review was in fact more lenient. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257-60 (1982); Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983). In addition, the Court adopted explicit exceptions to strict scrutiny for military and prison regulations, which it evaluated under a reasonableness or rational basis standard. *See* Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986) (military); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348-50 (1987) (prisons). The Court also ruled that the Free Exercise Clause did not limit the government's internal operations, even if those operations had an adverse effect on religious practices. *See* Bowen v. Roy, 476 U.S. 693, 699-701 (1986); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447-53 (1988).

61. 494 U.S. 872 (1990).

62. *See id.*

63. Prior to *Smith*, the Court had reaffirmed and relied upon *Sherbert* in several factually similar contexts. *See* Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989). The Court in *Smith* attempted to narrowly limit these decisions, stating that "[w]e have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation." *Smith*, 494 U.S. at 883.

64. The Court in *Smith* explained *Yoder* as a case involving a hybrid constitutional claim, based not only on the Free Exercise Clause, but also on the constitutional right of parents to control the education of their children. *Smith*, 494 U.S. at 881.

Thus, the Court declared that general laws affecting religious practices do not require any form of heightened judicial review and therefore do not require religious exemptions.[65] To grant such an exemption, the Court suggested, would be to permit the religious believer, "by virtue of his beliefs, 'to become a law unto himself,'"[66] a result that "contradicts both constitutional tradition and common sense."[67] *Smith* essentially reduced the Free Exercise Clause to a prohibition on deliberate governmental discrimination against religion, that is, on governmental action tainted by "the unconstitutional object of targeting religious beliefs and practices."[68]

The *Smith* Court suggested that despite its ruling, legislatures were not precluded from granting religious exemptions,[69] and, with respect to the particular issue before it, the Court noted with apparent approval that "a number of States have made an exception to their drug laws for sacramental peyote use."[70] Thus, under *Smith*, formal neutrality is sufficient to satisfy the demands of the Free Exercise Clause, but this form of neutrality is not necessarily required. Although legislatures cannot deliberately discriminate *against* religion in the imposition of legal burdens,[71] they can, if they wish, depart from formal neutrality in order to *relieve* religion from the burdens of otherwise general laws. But legislatively crafted religious exemptions themselves are confined by constitutional limitations. According to *Smith*, any such exemption must be "nondiscriminatory,"[72] presumably in the sense that it cannot prefer one religion over another in violation of the requirement of denominational

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65. *See id.* at 876-90. In so holding, the Court essentially reverted to the doctrine embraced in its 1878 decision in *Reynolds v. United States*, 98 U.S. 145 (1878).

66. *Smith*, 494 U.S. at 885 (quoting *Reynolds*, 98 U.S. at 167).

67. *Id.*

68. City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

In his contribution to this Symposium, Professor Michael J. Perry argues that the nondiscrimination requirement of the Free Exercise Clause can and should bear considerably more weight than the Supreme Court believes. *See* Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 IND. L.J. 295 (2000). In particular, Perry contends that this requirement should be construed to prohibit not only discriminatory hostility, but also selective indifference, by which he means "diminished respect and concern" for the religious group whose religious practice is subjected to regulation. *Id.* at 302; *cf.* Kent Greenawalt, Quo Vadis: *The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 343-45 (discussing an argument similar to Perry's and suggesting that the Constitution should be construed to forbid at least "self-conscious indifference" to the plight of religious minorities). Perry goes on to support a presumptive requirement of religious exemptions in accordance with the following rule: "If government could exempt a religious practice from a ban to which the practice is subject without seriously compromising either the objective the ban is designed to serve or any other important governmental objective, but government nonetheless refuses to do so, it shall be presumed that the refusal is based on diminished respect and concern for the religious group whose practice is banned." Perry, *supra*, at 303. (footnotes omitted). Perry maintains that this rule "is simply a practical way of implementing" the nondiscrimination requirement of the Free Exercise Clause. *Id.*

69. *Smith*, 494 U.S. at 890.

70. *Id.*

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

72. *Smith*, 494 U.S. at 890.

equality.[73] And if the exemption unduly favors religion, even religion in general, it will be found to violate the Establishment Clause.[74] The precise meaning of these limitations remains to be seen, but a religious exemption, unlike formally neutral legislation, is subject to serious constitutional scrutiny. Under *Smith*, formal neutrality thus is constitutionally sufficient and also constitutionally preferable, in that legislative departures from this norm run a serious risk of constitutional invalidation.

As noted earlier, the idea of denominational equality was promoted in the 1960s not only by the Supreme Court, but also by Congress, and this congressional action helped establish denominational equality as an undisputed ingredient of American religious liberty.[75] By contrast, Congress has not embraced formal neutrality in the free exercise context. Much to the contrary, Congress has strongly resisted the Court's position on this matter. Thus, in response to *Employment Division v. Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"),[76] which was designed to repudiate *Smith* and to once again require religions exemptions in accordance with the pre-existing doctrinal framework of *Sherbert* and *Yoder*.[77] But the Supreme Court did not stand still for this congressional impertinence. In its 1997 decision in *City of Boerne v. Flores*,[78] the Court invalidated RFRA, at least as applied to state and local governmental action, ruling that RFRA exceeded the constitutional power of Congress under Section 5 of the Fourteenth Amendment.[79] As its own rejoinder, Congress is now considering new legislation, the Religious Liberty Protection Act ("RLPA"), which would extend its requirements to state and local

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73. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 706-07 (1994) ("[W]hatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored.") (citations omitted).

74. *Compare* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (invalidating Texas sales tax exemption that was granted to religious literature, but not other literature), *with* 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 for religious organizations from ban on religious discrimination in employment).

75. *See supra* Part II.A.

76. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

77. *See* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 55-60 (1995).

78. 521 U.S. 507 (1997).

79. Section 5 grants Congress the power to "enforce" the Fourteenth Amendment, including the Fourteenth Amendment's incorporation of First Amendment rights, but the Court in *Boerne* concluded that RFRA went well beyond the permissible limits of congressional "enforcement." *Id.*; *see also* Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 638-45 (1998). For symposia addressing RFRA, *Boerne*, and related issues, see The James R. Browning Symposium for 1994, *The Religious Freedom Restoration Act*, 56 MONT. L. REV. 1 (1995); *Does Religious Freedom Have a Future?: The First Amendment After* Boerne, NEXUS, Fall 1997, at 1 (1997); Ben J. Altheimer Symposium, *Requiem for Religious Freedom?*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); Symposium, *Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 597 (1998).

governments on the basis of other theories and sources of constitutional power.[80] Like RFRA, RLPA would reject formal neutrality in favor of the *Sherbert/Yoder* framework, to that extent advancing the policy of substantive neutrality. So, too, have various state legislatures moved in a similar direction, adopting or considering state legislation to replace the invalidated federal RFRA.[81]

These legislative efforts are designed to displace the Supreme Court's preference for formal neutrality, but whether they can or will accomplish this result is an open question. As *Boerne* makes clear, legislation of this sort runs the risk of judicial invalidation.[82] And even if the legislation survives, it might well be interpreted narrowly. As the cases decided under RFRA suggest, courts are reluctant to depart from formal neutrality, and this reluctance is likely to affect the courts' interpretive decisionmaking.[83] Formal neutrality remains a contested concept in the legal culture of contemporary America,[84] but this concept currently dominates the law of free exercise, and there is reason to believe that this dominance will continue.

The dominance of formal neutrality can be explained, in part, by the emergence of a religiously neutral, autonomy-driven understanding of conscience. Thus, if the requirement of denominational equality has the effect of leveling all religions,[85] formal neutrality has the effect of leveling religious and noureligions claims of conscience. Claims of conscience might still receive legal protection in certain contexts. For example, the Supreme Court has granted substantial constitutional protection to "the zone of conscience and belief" that informs a woman's

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80. RLPA was originally introduced in the 105th Congress. *See* H.R. 4019, 105th Cong. (1998); S. 2148, 105th Cong. (1998). In revised form, it was reintroduced in the current, 106th Congress and, as amended, it was passed by the House of Representatives on July 15, 1999. *See* H.R. 1691, 106th Cong. (1999); 145 CONG. REC. H5608 (daily ed. July 15, 1999). The legislation now awaits Senate action.

81. For symposia addressing post-*Boerne* legislative efforts in the states and in Congress, see Symposium, *Restoring Religious Freedom in the States*, 32 U.C. DAVIS L. REV. 513 (1999); Symposium, *State and Federal Religious Liberty Legislation: Is It Necessary? Is It Constitutional? Is It Good Policy?*, 21 CARDOZO L. REV. 1 (1999).

82. On the constitutional power of Congress to enact legislation such as RLPA, thereby once again imposing RFRA-like obligations on state and local governments, compare Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 747-64 (1998) (offering a relatively broad interpretation of congressional power) with Conkle, *supra* note 79, at 646-83 (offering a somewhat more narrow interpretation). On the constitutional issues surrounding state legislation, see the symposia cited *supra* note 81.

83. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 585-97 (1998) (discussing and explaining legal impact of RFRA, including results of RFRA litigation); *see also* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 253-84 (1994) (explaining judicial resistance to free exercise claims and arguing that RFRA was destined to fail).

84. In addition to the legislative resistance to formal neutrality in this context, there is some resistance within the Supreme Court itself. In *Boerne*, for example, three Justices suggested that the approach of *Smith* should be reconsidered. City of Boerne v. Flores, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting); *id.* at 565-66 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

85. *See supra* text accompanying note 39.

decisionmaking with respect to abortion.[86] But formal neutrality rejects the notion of *special* protection for *religious* claims of conscience. Instead, conscience is viewed as an aspect of personal autonomy, a type of individual self-definition and self-determination that is the prerogative of the religious and nonreligious alike. The Court protects a woman's decision to have an abortion, for example, because it represents a "choice[] central to personal dignity and autonomy,"[87] a choice that falls within "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[88]

Under this view, we define our own consciences and determine what they require. Our consciences might include religious obligations, but then again they might not; it all depends on our particular self-definitions. Formal neutrality confirms and supports this understanding of conscience. And in so doing, it severely impairs the Founders' theological defense of religious liberty.[89] For the Founders, religious obligations were obligations to God—obligations that were not only special, but also paramount. According to the contemporary Supreme Court, by contrast, the law requires "equal respect for the conscience of the infidel [and] the atheist."[90] Under this view, obligations to God no longer are special under the law, nor are they especially important.[91] Certain "zones of conscience" are entitled to legal protection, but not to protect the exercise of duties owed to God. Instead, these zones, within their reach, protect the right of individuals to define and govern their own existence. To the extent that religious obligations fall within a protected "zone of conscience," they too are protected, but only as matters of self-definition and self-determination—in effect, as obligations not to God, but to self.[92]

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86. Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992).

87. *Id.* at 851.

88. *Id.*; *cf. id.* at 852 ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

89. *See supra* Part I.A.

90. Wallace v. Jaffree, 472 U.S. 38, 52 (1985). *See id.* at 53 ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

91. Arguing that "God Is Good," Professor John H. Garvey has contended that even today, special treatment for religion, including free exercise exemptions, can and should be defended on explicitly religious grounds. *See* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42-57 (1996); *see also* Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion's Sake*, 47 DRAKE L. REV. 45 (1998); Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 42 NOTRE DAME L. REV. 1597 (1997) (book review). But as Professor Frederick Mark Gedicks has explained, Garvey's argument faces an uphill struggle in our contomporary legal culture, as do other arguments defending exemptions for the benefit of religious believers alone. *See* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998). For critical responses to Garvey's argument, see, for example, Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35 (1998); Marshall, *supra* note 7, at 206-07.

92. It might be possible to define conscience more restrictively, but without limiting it to commitments that are religious in the traditioual sense. *See, e.g.*, Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 BYU L. REV. 645, 675-86 (arguing that conscience should be understood as a matter of moral

2. Establishment Clause

The Establishment Clause drew little attention in the Supreme Court prior to 1947, when the Court decided *Everson v. Board of Education*.[93] In *Everson*, a five-Justice majority rejected the constitutional challenge in the case at hand,[94] but all nine Justices endorsed a broad interpretation of the Establishment Clause—an interpretation that appeared to require not merely formal neutrality, nor even substantive neutrality, but also a separation of religion and government. Quoting Thomas Jefferson, the majority declared that "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[95] The four dissenters agreed, stating the separation requirement in even stronger terms: "[T]he object was broader than separating church and state in [a] narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[96]

By 1971, the separationist doctrine enunciated in *Everson* had generated the three-pronged constitutional test of *Lemon v. Kurtzman*.[97] This test required that governmental action be supported by a secular purpose, that it not have the principal or primary effect of advancing or inhibiting religion, and that it "not foster 'an excessive government entanglement with religion.'"[98] The first prong of the test, precluding laws that purposefully discriminated in favor of religion, essentially embodied a requirement of formal neutrality. The second prong, focusing on the actual effect of the governmental action, suggested a concern for substantive neutrality, and the third, focusing on entanglement, suggested a requirement of separation. Whatever their precise meanings, the second and third requirements of *Lemon* made it clear that formal neutrality was not sufficient under the Establishment Clause.[99]

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duty or obligation); Underkuffler-Freund, *Foundational Challenge*, *supra* note 22, at 963 (arguing that the focus should be "on the *process* of conscience, and on the *purposes* served by its freedom") (emphasis in original); Laura S. Underkuffler-Freund, Yoder *and the Question of Equality*, 25 CAP. U. L. REV. 789, 801-02 (1996) [hereinafter Underkuffler-Freund, Yoder *and the Question of Equality*] (emphasizing the other-regarding, social aspect of conscience).

93. 330 U.S. 1 (1947).

94. *Id.* at 17-18.

95. *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

96. *Id.* at 31-32 (Rutledge, J., dissenting).

97. 403 U.S. 602 (1971).

98. *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

99. *Lemon*, 403 U.S. 602.

Using the *Everson* doctrine and the *Lemon* test,[100] the Supreme Court invalidated numerous governmental practices, including practices that appeared to satisfy the requirement of formal neutrality. In particular, the Court struck down various legislative efforts to provide financial and other support for private religious schools, even through programs that did not single out the religious schools or their students for special, beneficial treatment.[101] In its 1985 decisions in *School District v. Ball*[102] and *Aguilar v. Felton*,[103] for example, the Court used the second and third prongs of *Lemon* to preclude publicly funded teachers from providing secular, remedial education on the premises of religious schools, even though the programs in question extended to religious aud nonreligious schools alike.[104] Despite the formal neutrality of the programs before it, the Court was concerned that they would in fact advance the religious mission of religious schools[105] or else result in undue governmental monitoring of the programs and therefore an impermissible entanglement of religion and government.[106]

In *Ball* and *Aguilar*, formal neutrality was not enough to satisfy the Establishment Clause. Only one year later, however, in *Witters v. Washington Department of Services for the Blind*,[107] the Court held that the Establishment Clause did not forbid an award of public funding to help a blind college student obtain a religious education in preparation for a religious career.[108] The funding was neutrally available to "'assist visually handicapped persons to overcome vocational handicaps,'"[109] and, as Justice Powell explained in his concurring opinion, a program that is "wholly neutral in offering educational assistance to a class defined without reference to religion" does not imply governmental support for religion, "because any aid to religion results from the private choices of individual beneficiaries."[110] In later cases,

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100. As a refinement of the *Lemon* test, the Court sometimes emphasized the "endorsement or disapproval" inquiry that was initially proposed by Justice O'Connor, according to which the critical inquiry was whether the government's action, either in actual purpose or reasonable perception, worked to endorse or disapprove religious beliefs. *See* Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring); *see also, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Edwards v. Aguillard, 482 U.S. 578, 585 (1987); County of Allegheny v. ACLU, 492 U.S. 573, 592-94 (1989).

101. *See, e.g.*, School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); Committee of Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971). During this same period, other programs of public support survived constitutional scrutiny, with the Supreme Court often relying on fine distinctions. *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983); Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980).

102. 473 U.S. 373 (1985).

103. 473 U.S. 402 (1985).

104. *Ball*, 473 U.S. 373; *Aguilar*, 473 U.S. 402.

105. *See Ball*, 473 U.S. at 384-97.

106. *See Aguilar*, 473 U.S. at 409.

107. 474 U.S. 481 (1986).

108. *Id.* at 489.

109. *Id.* at 483 (quoting WASH. REV. CODE § 74.16.181 (1981)).

110. *Id.* at 490-91 (Powell, J., concurring). Justice Powell argued that the Supreme Court's earlier decision in *Mueller v. Allen*, 463 U.S. 388 (1983), strongly supported the

the Court extended *Witters* even as it limited *Ball* and *Aguilar*. Thus, in *Zobrest v. Catalina Foothills School District*,[111] it upheld the use of a general program of funding to provide a publicly funded sign-language interpreter for a deaf student at a religious school, noting that "governmental programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge."[112] And in *Bowen v. Kendrick*,[113] the Court concluded that even religious *organizations* sometimes can receive governmental funding under neutrally drawn programs; in particular, it upheld a federal program authorizing grants to religiously affiliated as well as other organizations for counseling and research relating to teenage sexuality and pregnancy.[114]

Some ten years after *Ball* and *Aguilar*, the Supreme Court had largely abandoned the reasoning of those cases, and, indeed, the Court expressly rejected that reasoning in *Agostini v. Felton*,[115] a 1997 decision that overruled *Aguilar* and key portions of *Ball* as well.[116] In *Agostini*, the Court stressed the importance of formal neutrality in concluding, contrary to *Ball* and *Aguilar*, that the Establishment Clause did not preclude publicly funded teachers from teaching secular, remedial courses on the premises of religious schools under a federally funded program that supported teaching at nonreligious schools as well. Although the Court also relied on other considerations,[117] it suggested that Establishment Clause invalidation would be unlikely when "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[118]

In the decisions that limited and eventually repudiated *Ball* and *Aguilar*, the Supreme Court has implied that, at least in general, formal neutrality is constitutionally permissible in the provision of public benefits. If so, then the government may, but need not, include religious beneficiaries within the reach of its otherwise general programs. In its most dramatic endorsement of formal neutrality in the award of public benefits, however, the Supreme Court recently has indicated that the extension of funding to religious beneficiaries sometimes is constitutionally *required* by nondiscrimination principles emanating from the First Amendment's protection of freedom of speech and press. Thus, in its 1995 decision in *Rosenberger*

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constitutionality of this sort of formally neutral program. *See Witters*, 474 U.S. at 490-92 (Powell, J., concurring).

111. 509 U.S. 1 (1993).

112. *Id.* at 8.

113. 487 U.S. 589 (1988).

114. *Id.*

115. 521 U.S. 203 (1997).

116. *Id.* at 235-36. For an argument that *Agostini*'s procedural context made it a poor vehicle for doctrinal transformation, see Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343 (1998).

117. For instance, the Court noted that the federally funded education was "supplemental to the regular curricula" and that no federal funds "ever reach the coffers of religious schools." *Agostini*, 521 U.S. at 228.

118. *Id.* at 231.

v. Rector & Visitors of the University of Virginia,[119] the Court ruled that if the University of Virginia wished to maintain an otherwise neutral and general program of funding for the publications and activities of student organizations, the Constitution not only permitted funding for a religious publication, but also required it.[120] As in the free exercise context, then, there is at least some indication that the Supreme Court regards formal neutrality as not only permissible in the establishment context, but also constitutionally preferable, and indeed required in certain situations.

The Establishment Clause certainly is not moribund. The Supreme Court continues to invalidate laws that purposefully favor religion in violation of the requirement of formal neutrality,[121] and it is especially vigorous in ferreting out such deliberate favoritism in the context of the public schools.[122] Beyond the requirement of formal neutrality, moreover, the Court's doctrine retains other remnants of the

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119. 515 U.S. 819 (1995).

120. *See id.* at 845-46. In so holding, the Court extended the reasoning of earlier cases that had required that individuals seeking to engage in religious worship or expression be granted equal access to physical facilities that the government had otherwise made open for secular expression. *See* Widmar v. Vincent, 454 U.S. 263 (1981); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

121. In *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994), for example, the Court invalidated a New York law that had created a special school district for a Hasidic Jewish community in circumstances indicating a "purposeful delegation [of civic authority] on the basis of religion," as opposed to "a delegation on principles neutral to religion." *Id.* at 699.

In the current Symposium, Professor Michael J. Perry argues that the Establishment Clause should be interpreted to permit a limited degree of purposeful governmental favoritism of religion. In particular, he argues that an appropriately "moderate" understanding of the Establishment Clause permits the government to affirm a few "very basic religious beliefs," including the belief that God exists, as long as the government acts in a noncoercive manner. Perry, *supra* note 68, at 310. I have defended a somewhat similar position, although my argument would permit noncoercive governmental affirmations of religion only if they are embodied in longstanding, traditional governmental practices. *See* Conkle, *supra* note 12, at 1183-87.

Professor Frederick Mark Gedicks, by contrast, contends that the Supreme Court's prevailing ideology permits it to uphold governmental affirmations of religious beliefs or practices only by denying or ignoring their religious significance. *See* Frederick Mark Gedicks, Government Appropriation of Religion: A Critical Interpretation (July 22, 1999) (unpublished manuscript, on file with the *Indiana Law Journal*). As a result, Gedicks favors an Establishment Clause jurisprudence that prohibits governmental acknowledgment of such beliefs and practices "precisely because of their rich theological significance." *Id.* at 3.

122. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), for example, the Court invalidated a statute requiring "balanced treatment" for the teaching of "creation science" and "evolution science." Noting that "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *id.* at 583-84, the Court concluded that the statute's articulated secular purpose was a "sham" and that its actual purpose was to advance religion. *Id.* at 585-94. In its more recent decision invalidating school-sponsored graduation prayer, the Court's reasoning was more complex, but it once again invalidated a public school policy that deliberately favored religion. *See* Lee v. Weisman, 505 U.S. 577 (1992).

Lemon test, remnants that suggest lingering concerns about substantive neutrality and separation. In *Agostini*, for example, the Court linked its approval of formal neutrality to the policy of substantive neutrality, noting that the nondiscriminatory program it was evaluating—precisely because of its nondiscriminatory character—did not "have the effect of advancing religion by creating a financial incentive" for aid recipients "to modify their religious beliefs or practices."[123] In other contexts, formal neutrality and substantive neutrality might point in different directions, and the Court might rule that formal neutrality is insufficient. At least in the context of holiday displays, for example, the Court continues to suggest that even if the government has not purposefully favored or endorsed religion, a reasonable *perception* of favoritism or endorsement is enough to preclude the governmental action.[124] Beyond formal and substantive neutrality, moreover, the policy of separation may retain some force. Thus, even in the context of neutral programs, the Court has yet to approve the direct payment of tax money to organizations that are not only religiously affiliated, but also "pervasively sectarian,"[125] nor has it approved the direct funding of "specifically religious activities."[126]

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123. *Agostini*, 521 U.S at 231. More generally, the Court stated that it would continue to ask not only "whether the government acted with the purpose of advancing or inhibiting religion," but also "whether the aid has the 'effect' of advancing or inhibiting religion." *Id.* at 223. The Court likewise suggested that excessive "entanglement" remained a potential issue. *Id.* at 230-32. But the Court made it clear that its inquiry into "effect" would be guided by criteria substantially more relaxed than earlier cases had indicated, and it suggested that the "entanglement" issue would now be subsumed within this more general and relaxed "effect" analysis. *Id.* at 218-30, 232.

124. The Court so held in *County of Allegheny v. ACLU*, 492 U.S. 573, 598-602 (1989), and five Justices reaffirmed this basic principle in their separate opinions in *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995). *See Pinette*, 515 U.S. at 771-83 (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment); *id.* at 783-94 (Souter, J., joined by O'Connor and Breyer, JJ., concurring in part and concurring in the judgment); *id.* at 799-812 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

One could argue that this doctrine does not meaningfully depart from formal neutrality, in that it does little more than simplify the search for purposeful endorsement. On this view, a reasonable perception of governmental endorsement is enough to suggest the likelihood of purposeful governmental endorsement and therefore a violation of formal neutrality. Even so, the doctrine precludes the government from taking certain action that has the effect of advancing religion even when purposeful advancement has not been clearly demonstrated; to that extent, the doctrine can be seen to move beyond formal neutrality and in the direction of substantive neutrality.

125. Bowen v. Kendrick, 487 U.S. 589, 609-11, 620-21 (1988). *But cf. id.* at 624-25 (Kennedy, J., concurring) (arguing that extension of funding to pervasively sectarian institutions should not be declared unconstitutional unless "the funds are in fact being used to further religion").

126. *Id.* at 611-15, 621-22 (majority opinion). *But cf.* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 837-46 (1995) (approving neutral extension of public university funding, drawn from mandatory student fees, for printing of a Christian magazine, with money being paid directly to a third-party printer); *id.* at 842 (emphasizing that "no public funds flow directly to [the Christian magazine's] coffers").

Beyond the Court's own doctrinal caveats, moreover, a substantial group of dissenting Justices has protested the trend toward formal neutrality. In the Court's 1995 and 1997 decisions in *Rosenberger* and *Agostini*, for example, four Justices dissented from the Court's approval of the formally neutral funding programs, and their dissenting opinions evinced a decidedly more separationist philosophy.[127]

No less than in the context of free exercise, then, formal neutrality remains a contested concept under the Establishment Clause. But it is equally plain, here no less than there, that formal neutrality has become the dominant theme in the Supreme Court's doctrine. As a result, governmental programs that are formally neutral, including general programs of financial support for private individuals or organizations, are likely to be upheld—even if they may have the effect of advancing religion (along with other ideas or activities) and even if they create the risk of entanglement between religion and government.

Unlike in the free exercise context, moreover, it appears that Congress does not resist, but instead supports, the Supreme Court's emphasis on formal neutrality under the Establishment Clause. It was Congress, after all, that enacted the laws approved by the Supreme Court in *Bowen v. Kendrick* and in *Agostini*, laws that extended federally funded programs to religious organizations and individuals and that thereby pushed the Court in the direction of formal neutrality.[128] Indeed, it appears that a majority of Congress, or at least a majority of the House of Representatives, would support even further movement in this direction. Thus, a proposed constitutional amendment, the "Religious Freedom Amendment," would expressly forbid the government from "discriminat[ing] against religion" or "deny[ing] equal access to a benefit on account of religion,"[129] thereby confirming and expanding the idea that formal neutrality is not only constitutionally permissible in the provision of governmental benefits, but also constitutionally required. In a 1998 vote in the House of Representatives, this proposal failed to obtain the two-thirds margin required for constitutional amendments, but it was supported by a majority of the Representatives.[130]

In the Establishment Clause context, the dominance of formal neutrality can be seen as a boon for religion, permitting—and perhaps encouraging or even requiring—the government to treat religion on par with nonreligion in the provision of funding and other public benefits.[131] For example, formal neutrality supports the

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127. *See Rosenberger*, 515 U.S. at 863-92 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting); *Agostini*, 521 U.S. at 240-54 (1997) (Souter, J., joined by Stevens and Ginsburg, JJ., and joined in part by Breyer, J., dissenting). In the free exercise context as well, some Justices have protested the Court's move toward formal neutrality. *See supra* note 84.

128. Bowen v. Kendrick, 487 U.S. 589 (1988); *Agostini*, 521 U.S. 203.

129. H.R.J. Res. 78, 105th Cong. (1998).

130. The proposed amendment, which also would have recognized "the people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools," *id.*, received 224 votes, compared to 203 in opposition. *See* 144 CONG. REC. H4112 (daily ed. June 4, 1998).

131. For a volume of essays discussing—from various perspectives—the idea of "equal treatment" in this context, see EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY (Stephen V. Monsma & J. Christopher Soper eds., 1998).

inclusion of religious schools in publicly funded voucher programs, such as the Milwaukee program that was upheld by the Wisconsin Supreme Court in 1998.[132] But this seeming boon may be an illusion.

In the first place, formal neutrality in the establishment context ignores the risk that religion can be neutralized, homogenized, and secularized when it participates in governmental programs, programs that inevitably include governmentally imposed conditions that participants must honor.[133] Under the Milwaukee voucher program, for example, religious schools cannot participate if they require students to take part in religious education; such education must be voluntary, with objecting students permitted to opt out.[134] Over time, moreover, the funding conditions are likely to expand even as the participating religious organizations become more and

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132. *See* Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998).

In her contribution to this Symposium, Professor Laura S. Underkuffler disputes the Establishment Clause analysis that would permit this result. *See* Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167 (2000). In his contribution, by contrast, Professor Michael J. Perry contends that this result is not only *permitted* by the Establishment Clause, but also *required* by the Free Exercise Clause. *See* Perry, *supra* note 68, at 323-24; *see also* Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999) (elaborating a position similar to Perry's).

Without endorsing Perry's argument, Professor Martha M. McCarthy suggests that such a holding might well be the "next logical step" for the Supreme Court. Martha M. McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 164 (2000). More generally, McCarthy provides a well-documented account of the Establishment Clause trend toward formal neutrality as it relates to both public and private education. *See id.* at 123-66.

Constitutional challenges relating to vouchers and similar programs recently have produced competing results in the lower courts. *See, e.g.*, *Jackson*, 578 N.W.2d 602 (upholding inclusion of religious schools in Milwaukee voucher program); Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) (upholding program of tax credits extending to contributions made to religious schools); Bagley v. Raymond Sch. Dept., 728 A.2d 127 (Me. 1999) (upholding exclusion of religious schools from Maine's education tuition program and concluding that inclusion of such schools would be unconstitutional); Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) (reaching same result as *Bagley*); Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) (invalidating Cleveland voucher program on state-law grounds, but suggesting that program's inclusion of religious schools is not unconstitutional); Simmons-Harris v. Zelman, 1999 U.S. Dist. LEXIS 15117 (N.D. Ohio Aug. 24, 1999) (concluding, contrary to Ohio Supreme Court, that Cleveland voucher program probably violates Establishment Clause, and issuing preliminary injunction on that basis), *preliminary injunction stayed*, 1999 U.S. LEXIS 7480 (U.S. Nov. 5, 1999).

For recent symposia addressing the constitutionality of voucher programs and other programs that extend public funding to religious recipients, see *Commentary on School Vouchers and the Establishment Clause*, 31 CONN. L. REV. 803 (1999); *Symposium on Law and Religion*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239 (1999).

133. This is not to deny that the *exclusion* of religious organizations from general programs likewise can produce significant secularizing pressures. *See* Volokh, *supra* note 132, at 363-65.

134. *See Jackson*, 578 N.W.2d at 609, 617.

more dependent on the government's financial support.[135] No less than the stick of direct regulation, the carrot of governmental funding may work to the long-term detriment of religion, inducing religious organizations to modify and weaken their religious practices and requirements in response to secular demands.[136]

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135. Citing the lessons of Reformation history, Barry Hankins has warned that governmental funding carries a serious risk of "creeping regulation." Barry Hankins, *Through the Back Door: Martin Luther and Welfare Reform*, LIBERTY, May/June 1999, at 23, 26. Over time, he suggests, vouchers and similar funding programs might "fundamentally alter America's unique church-state arrangement in ways more problematic for the churches than for the state." *Id.* at 27. Quoting Harro Höpfl, Hankins notes that when the Protestant Reformers pursued similar church-state partnerships, they soon learned "'what indeed they might have anticipated, namely that the favor of princes is fitful and unreliable, and never comes without strings.'" *Id.* (quoting LUTHER AND CALVIN ON SECULAR AUTHORITY at ix (Harro Höpfl ed. & trans., 1991)).

Based on an empirical study, Professor Stephen V. Monsma has concluded that most religious organizations receiving public money in the United States presently operate "free from severe limitations on their freedom to live out their religious commitments and beliefs—whether from the government itself, limitations arising from private individuals or groups, or self-imposed limitations." STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 105 (1996). But Monsma notes that there are significant and troubling exceptions, and he adds that "there are warning signs on the horizon" indicating that the religious autonomy that currently exists "is in an unsafe, precarious position." *Id.*; *see also id.* at 63-108, 147-66.

For helpful commentary in the particular context of school voucher programs, see Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 895-902 (1999) (discussing potential effects of school voucher programs on religion and religious liberty); Mark Tushnet, *Will Context-Dependent Balancing Do the Job We Want Done?*, 31 CONN. L. REV. 861, 861-64 (1999) (discussing risks to religion and religious liberty that might arise from school voucher programs and explaining why these risks are constitutionally relevant despite their voluntary assumption by participating religious schools).

136. Arguing for the inclusion of religious organizations in formally neutral funding programs, Professor Perry seems largely unconcerned about funding conditions and their possible effects on the integrity of religious organizations. *See* Perry, *supra* note 68, at 321-22 nn. 84-86 (suggesting that funding may be subject to "certain appropriate limitations," including, but presumably not limited to, conditions precluding recipient organizations from discriminating on the basis of race or sex). But as Perry himself cautions later in his article, "One way for government to corrupt religion—to co-opt it, to drain it of its prophetic potential—is to seduce religion to get in bed with government; an important way to protect religion, therefore, is to forbid such intimacy." *Id.* at 330.

Like Professor Perry, Professor Carl H. Esbeck supports the inclusion of religious organizations in formally neutral funding programs. *See* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997). Esbeck concedes that "[t]he most compelling argument for a continued strict separation of church and state is the harm that can befall religion itself when faith-based ministries become unduly involved with governmental programs and benefits," and he admits that this harm is "real and threatening." *Id.* at 19-20 & n.74. Even so, Esbeck apparently is content to leave the autonomy of religious organizations primarily in the hands of the legislature, which he urges to adopt appropriate safeguards. *See id.* at 19-20, 37, 39. *But cf.* Carl H. Esbeck, *The Establishment Clause As a Structural Restraint on Governmental Power*,

More generally, formal neutrality in the establishment context also confirms the leveling of religion and nonreligion, thereby reinforcing the liberty-restricting effects of formal neutrality in the free exercise context. Indeed, to adopt formal neutrality in one context but not the other might suggest doctrinal and theoretical inconsistency: if religion is to be treated like nonreligion in the receipt of generally available benefits, why should it be excused from the imposition of generally applicable burdens?[137]

According to Professor Mark DeWolfe Howe, Roger Williams maintained that "government must have nothing to do with religion lest in its clumsy desire to favor the churches or its savage effort to injure religion it bring the corruptions of the wilderness into the holiness of the garden."[138] No less today than in Williams's colonial times, the separation of church and state can serve the interests not only of government, bnt also of religion.[139] Formal neutrality in the establishment context sometimes may serve the interests of religion, but it also may threaten the vibrant freedom that can result from more vigorous understandings of the Establishment Clause, understandings that include considerations relating to substantive neutrality and separation.[140]

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84 IOWA L. REV. 1, 95-96 (1998) (suggesting that certain types of program conditions might violate the Constitution, including the Establishment Clause understood as a structural restraint on governmental power). *See generally* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653 (1996) (urging recognition of constitutional protection against intrusive conditions affecting religious organizations, even when they accept public funding under general programs).

137. *See* Gedicks, *supra* note 91, at 570-71; *cf.* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 111 (1995) (suggesting that in each context, the prevailing rhetoric of secular individualism supports the approach of formal neutrality).

138. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 149 (1965). The views of Roger Williams in fact were rich and complex, and so too are their potential implications for contemporary issues of religious liberty. For interesting and provocative discussions, see TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY (1998); Steven D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213 (1999) (reviewing TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY (1998)).

139. *See* HOWE, *supra* note 138, at 11 ("The ultimate strength of our religious establishment is derived . . . not from the favoring acts of government, but, in largest measure, from the continuing force of the evangelical principle of separation."); Engel v. Vitale, 370 U.S. 421, 432 (1962) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 THE WRITINGS OF JAMES MADISON 183, 187 (Gaillard Hunt ed. 1901)) ("[R]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.").

140. As Professor Scott C. Idleman explains in his contribution to this Symposium, one important principle of separation, the general prohibition on legal adjudication of religious questions, may be traced to the Free Exercise Clause, the Establishment Clause, or both. *See* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 219-27 (2000). Whatever its precise constitutional grounding,

III. A LOOK TO THE FUTURE: FORMAL NEUTRALITY AND LITTLE MORE?

Despite the competing themes and caveats that I have noted, it seems plain that contemporary constitutional law favors formal neutrality under both the Free Exercise and the Establishment Clauses. Thus, under each clause, formal neutrality generally is constitutionally permissible and constitutionally preferable, and it sometimes is constitutionally required. Under the Free Exercise Clause, formal neutrality denies special protection for religiously motivated conduct and thereby restricts the scope of religious liberty. Under the Establishment Clause, the immediate impact of formal neutrality may seem beneficial for religion, but its long-term effect, at least in some contexts, may be to contaminate and secularize religion. Even in the establishment context, then, formal neutrality may indirectly impede the exercise of religious liberty.

More fundamentally, under both clauses, formal neutrality severely undermines the theoretical foundation of American religious liberty by subverting the original theology on which it was grounded. Contrary to the original theology, the doctrine of formal neutrality implies that religion is neither distinct nor distinctly important. Indeed, it implies that religion is virtually an irrelevancy, to be treated under the Constitution in the same way that race is treated under the Constitution. On this view, religion, like race, would have constitutional significance, but only in the sense that it would be deemed a constitutionally forbidden or disfavored basis for governmental discrimination or decisionmaking.[141] Otherwise, it would not be entitled to any form of special constitutional solicitude.

If I am right, the contemporary dominance of formal neutrality has adverse—or at least potentially adverse—cousequences for religion and religious liberty. But these consequences will be enduring only if formal neutrality is enduring. As the meaning of religious liberty continues to evolve over time, perhaps formal neutrality will fade away, only to be replaced by the return of earlier doctrinal frameworks or, perhaps, by the adoption of some new framework that we cannot as yet anticipate. Perhaps. But for the immediate future, at least, various factors suggest that formal neutrality will remain firmly entrenched as the dominant principle under the religion clauses and, indeed, that this principle may grow even more important as we enter the new century and new millennium.

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this principle departs from formal neutrality by treating religious questions differently than nonreligious questions. *See id.* at 220-39. Advancing an argument complementary to my own, however, Idleman contends that this principle is likely to erode in the years ahead, at least in the context of tort liability, giving way to the general drive toward formal neutrality. *See id.* at 239-71.

141. For a summary of the Supreme Court's equal protection doctrine as it relates to discrimination based on race and other criteria, see *infra* Part III.A.

A. The Importance of Formal Equality in America's Constitutional and Legal Culture

Formal neutrality disfavors deliberate or purposeful discrimination, either betweeu or among religions or between religion and nonreligion. As suggested earlier,[142] this principle tracks the most basic, and the most common, constitutional understanding of eqnality, an understanding that might be characterized as formal equality. And the idea of equality, so understood, has never been more important as a constituent element of American constitutionalism. Thus, in the last fifty years, the Supreme Court has ruled time and again that the Eqnal Protection Clause of the Fourteenth Amendment disfavors deliberate or purposeful discrimination on the basis of criteria that the Court regards as constitutionally offensive.[143]

The modern era of formal equality can be traced to the Supreme Court's 1954 decision in *Brown v. Board of Education*,[144] the effects of which coutinue to reverberate. As Professor Archibald Cox proclaimed a decade after *Brown*, "Once loosed, the idea of Equality is not easily cabined."[145] Later developments certainly have proved Cox's point, at least in the sense of formal equality.

In *Brown* and its progeny, the Court outlawed formal or deliberate segregation on the basis of race, not only in the public schools,[146] but in other public facilities as well.[147] More generally, the Court has extended its strict constitutional scrutiny to all forms of race-based classifications and race-based decisionmaking,[148] including race-based affirmative action.[149] And it has determined that the federal government, although not limited by the Equal Protection Clause of the Fourteenth Amendment, is constrained by similar principles under the Due Process Clause of the Fifth Amendment. Although this doctrine of "reverse incorporation" is historically

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142. *See supra* text accompanying note 53.

143. Although formal equality has been the dominant theme in the modern Court's interpretations of the Equal Protection Clause, it has not been the only theme in the Court's complex and multifaceted doctrine. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 628-916 (13th ed. 1997); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 595-959 (5th ed. 1995).

144. 347 U.S. 483 (1954).

145. Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

146. *Brown*, 347 U.S. 483.

147. *See, e.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf courses); Gayle v. Browder, 352 U.S. 903 (1956) (buses); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (parks); Turner v. Memphis, 369 U.S. 350 (1962) (municipal airport restaurants); Johnson v. Virginia, 373 U.S. 61 (1963) (courtrooms).

148. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (invalidating ban on interracial marriage); Palmore v. Sidoti, 466 U.S. 429 (1984) (overturning child custody decision grounded on racial considerations); Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating racially motivated disenfranchisement provision in Alabama Constitution); Batson v. Kentucky, 476 U.S. 79 (1986) (ruling that equal protection forbids racially motivated peremptory challenges of jurors).

149. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constr., Inc. v. Pena, 515 U.S. 200 (1995).

untenable,[150] the constitutional norm of equality is so strong that any other result would be "unthinkable."[151]

After some hesitation,[152] the Court extended a presumption of constitutional invalidity to formal or deliberate discrimination based on gender,[153] illegitimate birth,[154] and, in most contexts, alienage.[155] And even outside the context of these explicitly recognized "suspect" or "quasi-suspect" classifications, the Court has invalidated formal or deliberate discrimination on the basis of other criteria, such as mental retardation and sexual orientation, when, in the eyes of the Court, the discrimination could not be justified.[156] And the Court's decisionmaking has been supported and supplemented in the broader legal culture by the adoption of antidiscrimination laws of all sorts. Although these laws sometimes go further, they include at their core a prohibition on formal or deliberate discrimination. Thus, there are federal statutes precluding discrimination in various contexts and on the basis of various criteria,[157] and there also are state and local enactments that sometimes

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150. That is, an earlier constitutional amendment, the Fifth, is essentially interpreted to include the content of a later one, the Fourteenth.

151. Bolling v. Sharpe, 347 U.S. 497, 500 (1954); *see also Adarand*, 515 U.S. at 225-27.

152. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968) (invalidating illegitimacy-based classification on basis of opinion that ambiguously suggested possibility of heightened constitutional scrutiny); Reed v. Reed, 404 U.S. 71 (1971) (invalidating gender-based classification while purporting to avoid heightened constitutional scrutiny); Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating gender-based classification with no majority rationale, but with plurality urging standard of strict judicial scrutiny).

153. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996). In the context of gender, the presumption of invalidity does not trigger the strictest form of judicial scrutiny, but it does mean that gender-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197. Under this test, when the government classifies on the basis of gender, there must be an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 531. In *Craig*, the Court invalidated a law that forbade males, but not females, from purchasing 3.2% beer if they were over the age of 18 but under the age of 21. In *United States v. Virginia*, the Court ruled that the Equal Protection Clause required the Virginia Military Institute to discontinue its traditioual policy, dating from 1839, that had barred the admission of women. For other cases involving gender-based discrimination, see GUNTHER & SULLIVAN, *supra* note 143, at 681-720.

154. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (declaring that illegitimacy would be treated like gender, meaning that the Court would deem discrimination based on illegitimacy unconstitutional unless "substantially related to an important governmental objective").

155. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (holding that states cannot deny welfare benefits to aliens); Bernal v. Fainter, 467 U.S. 216 (1984) (holding that states cannot preclude aliens from becoming notaries public). Due to the special role of Congress in regulating aliens, as well as their special political status, the Court has applied more deferential scrutiny to federal regulations of aliens and to state laws precluding aliens from certain types of governmental employment. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976) (upholding federal law restricting aliens' eligibility for Medicare); Foley v. Connelie, 435 U.S. 291 (1978) (upholding state law barring employment of aliens as state troopers).

156. *See, e.g.*, Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (mental retardation); Romer v. Evans, 517 U.S. 620 (1996) (sexual orientation).

157. *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1994);

impose antidiscrimination prohibitions going beyond the requirements of federal law.[158]

Given the ever-increasing importance of formal equality under the Equal Protection Clause and in the legal culture generally, it is hardly surprising that an analogous or parallel doctrine, formal neutrality, has risen to prominence under the religion clauses.[159] Equality in the sense of nondiscrimination is a simple and powerful principle for avoiding governmental action that relies on criteria that the Constitution makes irrelevant. And if the Constitution in fact makes religion irrelevant—rather than distinct and distinctly important—then why not adopt a similar principle here? The concept of formal equality strongly supports the concept of formal neutrality, and there is no reason to believe that either concept will be "cabined" anytime soon.[160]

B. The Problem of Definition

According to the original theology of American religious liberty, religion was distinct and distinctly important because it entailed duties owed to God.[161] However Protestant this original theology might have been,[162] the defining characteristic of

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Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994) (forbidding discrimination in public accommodations based on race, color, religion, or national origin); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994) (forbidding employment discrimination based on race, color, religion, sex, or national origin); Fair Housing Act of 1968, 42 U.S.C. § 3604 (1994) (forbidding housing discrimination based on race, color, religion, sex, handicap, familial status, or national origin); Americans with Disabilities Act, 42 U.S.C. §§ 12101-213 (1994) (forbidding discrimination based on disability in various contexts, including employment, public services, and public accommodations).

158. A number of states and localities, for example, have extended their antidiscrimination laws to include discrimination based on sexual orientation. *Cf.* Romer v. Evans, 517 U.S. 620 (1996) (invalidating state constitutional amendment that would have nullified and precluded state and local policies of this sort).

159. *See* Gedicks, *supra* note 91, at 571 ("[A] society committed to individual eqnality cannot explain why believers should be deprived of benefits or relieved of burdens which are equally distributed and fully justified on secular grounds."); *cf.* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 580 (1991) ("Equal religious liberty is simply one of a series of parallel constitutional commitments—equal respect for ideas, for consciences, for privacy, for racial, ethnic, or religious identity, and for voluntary associational choices.").

160. In his contribution to this Symposium, Professor Frederick Mark Gedicks outlines some possible implications of an equal protection approach to religious liberty. *See* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77 (2000). In particular, he contends that the Supreme Court's protection of formal equality in the context of affirmative action implies that legislatively granted religious exemptions, arguably a type of affirmative action, should not be tolerated unless they are designed to compensate for special Establishment Clause disabilities. *See id.* at 99-103. At the same time, Gedicks argues that the "fundamental interests" strand of equal protection could and should be construed to offer some protection for religious free exercise. *See id.*

161. *See supra* Part I.A.

162. *See supra* text accompanying note 19.

religion—the performance of duties owed to God—was sufficiently clear and sufficiently broad to extend quite readily to other traditional religions as well, including, for example, Catholic Christianity and Judaism. As religious diversity grew in America, religious liberty did not always follow,[163] but the definition of religion was not the obstacle. In fact, the definition of religion, for purposes of religious liberty, did not become a serious question until the latter half of the twentieth century.

In its 1965 decision in *United States v. Seeger*,[164] the Supreme Court addressed a statutory religious-liberty provision that protected religious objectors to military service. In its definition of religion, the statute referred to "'an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.'"[165] To the Founders, this definition would have seemed entirely unexceptional. But by 1965, the definition seemed problematic to the Supreme Court—so much so that the Court saw fit to rewrite the statute through creative interpretation. Thus, the Court declared that the statute's definition would be interpreted to include any "sincere and meaningful" belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[166] So understood, the definition did "not distinguish between externally and internally derived beliefs,"[167] and it included the beliefs of a couscientious objector who acknowledged his skepticism concerning the existence of God, but who claimed a "'belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.'"[168]

Seeger's expansive understanding of religion reflected the rapidly changing character of religion in the United States. As the Court observed, American religion was remarkably diverse by the 1960s, and it extended well beyond the traditional confines of Christianity and Judaism.[169] Perhaps more important, modern theology was transforming certain strands of the traditional faiths themselves. For example, Protestant theologian Paul Tillich had concluded that God should no longer be understood "as a projection 'out there' or beyond the skies but as the ground of our very being."[170] "'The source of... meaning within meaningless,'" wrote Tillich, "'is not the God of traditional theism but the "God above God," the power of being,

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163. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (refusing to protect Mormons from federal ban on polygamy).

164. 380 U.S. 163 (1965).

165. *Id.* at 165 (quoting 50 U.S.C. app. § 456(j) (1958) (amended 1967)) (alteration in original).

166. *Id.* at 166.

167. *Id.* at 186.

168. *Id.* at 166 (quoting Record at 73). Professor Rebecca Redwood French has suggested that *Seeger* was "the first step by the Court into a postmodernist depiction of religion." Rebecca Redwood French, *From* Yoder *to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 78 (1999).

169. *See Seeger*, 380 U.S. at 174-75.

170. *Id.* at 180.

which works through those who have no name for it, not even the name of God.'"[171] So "'if that word [God] has not much meaning for you,'" Tillich explained, "'translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation.'"[172]

These trends in American religion have only accelerated since the 1960s. Thus, the diversity of the American religious experience is ever more extraordinary, and the diversity of thought within the traditional faiths is ever more pronounced.[173] As a result, *Seeger*'s expansive definition of religion, if appropriate for the 1960s, arguably is even more compelling today.[174] But however reflective of contemporary understandings, the *Seeger* definition inevitably blurs the distinction between religion and nonreligion.[175] Indeed, if religion includes "the source of your being, of your ultimate concern, of what you take seriously without any reservation,"[176] then religious liberty may be a problematic concept. More to the point, religious liberty may be problematic to the extent that it treats religion specially under the law, because a broad range of human thought and activity might very well qualify as religious. Thus, the Free Exercise Clause might require special exemptions in countless situations, and the Establishment Clause might preclude the government from endorsing or favoring a variety of moral perspectives. Religious liberty could quickly become unmanageable.

In light of these difficulties, it is not surprising that the Supreme Court has never adopted the *Seeger* approach as a *constitutional* definition of religion.[177] But at the same time, the Court appears to agree that a definition like *Seeger*'s might be well-suited for the end of the twentieth century and that, if anything, America has outgrown even the capacious approach of *Seeger*. Thus, as suggested earlier, the Court today may regard religion as simply one form of autonomy, and religious beliefs as simply one form of "internally derived" beliefs, to use the language of

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171. *Id.* at 180 (quoting 2 PAUL TILLICH, SYSTEMATIC THEOLOGY 12 (1957)).

172. *Id.* at 187 (quoting PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)) (alteration in original) (emphasis omitted).

173. In his contribution to this Symposium, Professor Stephen J. Stein provides a rich account of these developments, and he discusses the potential implications of contemporary America's "astonishing religious diversity." Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 59 (2000); *see also id.* at 47-49.

174. *Cf. id.* at 58 ("Only a very fluid definition of religion can do justice to the multitude of different 'religions' and forms of spirituality that exist in contemporary America.").

175. *Cf.* Welsh v. United States, 398 U.S. 333 (1970) (extending *Seeger* definition to include conscientious objector who had stricken word "religious" from his application and who had declared that his beliefs were not religious in any conventional sense).

176. *See supra* text accompanying note 172.

177. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for example, the Court ruled that the religious practices of the Amish, which were Biblically based, traditional, and communal, were entitled to constitutional protection under the Free Exercise Clause, but it stated that such protection would not extend to practices that were merely "philosophical and personal," based on a "subjective evaluation and rejection of the contemporary secular values accepted by the majority." *Id.* at 216; *see also id.* at 215-19. In his separate opinion, Justice Douglas noted and protested the Court's apparent departure from the *Seeger* approach. *See id.* at 247-49 (Douglas, J., dissenting in part).

Seeger.[178] At the very least, the Court appears to believe—perhaps with good reason—that the line between religion and nonreligion is increasingly thin in contemporary America.[179]

Supporting the modern tendency to blur religion and nonreligion is the increasing politicization of religion. Religion always has played a role in American politics,[180] but in recent decades, the relationship between religious perspectives and political ideologies has become unusually direct and highly visible. As Professor Robert Wuthnow has demonstrated, the 1960s and 1970s witnessed a dramatic decline of denominational differences in American religion and an equally dramatic rise of divisions *within* the various denominatious, divisions that increasingly placed religious conservatives on one side and religious liberals on the other.[181] As the competing groups confronted such issues as race relations, the war in Vietnam, abortion, homosexuality, and the role of women in society, their religious differences became iucreasingly political and increasingly polarizing, to the point that by the 1980s and 1990s it was possible to declare the existence of a "culture war" in American society.[182] And this culture war included explicitly political and partisan behavior by the religious combatants, with the competing sides participating more and more in electioneering, lobbying, and other forms of direct political action.[183]

All of this suggests that religion not only *influences* politics in the coutemporary United States, but that religion *is* politics to a degree that may be unparalleled in the American past. Religion is far more than politics, of course, even today, but the reality and the perception that religious beliefs and political beliefs are closely related tends to undermine the claim that religion warrants distinctive treatment

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178. *Seeger*, 380 U.S. at 186; *see also supra* text accompanying notes 86-90; *cf.* Stein, *supra* note 173, at 58 ("Religion has become whatever a person declares to be the object of regard or pursuit.").

179. Focusing especially on the issue of free exercise exemptions, Professors Christopher L. Eisgruber and Lawrence G. Sager have argued that religious commitments cannot be distinguished from other deep commitments, at least not in any way that would justify special constitutional protection. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); *cf.* Underkuffler-Freund, Yoder *and the Question of Equality*, *supra* note 92 (responding to Eisgruber and Sager by contending that special constitutional protection for religion can indeed be justified, but only if religion is defined broadly enough to include the exercise of conscience). In his contribution to the current Symposium, Professor Steven D. Smith suggests that Eisgruber and Sager beg the critical question that they purport to resolve, that is, the question of whether religious commitments are relevantly different from nonreligious commitments. *See* Smith, *supra* note 19, at 68-70.

180. And, in my view, properly so. *See* Conkle, *supra* note 18; Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J.L. & RELIGION 337 (1995-96).

181. *See* ROBERT WUTHNOW, THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II (1988); *see also* Stein, *supra* note 173, at 57-58.

182. *See* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); *cf.* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (referring to a contemporary American "Kulturkampf").

183. *See, e.g.*, ALLEN D. HERTZKE, REPRESENTING GOD IN WASHINGTON: THE ROLE OF RELIGIOUS LOBBIES IN THE AMERICAN POLITY (1988).

under the Constitution. Political equality is a core political value, at least in the sense of formal equality.[184] To the extent that religious perspectives also are political perspectives, therefore, it would seem that the religions perspectives should neither be preferred nor disadvantaged as compared to their secular analogues.[185]

These various difficulties suggest that at the turn of the millennium, the definition of religion has become ever more elusive and problematic. As a result, the Supreme Court has strong incentives to avoid the issue of definition whenever it can and, to the extent that the issue cannot be avoided, to at least reduce its constitutional significance. Formal neutrality serves both of these related objectives. The Court cannot entirely escape the definitional problem—that is, as long as the Court finds any content in the religion clauses. The Court need not set forth an explicit constitutional definition of religion, but in order to apply its constitutioual doctrine, it must have some understanding, at least implicit, of what counts as "religion" and what does not. Under the doctriual approach of formal neutrality, however, the Court need ouly determine whether "religion" has been subjected to deliberate or purposeful discrimination. If there is no plausible argument that it has, the Court's task is at an end. As compared to its doctriual alternatives, formal neutrality limits the occasious for a definitional inquiry. At the same time, it reduces the significance of the question and thereby limits the adverse consequences of definitional determinations that might be erroneous or doubtful.[186]

C. Judicial Restraint and Federalism

During the last quarter century, judicial restraint has become an increasingly important theme in the Supreme Court's constitutional decisionmaking. This theme includes three related components. First, as a general proposition, the Court today is inclined to limit the scope of previously recognized constitutional rights and to reject the creation of new ones, thereby expanding the authority of political decisionmakers and reducing the Court's own function. In the bellwether context of substantive due process, for example, the Court has restricted the reach of *Roe v.*

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184. *See supra* Part III.A. In the context of freedom of speech, the concept of formal equality generates an extremely strong constitutional presumption against viewpoint or content-based regulation, especially when political or ideological messages may be implicated. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

185. "Giving special protection to religion," argues Professor William P. Marshall, "gives the views advanced by religion a false vitality in the political marketplace and skews political debate." William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 401 (1996). And imposing special disabilities on religion, of course, likewise can skew political debate, albeit in the opposite direction. Citing "the equality principle underlying speech clause doctrine," Marshall rejects free exercise exemptions but supports the inclusion of religion in general benefit programs. *See id.* at 404-05; *see also* Marshall, *supra* note 7, at 207 (describing religion and nonreligion as "two alternative modes of ideology").

186. *See generally* Marshall, *supra* note 7, at 194-217 (discussing juridical concerns relating to the definition of religion and associated questions and arguing that these concerns support the Court's general embrace of formal neutrality).

Wade,[187] overruling some of *Roe*'s more contentious applications,[188] and it has rejected the claim that terminally ill patients have a constitutional right to physician-assisted suicide.[189] In this respect, judicial restraint calls for deference to the majoritarian policies adopted by political officials.

A second component of judicial restraint is a preference for doctrinal rules as opposed to more flexible standards, including standards that require the judiciary to balance competing interests through a process of case-by-case decisionmaking. For the current Court, this second component of judicial restraint is less prominent than the first, but it is present to a significant extent.[190] Indeed, the potential for relatively clear, formal constitutional rules may sometimes offset the Court's tendency to defer to majoritarian decisionmaking. In the area of equal protection, for example, the Court has not reduced—and arguably has invigorated—its enforcement of formal equality, a constitutional principle that often is conducive to relatively clear-cut exposition and application.[191]

Third, the Supreme Court today is deciding dramatically fewer cases than it did in the receut past. Thus, the last fifteen ycars have witnessed a "radical downsizing of tlie Supreme Court's docket,"[192] with the Court granting plenary review and providing written opinions in only about half as many cases as it did in the mid-1980s.[193] Various factors may have contributed to this trend,[194] but the Supreme Court's self-imposed "downsizing" appears to reflect a new—and more humble—self-understanding of the Court's role in American society. More

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187. 410 U.S. 113 (1973); *see* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (replacing strict scrutiny, trimester framework of *Roe* with more relaxed "undue burden" standard).

188. *See Casey*, 505 U.S. at 881-87 (upholding informed-consent and waiting-period requirements for abortion and overruling prior holdings to the contrary in *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), and in *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)).

189. *See* Washington v. Glucksberg, 521 U.S. 702 (1997). Notably, the Court in *Glucksberg* suggested that it no longer would recognize substantive due process rights that were not, "objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.* at 712 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)); *see also id.* at 712 (stating that nothing more than rational basis review is appropriate unless the case implicates a "fundamental right" that is "deeply rooted in our legal tradition"). Had this restrictive standard been in place in 1973, the Court could not have decided *Roe* the way it did. *See* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 227-28 (1987).

190. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT at xiii (1999) (arguing that some Justices think it is important to adopt "clear, bright-line rules," but that the Court as a whole tends to favor more narrow, "minimalist" decisionmaking).

191. *See supra* Part III.A.

192. Erwin Chemerinsky, *The Shrinking Docket*, TRIAL, May 1996, at 71, 71-72.

193. *See* David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 779 (1997).

194. For sophisticated discussions, see, for example, Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; O'Brien, *supra* note 193.

specifically, the Court's shrinking docket may be linked to the other two components of judicial restraint. Justices who honor the first component, the policy of judicial deference, naturally will be less inclined to review majoritarian actions, at least if those majoritarian actions have been upheld by the lower courts.[195] And the second component—a preference for rules, as opposed to standards—likewise supports the Supreme Court's downsizing, because rules can guide political decisionmakers and the lower courts without the need for continual, case-by-case oversight from the Court itself.[196]

In the context of the religion clauses, formal neutrality honors judicial restraint by limiting the Court's role not only on definitional questions, as noted above,[197] but also more generally. To be sure, formal neutrality can lead to the invalidation of governmental policies that might survive under other approaches.[198] More often, however, it calls for the approval of policies that might be invalid under competing approaches such as substantive neutrality or separationism.[199] Accordingly, formal neutrality honors the policy of judicial deference even as it emphasizes a rule of decision that is straightforward and relatively easy to apply—a rule that might limit the need for case-by-case review by the Supreme Court. Accordingly, formal neutrality supports judicial restraint in each of the three senses I have discussed: it tends to encourage deference to political decisionmakers; it offers a clearly defined, rule-based approach to questions of religious liberty; and, for these very reasons, it also supports the downsizing of the Supreme Court's docket.

Alongside the general theme of judicial restraint, there is a counter theme in the Supreme Court's recent constitutional decisionmaking. Thus, in the last decade, even as it has emphasized judicial restraint in the field of individual rights, the Court has become more activist in protecting the constitutional interests of the states. Thus, the Court has given new meaning to federalistic restraints on national power, invalidating congressional legislation on this basis to an extent not witnessed since the 1930s.[200] The Court's embrace of constitutional federalism, however, does not

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195. *See* David G. Savage, *Docket Reflects Ideological Shifts*, A.B.A. J., Dec. 1995, at 40.

196. *See* Hellman, *supra* note 194, at 430-31.

197. *See supra* Part III.B.

198. *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (invalidating Texas sales tax exemption that was granted to religious literature, but not other literature); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (ruling that University of Virginia could not exclude religious publications from program of funding for student publications and activities).

199. *See supra* Part II.B.

Focusing on the Free Exercise Clause, Professor Eugene Volokh has argued that the Supreme Court's shift toward formal neutrality is consistent with the Court's repudiation of economic substantive due process, with each development reflecting a reluctance to second-guess majoritarian decisions on questions not readily subject to judicial resolution. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1521-29 (1999).

200. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (10th Amendment); United States v. Lopez, 514 U.S. 549 (1995) (Commerce Clause); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (11th Amendment); Idaho v. Coeur D'Alene Tribe, 521 U.S. 261 (1997) (11th Amendment); City of Boerne v. Flores, 521 U.S. 507 (1997) (14th Amendment, Section 5); Printz v. United States, 521 U.S. 898 (1997) (10th Amendment); Florida Prepaid

undermine, and it in fact supports, the doctrine of formal neutrality under the religion clauses.

In deciding the constitutional claims of individual citizens, the Supreme Court defines the meaning of constitutionally protected individual rights. At the same time, however, it defines the boundary between national and state power, for to decide that the national Constitution protects an individual right is to remove the issue from state control.[201] Conversely, to reject a claim of individual right is to leave the states free to resolve the issue as they please. As a result, the Supreme Court's activist protection of states' rights is not entirely at odds with the Court's judicial restraint in the context of individual rights—at least to the extent that judicial restraint is understood in the sense of its first component, judicial deference to majoritarian decisionmaking. In protecting states' rights, the Supreme Court invalidates majoritarian decisionmaking by Congress, but it does so in order to facilitate majoritarian decisionmaking by the states. As a result, this form of judicial activism, like the Court's judicial restraint in the field of individual rights, supports the formulation of constitutional doctrine that defers to whatever policies a particular state might choose.

Formal neutrality can be used to restrict the states' authority, but, in general, it operates to give the states more leeway than does its doctrinal alternatives.[202] The Supreme Court's new emphasis on federalism, like its emphasis on judicial restraint in the field of individual rights, therefore tends to support the doctrine of formal neutrality under the religion clauses.

IV. CONCLUSION

In this Article, I have traced the American understanding of religious liberty from its theological and Christian origins to its contemporary emphasis on formal neutrality—that is, equal and nondiscriminatory treatment not only between and among religions, but also between religion and nonreligion. I also have suggested that various forces—the general appeal of formal equality, the ever-more-difficult

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Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999) (11th Amendment and 14th Amendment, Section 5); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) (11th Amendment and 14th Amendment, Section 5); Alden v. Maine, 119 S. Ct. 2240 (1999) (state sovereign immunity from federal claims asserted in state court). The Supreme Court's renewed concern for constitutional federalism has given rise to a wealth of scholarly commentary. For recent symposia containing collections of important articles, along with citations and references to other relevant literature, see Symposium, *New Frontiers of Federalism*, 13 GA. ST. U. L. REV. 923 (1997); Symposium, *National Power and State Autonomy: Calibrating the New "New Federalism"*, 32 IND. L. REV. 1 (1998).

201. This is true as long as the Constitution is construed to protect the individual right from state infringement. And most of the important individual-rights provisions of the Constitution have in fact been extended to the states, primarily through Supreme Court decisions holding that the Fourteenth Amendment limits the states not only by its own terms, but also by "incorporating" almost all of the Bill of Rights. *See generally* Duncan v. Louisiana, 391 U.S. 145, 147-50 (1968) (elaborating the Court's incorporation doctrine).

202. *See supra* Part II.B.

problem of defining religion, and the increasing importance of judicial restraint and federalism—support a continuing and perhaps expanding reliance on formal neutrality in the years ahead.

Formal neutrality has great appeal. But it also carries substantial risks for religious liberty. Under the Free Exercise Clause, the impact of formal neutrality is clearly detrimental, because it limits the protection of religiously motivated conduct.[203] Under the Establishment Clause, formal neutrality is benign in many contexts, but there are dangers here as well: the distinctiveness of religion is further put in question, and the vibrant independence of religious institutions may be threatened.

Although I believe that formal neutrality is likely to prevail in the future, this result is not inevitable. Formal neutrality is an increasingly dominant concept, but it remains a contested concept, under the Free Exercise and the Establishment Clauses alike. And the existence of competing understandings of religious liberty, understandings that require special—not equal—treatment for religion, may suggest that we have not entirely abandoned the original theology of the religion clauses. More specifically, these competing understandings may suggest that the American legal culture remains open to the argument that religion is, as the Founders believed, both distinct and distinctly important.

Needless to say, reversiug the trend toward formal neutrality will not be easy. It will require a persuasive case that religion really *is* distinct and distinctly important.[204] Otherwise, religious liberty should indeed be subsumed within more general understandings of equality and autonomy,[205] and it should not be immune from more general trends favoring judicial restraint and states' rights.

The idea that religion is distinct and distinctly important was obvious to Jesus when he answered the Pharisees. It was obvious to the Founders when they embraced the original theology of American religious liberty. It is obvious no longer. Whether it can be demonstrated afresh is a central question for the third millennium.

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203. This statement is not entirely uncontroversial. In particular, some would argue that formal neutrality in the free exercise context in fact is preferable from a religious point of view, at least as opposed to a scheme of judicially crafted religious exemptions. Such a scheme, according to these observers, can paint religion as a weak force, can undermine the truth claims of religion, and can leave believers in the position of religious supplicants to a secular judiciary. *See* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619 (1998); Robin W. Lovin, *Religious Freedom, 1997*, 114 CHRISTIAN CENTURY 716, 717 (1997); Tushnet, *supra* note 35, at 136, 138.

204. As Professor Scott C. Idleman has suggested, what is needed is "action that *teaches* society about the value and meaning of religious faith and exercise and thereby attempts to transform the culture," including especially the legal culture. Idleman, *supra* note 83, at 264-65 (emphasis in original).

205. *Cf.* Steven D. Smith, *Is a Coherent Theory of Religious Freedom Possible?*, 15 CONST. COMMENTARY 73, 81 (1998) (suggesting that if religious liberty is merely an inherited commitment, it might well be dissolved into other, more current constitutional values).