Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution

ALAN E. BROWNSTEIN*

I. INTRODUCTION

The unending conflict over the meaning of the religion clauses in the United States Constitution has much in common with the story of the three wise persons who, because they could not see, attempted to identify an elephant by touch alone. There was nothing intrinsically wrong with the idea; the problem arose because each of the individuals involved only came into contact with part of the elephant's anatomy, its trunk, leg, and tail to be precise. Not surprisingly, based on that limited information, they all reached erroneous conclusions about the animal they were attempting to understand.

The relationship between government and religion is as complex a connection as exists in constitutional law. In part this is due to the unique dual commands which the Constitution directs toward government with regard to religion, the establishment clause, and the free exercise clause. In part it is due to the multidimensional nature of religion itself as a social institution and as a facet of human experience.

Given the complexity of the subject, it is hardly surprising that the case law and commentary discussing the religion clauses is controversial and unsettled. But the analytic difficulties presented by religious issues is only part of the picture. Much of the conflict in this area is understood to be as much a clash of divergent value systems as it is a battle of interpretation between two camps, those endorsing the separation of church and state and those urging an accommodation of church and state.

This Article certainly cannot claim to be value neutral in discussing the meaning of the religion clauses. The primary problem it addresses, however, is common to moderate adherents of both camps. Neither group has been able to develop a coherent doctrinal framework which can justify a middle ground position. Lacking such a foundation separationists cannot clearly account for the numerous situations in which religion and government do accommodate each other and are permitted to do so, and accommodationists are incapable of explaining why religion must be separated from government in as many instances as it is and should be kept apart.

The classic context in which both separation and accommodation approaches fail most blatantly is the attempt to reconcile mandated exemptions from general regulations and burdens, which the free exercise clause often seems to require, with the prohibition of religious preferences apparently ordered by the establishment clause. Certainly, if the three part test of *Lemon v.*

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* Professor of Law, University of California, Davis; B.A., Antioch College 1969; J.D., Harvard 1977. The author wishes to thank Professors Carol Bruch, Michael Glennon, and Rex Perschbacher of the University of California, Davis, for reading drafts of this Article and for providing helpful criticism. I also wish to acknowledge the considerable help I received from my research assistants, Ted Cohen and Alison Green.

Kurtzman,[1] endorsed by current doctrine, is applied with any rigor, every governmental accommodation of religion will violate the establishment clause. It is, after all, difficult to even conceive of an accommodation of religion that neither has a religious motive, nor has the effect of promoting religion, and which does not involve an entanglement between church and state. It is equally clear, however, that if strict scrutiny is rigorously applied whenever governmental action seriously burdens religious beliefs or practices, religious practitioners will often receive the exact kind of preferential treatment that the *Lemon* test condemns.

While this kind of inconsistency is often aggressively pointed out by those Justices who dissent to or challenge current orthodoxy,[2] they can rarely point to a temperate way out of the trap that has snared their brethren. If one reads Justice Scalia's dissent in *Edwards v. Aguillard*,[3] the Louisiana creation science case, or Justice Burger's majority opinion in *Lynch v. Donnelly*,[4] the Pawtucket nativity scene case, it is difficult to determine when, if ever, these Justices think the government promotion of religion should be invalidated as unconstitutional. The limits on accommodation are always beyond the case at hand. Nor on the free exercise side can one rest any more easily with Justice O'Connor's apparent conclusion in *Lyng v. Northwest Indian Cemetery Protective Association*[5] that noncoercive government action which makes it more difficult, indeed which makes it impossible, to practice one's religious faith is unconstrained by the first amendment.[6]

The goal of this Article is to attack the problem of finding a middle ground at its roots by developing a doctrinal foundation for determining when the accommodation of free exercise rights ends and the prohibition of establishment clause preferences begins. In doing so, the Article will concentrate on under-

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1. 403 U.S. 602, 612-13 (1971). The *Lemon* test demands generally that state action must have a secular purpose and that "its principal or primary effect . . . be one that neither advances nor inhibits religion." *Id.* at 612. In addition the action must not foster excessive government entanglement with religion.

2. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting):

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.

Id. Wallace v. Jaffree, 472 U.S. 38, 110 (1984) (Rehnquist, J., dissenting) ("The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, . . . Even worse, the *Lemon* test has caused this court to fracture into unworkable plurality opinions, . . . depending upon how each of the three factors applies to a certain state action."); *see also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674-75 (1980); McConnell, *Accommodation of Religion*, S. CT. REV. 1, 1-2 (1985) [hereinafter *Accommodation*].

3. 482 U.S. 578, 610 (1987) (Scalia, J., dissenting).

4. 465 U.S. 668 (1984).

5. 485 U.S. 439 (1988).

6. In *Ling* the Court stated:

> Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. . . . Even if we assume that . . . the G-O road will "virtually destroy the Indians' ability to practice their religion," . . . the Constitution simply does not provide a principle that could justify upholding respondents' legal claims.

Id. at 451-52.

standing the religion clauses in terms of other constitutional interests which are relevant to, but are typically subsumed by, establishment clause and free exercise clause analysis. That is, the focus of this Article will be on how the interpretation of the religion clauses can be rendered more intelligible by analogizing their meaning to the equal protection doctrine and to the protection afforded the fundamental rights of autonomy and expression.

There are important substantive reasons for examining the religion clauses from the perspective of related constitutional doctrines. First, the problem is unavoidable. The relationship between religion and the state intrinsically involves autonomy, expression, and antidiscrimination concerns. That is why, courts have already on occasion reviewed state action relating to religious conduct under the authority of equal protection and first amendment principles.[7] This resort to auxiliary constitutional doctrine has not happened more often in part because the restraints imposed on government action by the free exercise clause and the establishment clause today are in many ways as, or more, extensive than those required by free speech and equal protection cases.[8] The overriding constitutional umbrella of religion clause limits on government, however, may be wearing thin if the current court retreats substantially from the strongly separationist case law of the last forty years. In that event, the question arises, for example, whether the equal protection clause by itself could be used to strike down preferences provided to certain religions, but not others, which might otherwise be held to be constitutional under new and less restrictive establishment clause doctrines.

Secondly, relating the meaning of the religion clauses to other constitutional rights and interests emphasizes a point which is too often overlooked by the recurrent historical debate over the original intent of the drafters and ratifiers of the first amendment.[9] The interpretation of particular constitutional

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7. In Cruz v. Beto, 405 U.S. 319 (1972), for example, the Court prohibited a state prison from discriminating against the Buddhist religion by denying the petitioner "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." *Id.* at 322. Even more directly, in Widmar v. Vincent, 454 U.S. 263 (1981), the Court held that the freedom of speech requirements of the first amendment prevented a state university from denying access to a group of evangelical Christian students who sought to use college facilities that were generally available to student organizations. *Id.* at 277.

8. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (striking mandated teaching of creation science in public schools for purpose of encouraging certain religions); Larson v. Valente, 456 U.S. 228 (1982) (invalidating state scheme involving denominational preferences in defining religious tax exemptions); Thomas v. Review Bd. of the Indiana Employment Security Div., 450 U.S. 707 (1981) (invalidating denial of unemployment compensation when petitioner quit work for religious reasons); Stone v. Graham, 449 U.S. 39 (1980) (striking display of Ten Commandments in public school classroom); Sherbert v. Verner, 374 U.S. 398 (1963) (invalidating requirement that Sabbatarian be available to work on Saturday in order to receive unemployment compensation); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating daily recitation of nondenominational Regent's prayer). *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1128 (1969) ("Other interests, such as those protected by the First Amendment, would call forth this same strict scrutiny in the equal protection contexts, but courts commonly use other provisions of the Constitution to safeguard them.").

9. *See generally* Wallace v. Jaffree, 472 U.S. 38, 91-114 (1984) (Rehnquist, J., dissenting); R. CORD, SEPARATION OF CHURCH & STATE 2-15 (1982); T. CURRY,. THE FIRST FREEDOMS (1986); M. MALBIN, RELIGION & POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986) [hereinafter *Origins of the Religion Clauses*]; Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986) [hereinafter *Nonpreferential Aid*].

provisions, like the religion clauses, must adapt to changes that occur elsewhere in the constitutional matrix. At a minimum, collateral changes raise important questions of interpretation.[10]

For example, should the establishment clause mean the same thing in a constitution with an equal protection clause as it does in a constitution without one?[11] Does the increasing number of suspect and quasi-suspect classes which the Court has identified to date affect the equality rights that must be provided to religious minorities. Because laws burdening illegitimate children receive heightened scrutiny,[12] how should laws burdening Mormon children be reviewed? If current constitutional doctrine identifies a range of fundamental rights of autonomy and privacy,[13] and conscience,[14] what are the implications of those decisions for the interpretation of the free exercise clause?

Even structural changes raise profound issues. Should the meaning of the religion clauses remain constant while the Constitution evolves from a system of limited enumerated national powers to one of open ended national authority?[15] If the Constitution is transformed from a system in which only the federal government is bound by the Bill of Rights to one in which the Bill of Rights is incorporated into the fourteenth amendment and made applicable to the states, does that require corresponding modifications in religion clause doctrine?[16] In brief, even if history and textual language are given their due, one must still ask what the religion clauses should mean today in light of contemporary interpretations of the rest of the Constitution.

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10. Thus, Justice Kennedy's argument in Allegheny County v. ACLU, 109 S. Ct. 3086, 3142 (1989) (Kennedy, J., concurring in part and dissenting in part) is plainly inadequate when he suggests:

> Whatever test we choose to apply [to the establishment clause] must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion. . . . A test for implementing the protection of the Establishment Clause that, if applied with consistency, would invalidate longstanding tradition cannot be a proper reading of the clause.

Id. Kennedy simply assumes without discussion that none of the changes in the Constitution's text or interpretation during the last 200 years should influence the Court's understanding of the establishment clause.

11. Consider Joseph Story's famous statement that "[t]he real object of [first] amendment was, not to countenance, much less advance Mohammedanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of national government." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 701, 728 (1833). This explanation surely cannot be reconciled with current equal protection principles.

12. *See, e.g.*, Pickett v. Brown, 462 U.S. 1, 8 (1983); Lalli v. Lalli, 439 U.S. 259, 265 (1978); Trimble v. Gordon, 430 U.S. 762, 767 (1977); Mathews v. Lucas, 427 U.S. 495, 506 (1976).

13. Recognized privacy and autonomy rights include the right to obtain an abortion, Roe v. Wade, 410 U.S. 113, 153 (1973); to use contraceptives, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1971), Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); to marry, Loving v. Virginia, 388 U.S. 1, 12 (1967); to procreate, Skinner v. Oklahoma *ex rel* Williamson, 316 U.S. 535, 541-42 (1942); and to control the education of one's children, Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925).

14. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (state cannot coerce financial contributions to union political activities); Wooley v. Maynard, 430 U.S. 705, 713 (1977) (requirement that motorists display state motto on license plate is unconstitutional); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating government compelled affirmation of allegiance to the flag).

15. *See* Wickard v. Filburn, 317 U.S. 111, 121-25 (1942); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424-25 (1987). *See generally* P. BENSON, THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970, at 73-108 (1970).

16. *See* Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968).

Finally, a rigorous analysis of the religion clauses that is tied to current fundamental rights and equal protection doctrine will help to demonstrate the often contradictory constitutional principles inherent in establishment and free exercise clause requirements. Religion may be thought of as a form of expression, or it may be conceptualized as a liberty or autonomy interest, or religious groups may be described in equal protection terms. All of these analogies are accurate to some extent, but, more importantly, each of them must be taken into account in understanding the religion clauses. That is why explanatory models based on the separation of church and state,[17] or the accommodation of religion,[18] or the promotion of religious liberty,[19] or government neutrality toward religion[20] are indefensible if viewed as unitary principles.

In reality there is no such unifying doctrine. The Constitution as it is currently understood protects numerous diverse interests in both religious and nonreligious contexts. In doing so, it inevitably creates conflicts when one protected interest clashes with another. Unlike more obvious constitutional clashes such as that between the freedom of association and equal protection rights, however, the religion clauses internalize these tensions by focusing so directly on the same subject. The key to understanding the religion clauses is to recognize this tension and accept the fact that the establishment and free exercise clauses represent one additional battlefield in the war between liberty and equality interests which is fought throughout the Constitution.[21]

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17. *See generally* McGowan v. Maryland, 366 U.S. 420, 430 (1961); Everson v. Board of Educ., 330 U.S. 1, 26-27 (1947) (Jackson, J., dissenting); L. LEVY, THE ESTABLISMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); Laycock, *Nonpreferential Aid, supra* note 9.

18. *See generally* McConnell, *Accommodation, supra* note 2; McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146 (1986) [hereinafter *Neutrality*].

19. *See generally* T. CURRY, *supra* note 9; W. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN PUBLIC (1986); Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779 (1986) [hereinafter *Free Exercise*]; Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 80 HARV. L. REV 1381 (1961); Merel, *The Protection of the Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986) [hereinafter *Religion*].

20. *See generally* W. KATZ, RELIGION AND AMERICAN CONSTITUTION (1963); P. KURLAND, RELIGION AND THE LAW (1962); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961) [hereinafter *Of Church and State*]; Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986) [hereinafter *Equal Access*].

21. The implications of this argument cannot be avoided by emphasizing the difficulty of determining what it means to be neutral with regard to religion in particular contexts. The problem is not difficulty, but constitutional impossibility. The government cannot act neutrally with regard to religion because the Constitution insists that it does not.

The most striking characteristic of religion in constitutional terms is that it is singled out for special consideration. One need not be a committed textualist to recognize that the inclusion of this term, and the two clauses referring to it, in the first amendment demonstrates that religion is an independent and unique factor in our political-legal system. The clear implication of the first amendment is that whatever constitutes religion must be treated differently than other important interests which do not receive as explicit constitutional attention or protection.

It is because religion is so clearly given a separate constitutional status that the commonly asserted principle that the religion clauses require neutrality on the part of government seems so anomalous. *See* W. KATZ, *supra* note 20. Even if it was accepted that the establishment clause prohibits government promotion of religion and the free exercise clause prohibits government burdening of religion, the sum of these two commands does not result in a policy of neutrality. By virtue of the free exercise clause, religious belief systems have a different constitutional

The work of this Article is to map out that battlefield. Parts II through IV analyze the religion clauses from the perspectives of fundamental autonomy rights, the equal protection clause, and freedom of speech. They conclude that the free exercise clause should primarily be understood to be an autonomy right, while the establishment clause should be strongly rooted in equal protection doctrine.[22] Part V examines current establishment clause and free exercise clause doctrine to determine how it should be modified if the religion clauses are understood primarily in autonomy right and equal protection terms. Finally, Part VI demonstrates how the results of several United States Supreme Court cases would be changed or better rationalized under the analytic model proposed.

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status than do nonreligious belief systems. The Constitution is not neutral in this respect just as it is not neutral with regard to any other fundamental right in relation to its complement. Speech and conduct are not treated neutrally. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficient important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). Nor are property and nonproperty interests treated neutrally, *see, e.g.*, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972) (the requirements of procedural due process apply only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property); United States v. Willow River Power Co., 324 U.S. 499, 502-03 (1945) ("[N]ot all economic rights are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.").

More concretely, almost every free exercise case decided by the Supreme Court reiterates the nonneutral treatment of religious beliefs and practices. It is permissible for people to lose unemployment benefits if they refuse to work so that they may study nature under the auspices of the Audubon Society, but not if work conflicts with their Sabbath worship. *See* Sherbert v. Verner, 374 U.S. 398, 407-09 (1963). The local hippie commune must obey the same compulsory school attendance laws with which the Amish need not constitutionally comply. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (a "way of life, however virtuous and admirable, may not be imposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the religion clauses, the claims must be rooted in religious belief.").

The establishment clause is equally discriminatory in its mandate. George Washington's picture can hang in a public school, but not that of Jesus Christ or Mohammed. *See* Stone v. Graham, 449 U.S. 39, 41-43 (1980) (school display of Ten Commandments on classroom wall is unconstitutional). The Pledge of Allegiance, but not the Lord's Prayer, may start each day of instruction. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963) (daily recital of the Lord's Prayer and Scripture readings in public schools unconstitutional establishment of religion); Engel v. Vitale, 370 U.S. 421, 430 (1962) (daily recitation of "non-denominational" Regent's Prayer is unconstitutional establishment of religion). *See also* Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 567 (1980) ("*Barnette* does not question the propriety of public officials using the state's resources to implement a flag salute ceremony—even one designed to foster allegiance to the state."). Indeed, the government may promote specific viewpoints and recommendations on an endless list of health, moral, political, and civic subjects except that of religion. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977) ("The State is seeking to communicate to others an official view as to proper appreciation of history, state pride and individualism. Of course the State may legitimately pursue such interests in any number of ways."); M. YUDOF, WHEN GOVERNMENT SPEAKS 17 (1980) ("No clause in the Constitution prohibits Congress from . . . promulgating secular 'truths.' "). In what sense then can it be plausibly argued that a constitutional principle of neutrality between the religious and the secular controls government action?

The religion clauses, far from mandating a rule of neutrality, do the exact opposite. They primarily command a clear discrimination and choice between religion or secular belief systems depending on the situation. This is not always the case. There are some circumstances where a neutrality principle might apply. *See infra* notes 145-52 and accompanying text. The great majority of contexts, however, involve explicitly distinctive treatment of religious and nonreligious activities. The Gordian Knot to be untangled is determining when one attitude or another of government toward religion is appropriate. Answering that question can be immeasurably assisted by analogizing aspects of the religion clauses to other constitutional interests.

22. Analogies between religion and speech are of occasional utility but play a subordinate role in the protection of religious rights and groups. *See infra* notes 128-59 and accompanying text.

II. RELIGION AS A FUNDAMENTAL RIGHT

The free exercise clause identifies the decision to engage in religious worship as a fundamental liberty right.[23] There are many such rights in contemporary constitutional analysis. These include the right to vote, to express oneself, to travel, to marry and raise a family, to elect to terminate a pregnancy, to associate for intimate or expressive purposes, to be heard before a grievous loss is inflicted, and others.[24] Analytically, these rights can be categorized as either instrumental to some other constitutionally valued goal, or as intrinsically valuable themselves as an aspect of human dignity, or as some combination of the two.[25]

On this conceptual continuum the free exercise of religion is essentially a dignitary right. It is part of that basic autonomy of identity and self-creation which we preserve from state manipulation, not because of its utility to social organization, but because of its importance to the human condition.[26] Along with sexual autonomy, intimate association, and the dignitary aspects of speech, property, and procedural due process, this is a right of self-determination and fulfillment, not social order and policy.

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23. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in that [14th] Amendment embraces the liberties guaranteed by the First Amendment. . . . It safeguards the free exercise of the chosen form of religion.").

24. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 488 (1980) (due process before infliction of grievous loss); Roe v. Wade, 410 U.S. 113, 153 (1973) (abortion); Cohen v. California, 403 U.S. 15, 24-25 (1971) (expression); Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (travel); Reynolds v. Sims, 377 U.S. 533, 554 (1964) (voting); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (marriage and family).

25. The right to vote is instrumental to the operation of a democratic political system. Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). The right to marry and have children on the other hand is essentially a dignitary interest. Thornburgh v. American College of Obstets. & Gyns., 476 U.S. 747, 772 (1986) ("Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy."). *See generally* Zablocki v. Redhail, 434 U.S. 374, 383-85 (1978) (outlining cases protecting marriage, procreation, child-rearing, and childbirth as fundamental rights and as demonstrative of the scope and importance of the right to marry). Freedom of expression and association serve a political, instrumental function, but they also reaffirm our understanding of what it means to be a complete person with some inherent role in the determination of one's own identity. *See* M. NIMMER, ON FREEDOM OF SPEECH § 1.02, § 1.03 (1984) (describing the self-governing and self-fulfillment functions of the first amendment); Cohen v. California, 403 U.S. 15, 24 (1971):

> The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, . . . in the hope that use of such freedom will ultimately produce a more capable citizenry and a more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . ."); Garvey, *Free Exercise, supra* note 19, at 788; *cf.* Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) ("Protecting [highly personal relationships] from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.").

26. "Rights of free exercise are quintessentially rights of autonomy. The rights of religious liberty embraced by the clause protects interests in making and maintaining spiritual commitments, and in living in accord with one's deepest presuppositions about humankind and nature." Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U.L. REV. 391, 422 (1987) [hereinafter *Employment Discrimination*].

Of course, religion and religious institutions play a much broader role in American culture and politics than the purely personal one just described. Religion contributes immensely to the moral tone of political debate and operates as an important political power base in society.[27] These aspects of religion, however, lack any special constitutional significance. A Catholic or a Jew may oppose abortion for religious reasons and an agnostic may oppose abortion for purely ethical reasons. Neither view is instrumentally of more value to our political system than the other. Indeed, it would be intolerable to our constitutional value system to insist that the religious message is somehow more meritorious or deserving of attention or respect.[28] Nor is the free exercise clause needed to protect the right of religious groups that argue for the criminalization of abortion. Freedom of expression is a fully sufficient prescription to insure that all antiabortion messages may be communicated to the polity.[29] The free exercise clause serves other functions. It enables people to define themselves in critical ways rather than have the state determine these essential aspects of a person's identity and sense of self.[30]

Under current case law, fundamental rights of this kind have several common features. Most critically, they involve interests which the state may not punish or penalize, but as to which the state need not remain neutral.[31] Accord-

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27. *See* R. JOHNSTONE, RELIGION AND SOCIETY IN INTERACTION 195-97 (1975).

28. *See* Douglas v. City of Jeannette, 319 U.S. 157, 179-81 (1943) (Jackson, J., concurring in part, dissenting in part) (arguing that religious proselytizing should not be given greater constitutional protection than is given other types of speech by virtue of its religious nature).

29. Most public religious speech is already subsumed and protected as freedom of expression. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 509 (1946) (citizens of company town entitled to same constitutional protection of right to distribute religious literature as general public); Cantwell v. Connecticut, 310 U.S. 296, 310-11 (1940) (reversing conviction for distributing religious materials as violation of freedom of speech). For an argument that the free exercise clause should be completely subsumed by freedom of expression principles see Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

30. Religion serves a self-identification function in two important respects; in terms of the individual's personal quest for meaning, comfort in adversity and ethical standards to live by, and in terms of one's relationship to other persons and groups. With regard to the individual aspect of religious identity see generally E. NOTTINGHAM, RELIGION: A SOCIOLOGICAL VIEW 76-114 (1971) (describing how religion assists believers to adjust to the uncertainties and strains of life as well as "providing an explanation with which human beings interpret their personal distresses and successes." *Id.* at 109); A. GREELEY, THE DENOMINATIONAL SOCIETY 50-62 (1972) [hereinafter DENOMINATIONAL SOCIETY] (describing the work of social theorist Talcott Parsons and his followers, who viewed religion as "a source of personal meaning for the individual agent of social action rather than as a social community in which man may enjoy intimate relationships with his fellow believers." *Id.* at 51). For discussions of the identity providing role of religion in defining the social group to which an individual belongs, see generally Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 306-11 (1986) [hereinafter *Paths to Belonging*] (describing how belonging to cultural groups, including religious groups, helps to determine one's sense of self and identity); A. GREELEY, DENOMINATIONAL SOCIETY, *supra*, at 231 (summarizing thesis of his book that religious denominations in America are "superethnic groups providing means of identification and location within the larger American social structure"); R. JOHNSTONE, *supra* note 27, at 267 (describing how religious affiliation becomes "a means people use to define their identity—'who they are and where they stand in a large and complex society.' ").

These multiple functions of religion are the factual predicates for the complex standards under which religion receives constitutional recognition. Since religion has both important individual and group connotations, it invokes issues of both personal autonomy and group treatment. *See infra* notes 270-76 and accompanying text.

31. *See* Harris v. McRae, 448 U.S. 297, 315 (1980) (federal law restricting funding of therapeutic abortions is constitutional since it "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization . . . encourages alternate activity deemed in the public interest."); Maher v. Roe, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity."). *See also* Regan v.

ingly, a state may subsidize childbirth, but not abortions, without abridging the right to terminate a pregnancy.[32] It may encourage tourism and immigration, without impinging the right to travel, as long as it does not discourage new arrivals.[33] It may pay workers double time to work on Sundays without violating the free exercise clause.

A corollary observation is that there is no essential equality dimension to dignitary interests of this kind. One need not demonstrate disparate treatment between those who exercise the right and those who do not to successfully claim that the right is abridged. These rights may be violated by facially neutral laws enacted for noninvidious reasons.[34] This is particularly true for free exercise cases, many of which involve laws of general applicability of concededly innocent origin.[35]

Disparate treatment and invidious intent are not irrelevant to the evaluation of laws alleged to violate the free exercise clause. These concerns clearly influence judicial decisions to invalidate such laws,[36] but they do so in a secondary sense. A law prohibiting the use of a building in a particular community for Islamic religious worship, but permitting the use of comparable buildings for

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Taxation with Representation, 461 U.S. 540, 549-50 (1983) (paraphrasing above quote from *Harris* in upholding power of Congress to subsidize lobbying efforts of veterans groups but not other tax exempt organizations).

32. *Harris*, 448 U.S. at 315; *Maher*, 432 U.S. at 474, 479.

33. *Maher*, 432 U.S. at 474 n.8 (right to travel cases "did not hold that states would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers"); *see also* Appleton, *Beyond the Limits of Reproductive Choice: Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 736-37 (1981). *Compare* Shapiro v. Thompson, 394 U.S. 618, 631-33 (1969) (one year residency requirement for welfare is unconstitutional penalty on right to travel) *with* Zobel v. Williams, 457 U.S. 55, 61-63 (1982) (state had legitimate state interest in encouraging immigration to Alaska, but program providing cash grants to residents dependent on length of residence in Alaska is not rationally related to that objective).

34. *See, e.g.*, Baird v. Department of Pub. Health, 599 F.2d 1098, 1102 (1st Cir. 1979) (disallowing application of neutral state licensing requirements if application would be unconstitutionally burdensome on the ability to exercise right to an abortion); Indiana Hosp. Licensing Council v. Women's Pavilion, 420 N.E.2d 1301, 1315 (Ind. Ct. App. 1981) (rejecting equal protection claim against abortion-neutral regulations but holding that overly burdensome licensing requirements could not be applied to abortion clinics absent showing of compelling interest on due process grounds); *see also* Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 17-18 (1988).

35. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987) (neutral job termination qualifications for unemployment compensation); Thomas v. Review Bd., 450 U.S. 707 (1981) (invalidating denial of unemployment compensation when petitioner quit for religious reasons); Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory education requirement); United States v. Seeger, 380 U.S. 163 (1965) (draft registration); Sherbert v. Verner, 374 U.S. 398 (1963) (invalidating denial of unemployment compensation when petitioner refused to accept employment requiring work on the Sabbath); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (flag salute); Forest Hills Early Learning Center v. Grace Baptist Church, 846 F.2d 260 (4th Cir. 1988) (state exemption to general licensing requirements for church-run child care centers). *But see* Bowen v. Roy, 476 U.S. 693, 707-08 (1986):

> In the enforcement of facially neutral and uniformly applicable requirement for the administration of welfare programs reaching millions of people, the Government is entitled to wide latitude . . . . Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application is a reasonable means of promoting a legitimate public interest.

Id.

36. *See, e.g.*, *Sherbert*, 374 U.S. at 406 (since the challenged statute expressly saved those observing Sunday as their Sabbath from making a choice between accepting official work or obeying their religious obligations, unconstitutionality of law was compounded by religious discrimination of failing to provide comparable exemption to Sabbatarian).

other social purposes is much more likely to be held unconstitutional than is a law preventing all nonresidential uses of land in the same community.[37] This is because the disparate treatment of the Islamic house of worship helps the court interpret the city's action as imposing a burden or penalty on religious practice. It undermines the court's confidence in any ostensibly legitimate rationale the city might assert to justify its action, and it identifies the city's decision as one in which the political process should be mistrusted.[38] Nonetheless, if the petitioners' complaint is that the city is violating the free exercise clause, the thrust of their argument must be that the city's action makes it more difficult for them to exercise their religious beliefs.[39]

The lack of an equality dimension to the free exercise clause is particularly important because of the pluralistic nature of religion in American society. In a heterogeneous environment, categorizing and protecting religious beliefs and practices as autonomy rights must inevitably result in the different treatment of various faiths. Some religious belief systems may simply have more tenets than others. Therefore, preserving the autonomy of persons holding these religious beliefs will require more immunities from regulation than need be provided to other faiths. If immunity from conscription on religious grounds is constitutionally mandated, for example, a strict adherence to free exercise principles may result in a greater percentage of Catholics than Quakers going to war.[40] The religion of each might be equally respected under some generic formula or standard of review, but that does not translate into an equal allocation of society's burden and benefits for each religion's adherents. Moreover, it will not even be possible to protect the important duties and obligations of each religion. Some religious obligations will be outweighed by compelling state interests while others may remain inviolate. This may depend on the nature of the religious

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37. Islamic Center of Miss. v. Starkville, 840 F.2d 293 (5th Cir. 1988).

38. *See id.* at 302 ("The City's approval of applications for zoning exceptions by other churches suggests that it did not treat all applicants alike. This undermines the City's contention that the Board denied a zoning exception to the Muslims solely for the purposes of traffic control and public safety."); State *ex rel.* Lake Drive Baptist Church v. Village of Bayside Bd. of Trustees, 108 N.W.2d 288, 297, 12 Wis. 2d 585, 602 (1961):

> [T]he courts must be sensitive to any claim that an undue burden is put on freedom of worship. This is true both because of the importance of this freedom, and because of the real possibility that an overgenerous reliance upon the presumption of validity may cloak discriminatory action against a religious group which is too small a minority in the community to have an effective voice.

Brownstein, *supra* note 34, at 14-16.

39. Obviously under this analysis free exercise decisions will often incidentally further the equality interests of religious groups. The invalidation of a law prohibiting attendance at mosques but allowing worship at synagogues and churches would promote religious equality among Moslems, Jews, and Christians. The point is simply that unequal treatment among religious groups is not a necessary predicate to a free exercise claim. Nor is equal treatment an intrinsic limit on the scope of religious autonomy rights. *See infra* notes 327-36 and accompanying text.

40. As pacifists, Quakers object to participation in or support of any war. This blanket prohibition increases their ability to obtain conscientious objector status. Catholics, on the other hand, oppose only wars they deem "unjust." Thus, even if courts did not generally balk at granting conscientious objector status to "selective" objectors, Quakers would avoid conscription in all wars while Catholics would have to participate in conflicts their religion recognized as "just." *See generally* United States v. Gillette, 401 U.S. 437 (1970). For further discussion on the differentiations in belief and treatment of absolute and selective objectors see R. REGAN, PRIVATE CONSCIENCE AND PUBLIC LAW: THE AMERICAN EXPERIENCE 21-44 (1972).

practice, as in the Mormon polygamy cases,[41] but it may also result from the size of the religion's membership. It may plausibly be argued that society can afford to allow Quakers to avoid conscription on religious grounds because there are so few of them, while similar immunity to Catholics for a conflict the Church condemned as unjust would seriously undermine the war effort.[42]

Another important characteristic of dignitary and autonomy rights is that they vary in strength along a private-public continuum. This facet of autonomy rights is as crucial as it is subtle and elusive. Autonomy rights receive their maximum respect when they are exercised "privately." In part this is locational. Acts of sexual intimacy, for example, are protected from state interference in the bedroom, but not in a public park.[43] Most people would agree that this limitation on the right of sexual autonomy is legitimate. It is much more difficult, however, to explain why protecting public sensibilities against offense or annoyance is a sufficient basis for limiting the exercise of this autonomy right, but not others. Justice Blackmun focused on this issue in his dissent in *Bowers v. Hardwick*[44] when he wrote:

> Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others.[45]

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41. *See, e.g.*, Cleveland v. United States, 329 U.S. 14, 20 (1946) (upholding polygamy convictions under the Mann act); Davis v. Beason, 133 U.S. 333, 348 (1890) (allowing discriminatory regulation against bigamists); Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (upholding conviction for polygamy).

A more contemporary example involves the claims of members of the Ethiopian Zion Coptic Church to a free exercise exemption from federal drug control laws prohibiting them from engaging in the sacramental use of smoking marijuana. The D.C. Circuit, in rejecting the church's petition, noted that Congress did exempt the use of peyote by the Native American Church from the prohibitions of the Controlled Substances Act. However, because the availability and abuse of marijuana in the United States was much more pervasive than that of peyote, and therefore raised a more serious drug control problem, the Constitution did not require the government to provide equivalent immunity to use illegal drugs to both churches. *See* Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (D.C. Cir. 1989).

42. Since Catholics constitute a large percentage of the population, it is difficult to imagine a successful war effort that did not draw on their resources. Conversely, there are fewer than 100,000 Quakers in the United States. *See* L. ROSTEN, RELIGIONS OF AMERICA 437-41 (1975). Of course Catholics as a group have much greater political power, and therefore, a greater voice in national decision making than the small and more discrete Quakers. If Catholics universally deemed a war unjust and opposed it, it is highly unlikely that the United States would reach the decision to engage in such a war in the first place.

43. The Court quotes Professor Bickel at length in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), to make this point.

> "A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discrete, if you will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies."

Id. at 59. *See also* Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970) ("the right to appear *au naturel* at home is relinquished when one sets foot on a public sidewalk"). *But see* Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986) (upholding Georgia statute criminalizing consensual sodomy even in the privacy of one's own home).

44. 478 U.S. 186 (1986).

45. *Id.* at 212-13 (Blackmun, J., dissenting).

Blackmun's argument is more conclusory than explanatory, however, and does not make fully clear its underlying assumptions. In part, there is the recognition that exposure to sexual activity in public disturbs the sensibilities of the unwilling viewer in a particularly immediate and emotional way.[46] Core feelings are affected that go beyond mere disagreements as to what is or is not aesthetically pleasing. At this level of sensitivity coexistence between the unwilling viewer and the sexual actor cannot be commanded. If the right of sexual autonomy is extended to the public arena, part of public life is effectively closed off to others. The goal of an open and accessible public life available to all persons trumps the right to exercise one's sexual autonomy wherever one pleases.

The Court's willingness to protect the sensibilities of uncomfortable viewers with regard to sexual matters cannot be explained completely by the exceptionally vulnerable feelings of the public to this kind of affront. The emotional reaction of the majority alone is not a generally permissible cap on the exercise of constitutional rights. Equally, if not more, important is the understanding that the core right of sexual autonomy, which society through the Constitution is willing to protect, is an inward looking, personal interest that can be exercised meaningfully in private. The desire to expose the exercise of this right in public is at best a fringe concern, unconnected to the right's central significance.[47]

Obviously any analogy between the autonomy right to worship as one sees fit and the right of personal autonomy in marriage, procreation, and sexual relationships must be limited in scope. Public religious worship cannot be equated in any meaningful sense with public sexuality. The latter is held to be much more intrinsically private and intimate than the former.

The nature of these two fundamental rights do correspond to each other, however, in certain respects. The core of the right to worship *is* personal and inner-directed. Its social dimension is predicated on voluntary and consensual participation in a collective undertaking.[48] True, the scope of a person's religious beliefs may exceed that narrow definition. Religious obligations may also involve public action and unconsenting third parties in a variety of respects.[49] It is this very breadth of religious beliefs and duties, however, that requires the free exercise clause to be understood in terms of a limited, private, and personal right of religious conscience. At some point one individual's claim to religious

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46. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 953-54 (2d ed. 1988).

47. *See generally* Chapin v. Town of Southampton, 457 F. Supp. 1170, 1174 (E.D.N.Y. 1978) (nude sunbathing on public beach entitled to some constitutional protection but does not constitute core fundamental right).

48. *See generally* Note, *The Collusion of Religious Exercise and Governmental Non-Discrimination Polices*, 41 STAN. L. REV. 1201, 1219-20 (1989).

49. Religious street teaching and proselytizing invariably require a listening third party, albeit an unwilling one at times. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 651 (1981); Cantwell v. Connecticut, 310 U.S. 296, 308-09 (1940). Special zoning in residential areas to accommodate religious worship requires tolerance by nearby property owners of noise, crowd, and traffic problems that accompany religious services. *See* Grosz v. City of Miami Beach, 721 F.2d 729, 738 (11th Cir. 1983); Lakewood, Ohio Congregation of Jehovah's Witnesses v. Lakewood, 699 F.2d 303, 308 (6th Cir. 1983). Political action which dramatically affects others may, of course, be religiously motivated. The Civil Rights Movement of the 1960s, for example, which changed the lives of many Americans was founded on Martin Luther King, Jr.'s, vision of social justice constructed around his Christian beliefs. *See* A. ASSENSOH, REVEREND DR. MARTIN LUTHER KING, JUNIOR AND AMERICA'S QUEST FOR RACIAL INTEGRATION 36 (1987); *see generally* D. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN LEADERSHIP CONFERENCE (1986).

autonomy will necessarily conflict with that of a person of another faith.[50] When that inevitable tension arises it would be intolerable for inconsistent religious values or secular sensibilities to trump the free exercise of religion in private areas as easily as they may and sometimes must do in public. It would be equally intolerable (and impractical) however, to argue that free exercise rights outweigh secular values and sensibilities (or those of alternative religions) in public as strongly as they do in private. In a pluralistic society free exercise values must have less force in public life than they do in the context of private worship.[51]

A parallel limit on the nature of autonomy rights can be seen in recent court decisions relating to associational freedom. Ostensibly private arrangements involving those with whom one socializes, for example, can become institutionalized in a way that extends beyond the social sphere into political and economic life. Private clubs with self-selected members can serve as formidable barriers to increasing the economic and political power of disadvantaged groups by depriving them of access to the interaction networks in which many business and political decisions occur. Accordingly, the right to associate in exclusive large clubs is more limited than is associational autonomy in more intimate contexts such as the home and family.[52]

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50. For example, if one person's religious faith requires absolute silence on the Sabbath and another's requires loud and boisterous celebrations on the same day, the resulting conflict cannot be resolved by resort to the free exercise clause alone. Similarly, if one's religious faith holds that it is sinful to look at idols or to listen to proselytizing messages of other faiths and another religion requires the public display of idols and aggressive proselytizing, a comparable set of religious cross purposes arise. The point is not simply an academic one. In some parts of the world this type of conflict may lead to tragic consequences. *See, e.g.*, C. MANSHARDT, THE HINDU-MUSLIM PROBLEM IN INDIA, 44-45 (1936) (describing civil disturbances which arise when Hindu religious rites involving the playing of music occur in the vicinity of mosques in which the use of music in worship is strictly enjoined); Los Angeles Times, Aug. 3, 1989, at 2, col. 1 (disturbance requiring police intervention occurred when Israeli women prayed at public religious shrine in violation of ultra-orthodox religious tenets prohibiting the hearing of women's voices during prayer).

There are equitable value systems that can be implemented to resolve these situations, but to utilize them, one must first recognize that in public life, free exercise values have less constitutional force than they do in the context of private worship.

51. *See* Cantwell v. Connecticut, 310 U.S. 296, 304 (1939):

> No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views . . . . It is equally clear that a state may by general and nondiscriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order, and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

52. *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984). The *Roberts* Court recognized a continuum of associational freedom. Maximum protection is provided for intimate familial association and little or no protection for large business enterprises. *Id.* at 618-20. While the court declined to delineate a formula to determine the protection due groups on any particular place on the continuum, it did specify "factors that may be relevant includ[ing] size, purpose, policies, selectivity, congeniality, and other characteristics . . . that may be pertinent." *Id.* at 620.

Similarly, the government may not regulate familial living arrangements through a zoning ordinance which precludes members of an extended family from lawfully living in the same household, since the family unit is a small, highly selective, and intimate association. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 520-21 (1977) (invalidating ordinance defining family unit so narrowly as to preclude a grandmother, son and two grandsons from occupying same household). Yet it may demand that an all-male public service club admit women as members because of its large size, minimal entrance qualifications, and the highly public nature of its activities. *See* Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547 (1987). *But see* Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974) (upholding ordinance restricting land use to one family dwelling and defining family as one or more persons related by blood, adoption, or marriage or not more than two unmarried persons).

Again, this is *not* to suggest that the force of the free exercise clause evaporates as soon as a religious person exits from his home or house of worship. Religious rights exist in public life as well. There is a continuum of protection here, however, as there is with other dignitary and autonomy rights. The pole of that continuum at which constitutional protection is at its maximum is in the private sphere of life, that of the individual, the family, and consenting co-religionists.[53]

A final component of the private-public nature of religious autonomy rights pertains to the individual and the state. Autonomy rights are private sector interests. The Constitution does not require the state to transfer revenue from third parties or the public to support the autonomy choices of others. There is no more a constitutional right to have a governmental entity support one's religious practices than there is a constitutional right to have the state facilitate or support one's procreational goals or artistic endeavors.

Acknowledging that the free exercise clause parallels all other autonomy and dignitary rights by varying the protection it provides along a complex private-public axis has important implications for reconciling free exercise and establishment clause requirements. It provides a substantive foundation for determining when free exercise concerns may be outweighed by competing constitutional interests. This is only one variable in the equation, however. Its utility, as will be seen, depends on how the establishment clause is interpreted.

III. Religion as an Equal Protection Interest: The Prima Facie Case for the Equal Protection of Religious Minorities

Identifying the establishment clause with the equal protection clause has produced protests by Michael McConnell among others that this is "doctrinal imperialism" by which "the 'equal protection mode of analysis has come to dominate the interpretation of many other clauses of the Constitution.' "[54] In one sense, this is a curious argument in that in literal terms the reverse phenomenon has actually occurred. The *Lemon* test of the establishment clause is applied to most instances of allegedly disparate treatment of religious groups,[55] while there is very little constitutional case law directly applying the equal pro-

53. This conclusion is a limited one in several important respects. First, it is directed at autonomy rights. Rights which are more instrumental in nature must be evaluated differently. Political expression, for example, receives as much if not more protection in public as it does in private. The function of the right would be ill-served if that was not the case. Secondly, it applies with added emphasis to behavior in general as opposed to beliefs and expression. Thus, for example, religious requirements that groups be segregated along racial or gender lines, will be protected in private far more readily than they would be in more public contexts. The relationship between religion and speech is discussed *infra* in part IV of the text.

54. *See, e.g.*, McConnell, *Neutrality*, *supra* note 18, at 146.

55. *See, e.g.*, Corporation of the Presiding Bishop of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987) (upholding exemption for religious groups from Title VII antidiscrimination employment laws); Lynch v. Donnelly, 465 U.S. 668, 685 (1984) (upholding constitutionality of Christmas crèche display paid for and maintained by city officials); Stone v. Graham, 449 U.S. 39, 42-43 (1980) (invalidating posting of the Ten Commandments in school room); Abington School Dist. v Schempp, 374 U.S. 203, 223 (1963) (invalidating law requiring that schools begin each day with a bible reading).

tection clause to religious minorities.[56] Since the establishment clause has become a *de facto* substitute for an independent equal protection analysis of the treatment of religious minorities by the state, it is essential that whatever equal protection dimension of the establishment clause exists be recognized and respected.

The key issues underlying McConnell's comments, of course, are whether an equal protection mode of analysis is properly applied to state treatment of religious groups and, if so, how that analysis should be conducted. Critics of establishment clause analogies to equal protection doctrine never really explain why religious minorities do not need the same kind of protection against discrimination provided to aliens, illegitimates, women, and ethnic and racial groups.[57] On the other hand, proponents of an equality oriented analysis often presume its validity rather than justifying their conclusions.[58] The question, however, is sufficiently complicated that all broad and unsubstantiated generalizations should be viewed warily.

To begin with, it should be emphasized that this discussion refers to the original core concern of the equal protection clause—the disparate treatment of the distinct and insular minority or disfavored class. Equal protection doctrine has also been extended to cover the exercise of fundamental rights including travel, voting, and speech.[59] Under that rubric, unequal treatment among those who choose to exercise their fundamental right to worship as they please might invoke an equal protection analysis. Whatever the merits of this approach for the protection of liberty interests in general or religious rights in particular, it is not the focus of this Article. The subject here involves groups, not rights.[60] In-

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56. Prior to 1982, Supreme Court cases occasionally made references to equality concerns in resolving establishment clause cases, but rarely grounded their decision on equal protection doctrine. *See, e.g.*, Cruz v. Beto, 405 U.S. 319, 324 (1972) (per curiam) (Rehnquist, J., dissenting) (indirectly raising equal protection issue); Walz v. Tax Comm'n of New York, 397 U.S. 664, 695 (1970) (Harlan, J., concurring) (establishment clause requirement of religious neutrality "in its application requires an equal protection mode of analysis"); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (implicitly requiring equal protection treatment of religious minorities); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring) (implicitly applying equal protection analysis to statute used only to prosecute speakers from unpopular religions).

In deciding Larson v. Valente, 456 U.S. 228 (1982), however, the Court applied conventional equal protection strict scrutiny, rather than the *Lemon* test, to invalidate a statute it found to include a "denominational preference" for certain religions over others. *Id.* at 255. Since *Larson*, lower federal courts, at least, have been more prone to recognize explicitly the close connection between equal protection and establishment clause requirements. *See, e.g.*, Olson v. Drug Enforcement Admin., 878 F.2d 1458 (D.C. Cir. 1989).

57. *See* McConnell, *Neutrality*, *supra* note 18, at 146-48; Paulsen, *Religion*, *supra* note 19, at 324-35, 352-53 (arguing that constitutional equality pertains only to the right to worship, not to core equal protection concerns of equal status).

58. *See, e.g.*, Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 982-87 (1989) [hereinafter *Where Rights Begin*] (arguing presumptively that the equal protection rights of religious groups are governed by the doctrinal principal that "the state may not create disadvantageous distinctions intentionally based upon the religious character of an affiliation or practice." *Id.* at 984.); *see also* Garvey, *Freedom and Equality in the Religion Clauses*, 1981 S. CT. REV. 193 [hereinafter *Religion Clauses*].

59. L. TRIBE, *supra* note 46, at 1454-55, 1458.

60. *See supra* notes 34-39 and accompanying text. The application of the equal protection clause to laws that abridge fundamental rights is best understood as a useful methodology for helping to determine when the exercise of rights are penalized. It does not command that those exercising fundamental rights and those that do not must always be treated in the same manner. This approach stands in sharp contrast to the arguments of Paulsen, *Religion*, *supra* note 19, who contends that the Court's equal protection analysis in fundamental rights

deed, to emphasize the point it may be helpful to reject *arguendo* the direct application of the equal protection clause to fundamental rights entirely. Assume *Shapiro v. Thompson*,[61] *Zablocki v. Redhail*,[62] and other Supreme Court precedents were overruled. If that occurred, what protection might be provided religious minorities under equal protection principles?

The criteria for identifying a suspect class for constitutional purposes includes several variables. Foremost is the presence of historical disadvantagement and victimization. The Court repeatedly refers to this factor in explaining its decisions.[63] Moreover, it is the most convincing common denominator among those groups which the Court has identified to date as suspect: blacks, hispanics, asians, women, aliens, and illegitimates.[64] It is also, of course, the central fact of the black historical experience which led to the ratification of the fourteenth amendment.[65] Political powerlessness is also important.[66] This is presumed for numerical minorities, but it can also be the product of the extended disadvantagement of a very large group, as with women.[67] Distinct attributes of the suspect group and an insular group identity are relevant factors, but they are not necessary ones. Illegitimates are not easily identified and women are not insular in the conventional sense.[68]

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cases is the dominant constitutional equality concern to be considered for establishment clause purposes. Paulsen's thesis, taken to its logical conclusion, virtually requires the fragmentation of public institutions along religious lines. *Id.* at 358. This is a result which appears to raise no equality concerns for its author. The equal protection line of cases wich Paulsen ignores, those dealing with race, national origin, gender, and illegitimacy, obviously suggest contrary conclusions.

61. 394 U.S. 618, 631-33 (1969) (one-year residency requirement to qualify for welfare benefits unconstitutionally penalizes the exercise of the fundamental right to travel).

62. 434 U.S. 374, 387 (1978) (requirement of court order to remarry if party had child from former marriage impermissibly burdens fundamental right to marry).

63. Mathews v. Lucas, 427 U.S. 495, 506 (1976) (laws discriminating against illegitimates receive lower level of scrutiny than laws discriminating against African-Americans and women because "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."); Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (increased level of review applied to gender classification is justified in part because "our nation has had a long and unfortunate history of sex discrimination."); Hernandez v. Texas, 347 U.S. 475, 479-80 (1954) (Mexican-Americans constitute suspect class because of history of segregation and discrimination).

64. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (stating class is not suspect if it "is not saddled with . . . disabilities, or subjected to such a history of purposeful unequal treatment"); Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 980 (1975) ("Suspect classes have suffered historical vilification"). But as Wilkinson points out, "the Court has been less than precise. It has not, for example, defined what quantum, kind, or how recent past discrimination is required." *Id.* at 981.

65. Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 306-07 (1879); H. ABRAHAM, FREEDOM AND THE COURTS 44 (5th ed. 1988); W. GUTHRIE, LECTURES ON THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 9-12 (1898).

66. *See* L. TRIBE, *supra* note 46, at 1002.

67. *See* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) ("It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decision making councils."). *See generally* K. AMUNDSEN, A NEW LOOK AT THE SILENCED MAJORITY (1977). "The peculiarity in the situation of women in America is . . . that although they constitute a potential voting majority of this democracy, they have only lately come around to *using politics* to change the institutional forms of sexism and thereby improve their own life chances." *Id.* at 120 (emphasis in original).

68. Legitimacy depends on the marital status of one's parents, a fact not readily apparent by brief or casual contact with the individual. *See* Mathews v. Lucas, 427 U.S. 495, 506 (1976) ("illegitimacy does not carry an obvious badge, as race and sex do"). Women are obviously not insular. They live in the same community; indeed,

Immutability of the defining characteristics of a group is another frequently cited factor.[69] It is clearly not a sufficient basis for creating a suspect class.[70] Whether it is a necessary one remains unclear. Some illegitimates and aliens have the ability to change their status,[71] but other members of these groups do not.

Finally, there is the criteria that the group's defining attribute be an irrational proxy for legitimate state concerns.[72] Race, the Court tells us, provides no basis for predicting an individual's abilities or behavior. It does not correlate precisely with any reasonable ground for distinguishing among people.[73] Obviously, the fact that a group characteristic may be used irrationally in some contexts is not a sufficient basis for identifying a suspect class.[74] On the other hand, the general rationality or irrationality of a group quality as the basis for legislation is easily defended as a necessary factor to consider. Murderers and thieves are not suspect classes because it is reasonable to discriminate against them.[75]

While all of the above criteria may be imprecise, they can be clarified by concentrating on a primary reason these factors are considered. The focus of the courts is to identify situations in which majoritarian decisionmaking cannot be

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often the same household as men. Thus, their interests are not sufficiently separate from men, the majoritarian group, so that the majority may burden women without disadvantaging itself. *See* Wilkinson, *supra* note 64, at 981 (insularity as a traditional indicia of suspicion is not dispositive since "the female sex is not only not insular but a majority as well.").

69. *Mathews*, 427 U.S. at 505 ("the legal status of illegitimacy . . . is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society"); *Frontiero*, 411 U.S. at 686:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'

Id. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

70. No one, for example, would suggest that short people constitute a suspect class although height is an immutable characteristic. "Classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant." J. ELY, DEMOCRACY AND DISTRUST 150 (1980).

71. Resident aliens have the option of becoming a citizen but choose to retain their noncitizenship status. This mutability, in turn, may affect the degree of protection provided by the Court. *See* Ambach v. Norwick, 441 U.S. 68, 80-81 (1979). States have devised numerous methods for changing one's illegitimate status. *See* H. CLARK, DOMESTIC RELATIONS 326-27 (3d ed. 1980); H. KRAUSE, ILLEGITIMACY 11-15, 19-21 (1971).

72. *See, e.g.*, Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985) (mentally retarded are not a suspect class in part because the government often has legitimate and rational reasons for classifying on the basis of retarded mental ability); *Frontiero*, 411 U.S. at 686 ("[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society.").

73. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 496 (1979) ("Racial classification must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision.").

74. *Cleburne*, 473 U.S. at 445-46 (noting that the retarded, the disabled, the aged, the mentally ill, and the infirm may all be victims of prejudice and irrational classifications on some occasions but that does not require identifying all such groups as suspect classes).

75. Classifications based on one's criminal conduct such as theft or murder obviously reflect widespread hostility against members of that class. Unlike other suspect classifications, however, the state acts rationally in protecting society by isolating and punishing those who kill others to prevent and discourage such conduct in the future. The classification and punishment of the offense fits the state's needs so closely that people intuitively assume it is a rational and reasonable classification. *See* J. ELY, *supra* note 70, at 154.

trusted to operate with some minimum level of fairness and efficiency.[76] This central concern gives special meaning and direction to these otherwise abstract and ambiguous factors.

Given all of these considerations, are religious groups suspect classes? There is little difficulty in identifying various religious groups as disfavored minorities in historical terms. Jews,[77] Catholics,[78] Mormons,[79] and Quakers[80] are obvious examples, although this list is hardly intended to be exclusive. Abuses against these and other faiths have included lynching;[81] physical assaults;[82] and discrimination in housing,[83] employment,[84] and education.[85] Not every religious

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76. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (dictum); L. TRIBE, *supra* note 46, at 1465.

77. *See generally* ANTI-SEMITISM IN AMERICAN HISTORY (D. Gerber ed. 1986); H. QUINLEY & C. GLOCK, ANTI-SEMITISM IN AMERICA [hereinafter ANTI-SEMITISM]; M. SELZER, "KIKE!" A DOCUMENTARY HISTORY OF ANTI-SEMITISM IN AMERICA (1972); S. ZEITLIN, WHO CRUCIFIED JESUS (1964).

78. *See generally* ANTI-CATHOLICISM IN AMERICA, 1841-51 (1977); R. BILLINGTON, THE PROTESTANT CRUSADE, 1800-60 (1938); L. CURRY, PROTESTANT-CATHOLIC RELATIONS IN AMERICA 1-35 (1972); A. GREELEY, AN UGLY LITTLE SECRET: ANTI-CATHOLICISM IN NORTH AMERICA (1928) [hereinafter UGLY LITTLE SECRET]; J. KANE, CATHOLIC-PROTESTANT CONFLICTS IN AMERICA (1955); D. KINZER, AN EPISODE IN ANTI-CATHOLICISM: THE AMERICAN PROTECTIVE ASSOCIATION (1964); U.S. COMM'N ON CIVIL RIGHTS, RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE (1979) [hereinafter RELIGIOUS DISCRIMINATION]; Note, *The Forgotten Hatred: Anti-Catholicism in Modern Times*, 4 N.Y.L. SCH. HUM. RTS. ANN. 203 (1986) [hereinafter Note, *Forgotten Hatred*].

79. *See generally* A. HAMPSHIRE, MORMONISM IN CONFLICT, THE NAUVOO YEARS (1985); T. STENHOUSE, THE ROCKY MOUNTAIN SAINTS (1873); M. WELLS, ANTI-MORMONISM IN IDAHO, 1872-92 (1978).

80. *See generally*, J. BOWDEN, THE HISTORY OF THE SOCIETY OF FRIENDS IN AMERICA (1850); W. SWEET, RELIGION IN COLONIAL AMERICA 144-53 (1942); J. SYKES, THE QUAKERS: A NEW LOOK AT THEIR PLACE IN SOCIETY (1958).

81. *See, e.g.*, L. DINNERSTEIN, THE LEO FRANK CASE (1968) (lynching of Jewish murder suspect); R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY 2 (1982) (in colonial Massachusetts "Roman Catholics were forbidden to enter the colony under threat of death. Baptists and Quakers were frequently fined, imprisoned, whipped and banished; at least four Quakers were executed."); Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 416 (1986) [hereinafter *Survey of Religious Liberty*] (murder of Joseph Smith, the founder of the Mormon Faith, by an Illinois mob).

82. *See, e.g.*, H. QUINLEY & C. GLOCK, ANTI-SEMITISM, *supra* note 77, at 275-98 (antisemitic police riot at funeral of prominent rabbi in 1902 resulting in hundreds of injuries to mourners); C. BEALS, BRASS KNUCKLE CRUSADE (1960) (detailing anti-Catholic violence during years of 1820-1860); R. BILLINGTON, *supra* note 78, at 70-84, 420-21 (describing anti-Catholic rioting and arson in Boston area in 1830s and violence perpetrated by anti-Catholic Know Nothing societies during mid-1850s); J. LOUGHBOROUGH, THE GREAT SECOND ADVENT MOVEMENT: ITS RISE AND PROGRESS 177 (1905) (Seventh Day Adventist preacher attacked by mob); E. RAAB, RELIGIOUS CONFLICT IN AMERICA 3-4 (1964) (anti-Jewish violence in Louisiana, Mississippi and New Jersey in late 1800s); T. STENHOUSE, *supra* note 79, at 46-47, 80-102, 222-37 (detailing anti-Mormon rioting, assaults, and arson in Missouri in 1833 and in Illinois in 1845); W. WADE, THE FIERY CROSS: THE KLU KLUX KLAN IN AMERICA (1987) (anti-Catholic and antisemitic activity of KKK); J. YINGER, ANTI-SEMITISM: A CASE STUDY IN PREJUDICE AND DISCRIMINATION 44 (1969) (documenting antisemitic activity including painting of swastikas and/or anti-Jewish epithets and slogans, mail, telephone and personal threats, and physical damage to personal and community property.); Laycock, *Survey of Religious Liberty*, *supra* note 81, at 417 (anti-Catholic riots and burning of Catholic churches in 1844 in Philadelphia).

83. C. ABRAM, FORBIDDEN NEIGHBORS 234-35, 265 (1955) (discrimination in housing against Jews and Catholics); N. BELTH, BARRIERS: PATTERNS OF DISCRIMINATION AGAINST JEWS 92-112 (1958); B. EPSTEIN & A. FORSTER, SOME OF MY BEST FRIENDS 79-142 (1962) (discrimination against Jews in housing); E. GRIER & G. GRIER, DISCRIMINATION IN HOUSING 8-10, 20-25 (1960) (discrimination in housing against Jews directly and Catholics indirectly on the basis of Italian or Irish ancestry).

84. *See* ANTI-SEMITISM IN AMERICAN HISTORY, *supra* note 77, at 22-29 (discrimination against Jews in employment); N. BELTH, *supra* note 83, at 43-60 (discrimination against Jews in employment); J. KANE, *supra* note 78, at 70-89 (discrimination against Catholics in employment); E. RAAB, *supra* note 82, at 3 (widespread discrimination against Catholic workers and businessmen in late 1800s); RELIGIOUS DISCRIMINATION, *supra* note 78, at 88-94, 259-80 (discrimination against Jews and Catholics in employment); Note, *Forgotten Hatred*, *supra* note 78, at 222-30.

denomination may have experienced significant mistreatment, but that certainly is beside the point. The fact that whites have not been the victims of societal discrimination hardly denies the reality that blacks are a suspect class.[86] At a minimum those groups which have been the victims of persecution and prejudice should be included. Or one could adopt a more inclusive approach. National ancestry constitutes a suspect class for every nationality[87] even if some northern european groups may have had a more benign reception in the United States than did persons from other regions.

Political powerlessness also applies, although that requires some explanation. The power of religious groups is uneven. Some religions have been disproportionately successful in the political arena, while others have not.[88] Current power relationships, however, can change quickly. As with race and nationality, temporary political success in particular areas does not undermine the necessity for long-term constitutional vigilance. As a prophylactic rule, the fact of numerical minority status is a virtually irrebuttable presumption of powerlessness for any faith with relatively few members.[89]

While determining the "minority" status of different religions is not without difficulty, here again, an analogy to race and nationality can clarify the problem. Distinct nationalities, such as Poles or Italians, may be minorities in terms of ancestry, but, being white, comprise a racial majority. Similarly, while most specific sectarian denominations, such as Methodists or Mormons, are a minority in the United States, the general religious orientation of Protestant or Christian constitutes a majority and would hardly qualify as a class needing protection under conventional criteria.

The distinct and insular nature of religious groups varies among religions and over time. Some sects such as the Amish or Hasidic Jews blatantly meet this criterion.[90] While religions cross racial lines, there are physical characteristics popularly associated with different religions, and prejudice toward religious

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85. *See, e.g.*, N. BELTH, *supra* note 83, at 60-91 (discrimination against Jews in education); A. GREELEY, UGLY LITTLE SECRET, *supra* note 78, at 63-85 (discrimination against Catholics in higher education); Synnott, *Anti-Semitism and American Universities*, in ANTI-SEMITISM IN AMERICAN HISTORY, *supra* note 77, 233-71 (detailing discrimination against Jews in higher education during period from 1870-1970).

86. Indeed, the reverse is true. Since Blacks are designated as a suspect class, the Court has held that all racial classifications will receive the highest level of scrutiny. Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721 (1989) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.") (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978)).

87. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (provisions of the fourteenth amendment "are universal in their application, to all persons . . . without regard to any differences of race, of color, of nationality.").

88. *See, e.g.*, W. SALISBURY, RELIGION IN AMERICAN CULTURE 344-48 (1964) (noting that various religions including Episcopalians, Presbyterians, and Unitarians were substantially overrepresented in the 87th Congress). *See generally* R. FOWLER, RELIGION AND POLITICS IN AMERICA (1985).

89. For example, Unitarians comprised 0.15% of the religious population of the U.S. in the early 1960s, but 1.5% of the members of the 87th Congress were members of that faith. *See* W. SALISBURY, *supra* note 88, at 347. Obviously that dramatic overrepresentataion cannot detract from the basic vulnerability of such a small religious group to mistreatment by the majority. *See also* R. FOWLER, *supra* note 88, 196-203 (describing various factors that affect political power of Jews in the U.S.).

90. *See, e.g.*, J. HOSTETLER, AMISH SOCIETY (1968); S. POLL, THE HASIDIC COMMUNITY OF WILLIAMSBURG (1962).

minorities has often focused on physical characteristics as well as those relating to language and accent.[91] Religious paraphernalia on one's person or home (often religiously required) can easily identify members of a minority faith.[92] Also, the behavior of adherents of several faiths identifies and separates them from others as well. Dietary restrictions, the choice of Sabbaths or holy days, and the act of prayer itself, may make membership in many religions an identifiable characteristic of individuals.[93] Co-religionists are also often insular in the sense that they live and work together.[94] In all, a strong case can be made that conventional equal protection criteria apply here at least as strongly as they do with regard to women, aliens, illegitimates, and many nationalities. Certainly there is as much reason to mistrust the polity in its treatment of religious minorities as there is for other suspect classes.

Whether religion is a rational proxy for various legal purposes depends, of course, on the tenets of the religion and the nature of the state's interests. One's status as a Quaker for example, is strongly correlated with pacifism.[95] Moslems do not eat pork,[96] Jews have a genetic predisposition to bearing children with Tay Sachs disease,[97] and Seventh Day Adventists do not work on Saturday (their Sabbath).[98] Legal generalizations predicated on these characteristics and others are not inherently irrational.[99] On the other hand, for many governmen-

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91. *See generally* M. SELZER, *supra* note 77 (describing antisemitic materials focusing on language, customs, dress, and physical characteristics of Jews); Schiff, *Shylock's* Mishpocheh*: Anti-Semitism on the American Stage*, in ANTI-SEMITISM IN AMERICAN HISTORY, *supra* note 77, at 79. According to Schiff, the Jew in early American plays was "regularly made ludicrous by his funny accent, if not altogether corrupt dialect." *Id.* at 82. Distinctive language and dress has also proved beneficial for minority religions seeking to retain their identity. *See* J. HOSTETLER, *supra* note 90, at 4-9.

92. For example, adherents of Krishna Consciousness are quickly recognizable by their mode of dress (adhotis for men and saris for women), the man's shaven head (except for the topknot), and two white clay lines on each member's forehead. *See* R. BUSH, K. DOLLARHIDE, A. NANJI, H. CONVERSE, K. YATES, JR., J. BUMSTEAD, & R. WEIR, THE RELIGIOUS WORLD: COMMUNITIES OF FAITH 362 (1982) [hereinafter THE RELIGIOUS WORLD]. Jews may be seen wearing a prayer scarf (tallis) and/or a skull cap (yarmulke). Their homes may be identified by the small container containing verses from Deuteronomy (mezuzah) on their doorpost, or a menorah placed in the window during Chanukah. *See* W. SALISBURY, *supra* note 88, at 147. Christians often wear ornate crosses or saint medals in the form of jewelry. They are often identifiable by a symbol of ikthus or a descending dove of peace in their home or car. At Christmas time many Christians place nativity scenes in their homes. Catholics may be particularly distinguishable from other Christians by statues, pictures or other special representations of the Virgin Mary. Some religious distinctions based on dress, however, have lost their significance over time. *See, e.g.*, L. ROSTEN, *supra* note 42, at 230-31 ("plain dress" custom of Quakers no longer prevalent).

93. Dietary beliefs, for example, cover an extreme range. Muslims do not eat pork. F. MEAD, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES 190 (7th ed. 1980). Hindus do not eat beef. *See* J. HUTCHINSON, PATHS OF FAITH 173 (1975). The good Seventh Day Adventist is a vegetarian. R. MATHISON, FAITHS, CULTS AND SECTS OF AMERICA: FROM ATHEISM TO ZEN 59 (1960). Many faiths, including the Muslims, Seventh Day Adventists, Jehovah's Witnesses, and Christian Scientists proscribe the use of intoxicating liquors and/or tobacco. R. MATHISON, *supra*, at 59, 62, 68; F. MEAD, *supra*, at 22, 93, 190.

94. *See* G. LENSKI, THE RELIGIOUS FACTOR 17-19, 32-39 (1961) (noting the communal nature of religious affiliation in that it serves as the foundation of basic social relationships including the family and friendship groups); *See generally* A. GORDON, JEWS IN SUBURBIA 231 (1959).

95. L. ROSTEN, *supra* note 42, at 229-30.

96. *See supra* note 93.

97. *See, e.g.*, M. KABACK, TAY SACHS DISEASE: SCREENING AND PREVENTION 95-105 (1977).

98. *See* Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963).

99. For example, it presumably would be constitutional for a public school to accept as an excused absence that a Jewish student declines to attend class on the Jewish High Holy days. A Protestant student absent from class on the same days would be treated as a truant. The state's discrimination between the two students on the basis of their religion is certainly reasonable.

tal purposes relating to the allocation of benefits and burdens, one's religious faith is an irrational factor which properly should be ignored by the state.[100]

Finally, there is the factor of immutability. If it is essential to the definition of a suspect class, religious groups will arguably receive no special constitutional attention under the equal protection clause. While some religions have been victimized as racial groups toward which a stigma applies at birth without regard to an individual's actual beliefs, in many circumstances a person can change their religion and by doing so will substantially alter the attitudes of others toward them. Conceptualized in this latter way, religious groups would not be covered by the equal protection clause because of their mutable status, and whatever claims to equality they might assert would have to be based indirectly on the exercise of their free exercise rights.

A strong argument, however, can be raised against excluding religious groups from the coverage of the equal protection clause because the status of group members is a mutable condition. In conventional terms, immutable characteristics are relevant to a group's suspect class status for two reasons: 1) by definition, a burden directed toward an immutable attribute of an individual cannot be escaped, *i.e.*, the victim is trapped[101] and 2) the motives behind a burden directed at an immutable condition are intrinsically suspect; the state cannot explain its classification as an attempt to change or discourage the offending attribute.[102]

Both of these explanations are seriously flawed as suspect class criteria. Whether one is trapped into suffering a burden imposed by government cannot be measured exclusively in absolute terms; it is an equally real condition whenever the value of the burdened attribute to the victim exceeds the cost of the burden. If the government orders everyone living in a certain area to pay 500 dollars and the cost of relocating into an untaxed area is 1,000 dollars, in a very real sense the pain of the 500 dollar assessment is as unavoidable as it would be if it was assigned on the basis of skin color.

As for the ostensibly more legitimate motives for burdening a mutable characteristic, there are many legitimate reasons for burdening immutable characteristics (Ely uses the example of prohibiting blind people from flying airplanes).[103] More importantly, there are an almost unlimited number of illegitimate reasons for burdening mutable characteristics. Wealth is a highly mutable condition, but executing the rich in order to seize their assets would presumably be an invidiously motivated and unconstitutional act.

Both of these immutability criteria weaknesses come into play when religious groups are considered as a potential suspect class. Many religious persons place an enormously high value on their adherence to their faith, even including a willingness to die to maintain it. For these individuals it is unrealistic to view

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100. Criminal laws, for example, should obviously not vary depending on the religious faith of the accused. Nor should welfare benefits depend on the religious affiliation of the needy. *See generally supra* notes 83-85.

101. *See* J. ELY, *supra* note 70, at 150; *see also* Nyquist v. Mauclet, 432 U.S. 1, 17-22 (1977) (Rehnquist, J., dissenting).

102. J. ELY, *supra* note 70, at 154-55; O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19, 62 (1979).

103. *See* J. ELY, *supra* note 70, at 154-55.

this characteristic as mutable except perhaps for the most egregious of burdens. Similarly, one can hardly point to the mutability of religious faith as implying the legitimacy of laws that burden particular religious denominations. While a particular practice of a faith may need to be deterred to further important state interests, it is difficult to rationalize a state decision to discourage membership in the religion itself.

Moreover, for constitutional purposes, religious affiliation *is* an immutable characteristic vis-à-vis state action, at least to the extent that the free exercise clause condemns as invidious the penalizing of religious beliefs.[104] Thus, from an equality as well as a liberty perspective, the state's desire to stamp out benign belief systems on which individuals ground their identity and values is illicit and irrational. The equal protection clause can be understood to command a respect for diversity by choice as well as by birth.[105]

An even more aggressive position may be taken on the issue. Not only is the mutability of religious affiliation not a bar to equal protection review of the treatment of religious minorities, but the mutability of religious beliefs makes the treatment of religious minorities particularly deserving of stringent equal protection review. The nature of religion is such that religious minorities are particularly vulnerable to unequal and injurious treatment by the state. Because suspect classifications such as race and national origin are immutable and cannot change, they are not intrinsically threatening to each other. They may compete for scarce resources, but the passive existence of each group does not undermine the viability of its peers. Religious beliefs, on the other hand, are intrinsically competitive and conflicting. Each seriously undermines the validity

104. *See, e.g.*, Braunfield v. Brown, 366 U.S. 599, 607 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions or to discriminate invidiously between religions, that law is constitutionally invalid.").

105. Indeed, the fact that individuals may change religion has not prevented sociologists from recognizing the functional equivalence of ethnicity and religious denomination. *See supra* note 30.

of the other.[106] Even if many religions did not aggressively proselytize their faiths, as they do,[107] this basic dissonance cannot be avoided.

As a consequence of the competitive tension among religious belief systems, religious groups have an incentive to discriminate against adherents of opposing faiths which is not inherent in other suspect classifications. The very fact of

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106. This statement requires a necessary caveat. Not all members of the same religion hold exactly the same beliefs. Moreover, religious beliefs and the attitudes of the members of one faith toward other faiths change over time. Still the fact remains that religions do differ on numerous fundamental matters, so much so that the faithful pursuit of one effectively repudiates the doctrine of others. For example, "Baptists believe that every true believer in Christ as personal savior is saved—without the intervention of preacher or church." L. ROSTEN, *supra* note 42, at 41. Presbysterians hold similar beliefs. Catholics, on the other hand, believe "it is through Christ's Catholic Church alone, which is the all-embracing means of salvation, that the fullness of the means of salvation can be obtained." *Id.* at 205.

Christians believe that Jesus was the Messiah who redeemed the world. Jews do not, and still await the Messiah. Thus Jews reject the essential foundation and doctrine of the Christian faith. Moreover, "[t]he Christian doctrines of the Trinity, the Incarnation, the Virgin Birth and the Atonement have always been looked upon by Jews as running completely counter to the pure monotheism taught by Judaism." L. JACOBS, WHAT DOES JUDAISM SAY ABOUT . . . ? 85 (1973).

Moslems also do not accept the divinity of Christ. They respect Jesus as a prophet with whom God has chosen to communicate, but prophets are exclusively human "and can never be the object of worship, which is due to God alone." R. WEIR, THE RELIGIOUS WORLD, *supra* note 92, at 317. From the Christian perspective the theological consequences of such repudiations are often severe. *See, e.g.*, L. ROSTEN, *supra* note 42, at 48-49 (Catholics generally believe unbaptized children are denied salvation in heaven); H. QUINLEY & C. GLOCK, ANTI-SEMITISM, *supra* note 77, at 105 (quoting Reverend Wayne Dehoney, former President of Southern Baptist Convention, as stating "Christians do believe that all Jews who reject Christ as the Messiah are therefore lost from God's redeeming love—as are all men of all races who have not personally responded to God's grace through faith in Jesus Christ.").

Buddhism postulates a world of continual birth and rebirth until one achieves a cessation of the cycle by achieving Nirvana, a complete release from all facets of existence. J. HUTCHINSON, *supra* note 93, at 125-27. These beliefs are "at variance with Jewish teachings about the survival of the individual and his possession of an immortal soul," L. JACOBS, *supra*, at 58, and also conflict with Christian concepts of salvation and heaven. R. WEIR, THE RELIGIOUS WORLD, *supra* note 92, at 303.

Hinduism is a polytheistic religion countenancing the worship of numerous Gods and Goddesses through rituals revering their images. Buddhism, by contrast, is in essence an atheistic faith. R. WEIR, THE RELIGIOUS WORLD *supra* note 92, at 70-73, 84-94. Both systems of belief are fundamentally inconsistent with monotheistic religions.

Thus from a Jewish perspective "the anti-theistic elements in Buddhism must be uncategorically repudiated" and the Hindu "belief in, and worship of many gods . . . [is looked] upon as idolatry." L. JACOBS, *supra*, at 59, 169. Christianity is very much like Judaism in this regard in contradicting the teaching of atheistic or polytheistic faiths. *See* E. RICE, THE FIVE GREAT RELIGIONS 82-83 (1973). Islam is even more categorical in its attitude. "Allegiance to the one God leads to the rejection of other gods as false idols. Islam's expression of this principle is the idea of *shirk*, which is the unforgiveable sin." J. HUTCHINSON, *supra* note 93, at 454.

Notwithstanding the current ecumenical spirit among many religions in the U.S., these differences remain intact. "The value system proposed to man by the various religions do in fact differ fundamentally at many important points. No amount of dialogue will remove the differences between the Buddhist Nirvana and the Judeo-Christian heaven." *Id.* at 620.

Indeed, when religious differences are minimized by some members of a faith, that may inspire criticism by more orthodox adherents. *See, e.g.*, G. GROB, ANTI-CATHOLICISM IN AMERICA 53 (1977) (anti-Catholic lecture by Presbyterian pastor arguing "[w]e are not worthy of the name of Protestants, if we desire a truce with popery, or even fancy that such a thing can be."); W. HUDSON, RELIGION IN AMERICA 242 (1973) (describing a book written in 1866 by a Catholic Theologian " 'to refute' those soft, weak, timid, liberalizing Catholics, who labor to explain away all the points of Catholic faith offensive to non-Catholics, and to make it appear there is no question of life and death, of heaven and hell, involved in the differences between us and Protestants"). A more recent illustration is that of the dissident French Archbishop Marcel LeFebvre whose attacks on the Vatican led to his excommunication. N.Y. Times, July 4, 1988, at 1, col. 1. LeFebvre challenged "the church's efforts to improve relations with Protestants, Jews, Moslems and other religions" charging that such conduct "undermines the Roman Catholic Church and lends credibility to 'false' religions." N.Y. Times, July 1, 1988, at 4, col. 5.

107. *See generally* B. OLSON, FAITH AND PREJUDICE 168-94 (1963).

each group's mutability makes them less trustworthy as the majority and more vulnerable as a minority than may be true in other circumstances.[108] In terms of the basic concern that legitimates heightened scrutiny under the equal protection clause, that of rigorously reviewing laws when the results of the political process cannot be trusted, laws discriminating against religious groups require the same level of scrutiny directed at laws discriminating against racial and ethnic groups.

This does not mean that the interpretation of the religion clauses must precisely parallel equal protection doctrine. It does demonstrate, however, that the same kinds of concerns which support the application of antidiscrimination and equality principles to laws involving racial, gender, and nationality groups arise in religion cases as well. History, vulnerability, bias, and mistrust provide important grounds for protecting the civil status of religious groups. No interpretive model of the religion clauses can be complete if it ignores or disregards this constitutional dimension.

IV. RELIGION AS SPEECH

Under the foregoing analysis, state action that discriminates among religious groups should receive a level of scrutiny which is similar in rigor, if not identical in coverage, to that imposed by the equal protection clause on laws burdening suspect classes. It is much less clear, however, that equal protection doctrine relating to disadvantaged groups should be applied to state distinctions between those who generally hold religious beliefs and those that do not. While it is relatively easy to analogize laws that discriminate among specific religions to laws that discriminate among different races or nationalities, there is much less of a parallel between the core distinctions prohibited by the equal protection clause and state classifications directed at a person's generally religious or nonreligious orientation. Certainly the group cohesion and identification which makes religion so much akin to other suspect classes is diffused and diluted in the context of the generally religious or nonreligious individual. There is also less evidence of discrete and insular attributes. Moreover, while the nonreligious are a minority in American society and have been the subject of discrimination in specific circumstances, far less prejudice and mistreatment has been directed at them historically than is the case for persecuted religious minorities.[109]

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108. For example, anti-Catholic and antisemitic writings in Protestant teaching materials often seemed based on the perception of Catholics as a religious threat to Protestantism and on resentment against Jews for their continued repudiation of Christ in their resistance to conversion. *See* B. OLSON, *supra* note 107, at 142-60 and 168-94.

109. For a detailed account of the decline of any group consciousness of freethinkers, atheists and agnostics, the "infidels" of the nineteenth century see M. MARTY, THE INFIDEL, FREE THOUGHT AND AMERICAN RELIGION (1961). Marty suggests correctly that nonreligious beliefs in contemporary society are no longer antireligious, but are rather more accurately identified as materialistic or secularist. *Id.* at 179-93. The vagueness of such terms helps to explain why people holding secular beliefs, for example, cannot be characterized as a suspect class. *See also* B. OLSON, *supra* note 107, at 28 ("[R]eligious groups will have considerably more difficulty with the existence of other religions than with nonreligious groups, because they encounter unique problems of commitment and value conflicts with respect to the former."); Grumelli, *Secularization: Between Belief and Unbelief*, in THE CULTURE OF UNBELIEF: STUDIES AND PROCEEDINGS FROM THE FIRST INTERNATIONAL SYMPOSIUM ON BELIEF HELD AT ROME, Mar. 22-27, 1969 (R. Caporale & A. Grumelli eds. 1971):

Thus, it is not enough to understand the religion clauses as exclusively constituting two constitutional commands; one protecting religious autonomy and the other affirming the equality of religious groups. Religion as a system of ideas and expressive association invokes a third perspective pursuant to which discrimination between religious and nonreligious beliefs may be more closely examined. Religion and freedom of expression must also be considered as an appropriate constitutional analogy.

Attempts to analogize religious observance and speech must proceed carefully. There is much commonality here, of course. Spoken prayer is literally speech—it constitutes an act of verbal expression. But while speech is an aspect of religious observances and rituals, just as it is an aspect of virtually every human endeavor, speech and worship are constitutionally very different interests.[110] They are not as fully fungible as is sometimes suggested.[111]

The Supreme Court has clearly insisted, for example, that it will not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[112] Thus burning a draft card is not fully protected speech,[113] nor is taping a peace symbol on a flag,[114] nor sleeping in Lafayette Park.[115] If these

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> [T]he unbeliever is nowhere and everywhere. There exists no Church of Atheism or Community of Unbelievers with whom the Confessional Church may exchange ideas. Individual nonbelievers conceptualize almost exclusively in terms of their own personal experience and speak in the name of no collectivity; no group delegates them to express common views and tenets.

Id. at 90.

This does not suggest that nonreligious persons are immune from discrimination and prejudice. They have been and continue to be victimized. *See, e.g.*, G. SELZNICK & M. STEINBERG, THE TENACITY OF PREJUDICE 152-53 (1969) (60% of those surveyed believe atheists should not be allowed to teach in public high schools); Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 YALE L.J. 659 (1930). One searches in vain, however, for descriptions of systematic persecution or discrimination against them that parallels the experience of minority religions. Accordingly, it is difficult to escape the conclusion that they simply do not meet the criteria of suspect classes as strongly as do other groups. Even if the nonreligious were held to be comparable to other groups protected by the equal protection clause, they would be most closely analogized to illegitimates. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 506 (1976) ("[B]ecause illegitimacy does not carry an obvious badge, as race or sex do, . . . discrimination against illegitimates has never approached the severity or pervasiveness of the historic, legal, and political discrimination against women and Negroes."). The standard of review applied to laws discriminating against illegitimates is substantially lower than that applied to race or gender based classifications. *See id.* at 510 (unlike race and gender cases, those challenging the constitutionality of laws discriminating against illegitimates bear the burden of proving the "insubstantiality" of the relation between the government's classification and the legitimate objectives it seeks to further).

110. *See generally* Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 241-46 (1989).

111. A good example of an overly simplistic attempt to equate speech and religion is the Equal Access Act, 20 U.S.C. §§ 4071-4074 (West Supp. 1989), requiring public secondary schools which permit student groups to meet on school premises to provide religious groups equal access to school facilities. While there are legitimate arguments which may be raised in support of the Act's constitutionality, the Act on its face appears to permit activities which are certainly unconstitutional. *See* Laycock, *Equal Access, supra* note 20; Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 Nw. U. L. REV. 174 (1986).

112. United States v. O'Brien, 391 U.S. 367, 376 (1968).

113. *Id.*

114. Spence v. Washington, 418 U.S. 405, 409 (1974).

115. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293-94 (1984).

activities are not pure speech for constitutional purposes,[116] then neither are the numerous religious rituals which are conduct-intensive in nature.[117]

Not only is speech distinct from many religious activities in literal terms, but the reasons for protecting speech are different from those underlying the free exercise of religion. The core meaning of the constitutional right to speak is instrumental; its function is to permit the open and robust debate and marketplace of ideas which are intrinsic to a democratic political system.[118] Freedom of speech promotes additional values, of course. It has a dignitary aspect to it.[119] This dimension of expression is considered, however, to be a secondary attribute of free speech; and one that is more easily outweighed by legitimate state interests.[120] Indeed, every form of speech which the Court has determined to be unprotected or less protected speech is defined in part by its irrelevance to the core institutional function of political expression and public debate.[121]

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116. *See, e.g.*, Texas v. Johnson, 109 S. Ct. 2533, 2540 (1989) ("[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.").

117. *See generally* E. NOTTINGHAM, *supra* note 30, at 18 (religious ritual "can include any kind of behavior: wearing special clothing, sacrificing life and produce, reciting formulas, maintaining silence, singing, chanting, praying, praising, feasting, fasting, dancing, wailing, washing, reading"). Nonverbal conduct in religious worship is prevalent in most faiths. Catholic worship for example may involve counting rosary beads, genuflecting (kneeling), striking one's breast with one's hand (mea culpa), kissing the alter, making the sign of the cross, lighting candles, lighting incense, washing hands, eating the bread in the Eucharist, immersion or sprinkling with water (Baptism), and fasting. *See generally* H. DANIEL, THIS IS THE MASS (1958); J. DAVIES, A NEW DICTIONARY OF LITURGY AND WORSHIP 245-51, 437-39 (1986). Devout Moslems perform cleaning and purification rituals as part of their faith. The act of prayer involves kneeling and directional gestures. R. WEIR, THE RELIGIOUS WORLD, *supra* note 92, at 321-22. Native American religious rituals include dancing, sandpaintings, the ingestion of herbs, and the manipulation of instruments (gourd rattles, feathers, staff, and drums among others). R. WEIR, THE RELIGIOUS WORLD, *supra* note 92, at 16-29. The practice of Hinduism involves a mixture of physical offerings, ascetic practices (*e.g.*, fasting, fixed postures), physiological disciplines (yoga), ritual purifications, and other activities. H. FRIES & H. SCHNEIDER, RELIGION IN VARIOUS CULTURES 94-107 (1960). The above list is certainly not exclusive.

118. Board of Educ. v. Pico, 457 U.S. 853, 866-67 (1982); Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964-90 (1978); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 883 (1963).

119. *See* Herbert v. Lando, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting); Procunier v. Martinez, 416 U.S. 396, 427 (1974); Cohen v. California, 403 U.S. 15, 24 (1971).

120. Melville Nimmer, for example, defines the dignitary aspect of speech as the "self-fulfillment function." M. NIMMER, *supra* note 25, at 1-49. He notes that in balancing speech interests against the government's interest in regulating speech "the speech interest may often be found subordinate to the anti-speech interest where only the self-fulfillment . . . function is served by the speech." *Id.* at 1-52. *See also* Connick v. Myers, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (defamation action brought against critic of official conduct of public official is subject to special constitutional scrutiny because "speech concerning public affairs is more than self-expression; it is the essence of self-government.").

121. Categories of unprotected or lesser protected speech which have been identified in part because of their lack of relevance to the first amendment's primary concern, protecting the instrumental value of speech in a free marketplace of ideas, include the following:

False statements of fact. *See* Gertz v. Welch, 418 U.S. 323, 340 (1974) ("Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues") (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

Speech on matters of private concern. *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 758-59 (1985) ("It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection' . . . speech on matters of purely private concern is of less First Amendment concern") (quoting First Nat'l Bank of Boston v. Bellott, 435 U.S. 765, 776 (1978)); *see also* Connick v. Myers, 461 U.S. 138, 145-47 (1983).

The conceptual foundation of freedom of religion, on the other hand, reverses this hierarchy. The essential acts of religious belief, worship, and prayer, are often directed to a divine being, or in nondeistic religions, to oneself; not to a public audience.[122] Society and the courts do not protect the free exercise of religion primarily to make better governments or to improve the operations of our political system. As noted previously, it would be intrinsically offensive to free speech values to insist that religious contributions to public debate (on the issue of abortion for example) are entitled to some special constitutional consideration.[123] Rather, religious liberty is revered because of its value to individuals and their families. The dignitary and autonomy dimension of the right is the critical core which the Constitution most vigorously protects.

Indeed, it is probably the case that our most basic religious beliefs are generally unsuitable to a marketplace of ideas theory. When public policy and political choices or scientific investigations are at issue the words of Holmes and Brandeis are persuasive: "[t]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[124] With regard to the search for religious truths, however, the above statement sounds hollow and op-

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Obscenity. *See* Miller v. California, 413 U.S. 15, 34-35 (1973) (" 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people.' . . . [T]he public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.").

Fighting words. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

Sexually graphic and indecent speech. *See* Young v. American Mini-Theatres, Inc., 427 U.S. 50, 70 (1976) (some discrimination against "erotic materials that have some arguably artistic value" is permissible because "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .").

Commercial speech. *See* Virginia Bd. of Pharmacy v. Virginia Citizens Council, 425 U.S. 748, 779-80 (1976) (Stewart, J., concurring) (commercial speech is different from and less protected than "ideological expression" since "the First Amendment protects the advertisement because of the 'information of potential interest and value' conveyed . . . rather than because of any direct contribution to the interchange of ideas") (quoting Bigelow v. Virginia, 421 U.S. 809, 822 (1975)). *Compare In Re* Primus, 436 U.S. 412, 426-32 (1978) *with* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (client solicitation by attorney is generally commercial speech which receives "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." Client solicitation for political purposes receives much more rigorous constitutional protection.).

Speech creating a clear and present danger of violent or unlawful conduct. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (dangerous speech may only be suppressed when debate is impossible because "[t]he incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion"); *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (rejecting the majority opinion in *Whitney* and adopting Brandeis' standard).

122. *See, e.g.*, R. WEIR, THE RELIGIOUS WORLD, *supra* note 92, at 285 ("worship in Christianity . . . is an act for God . . . . [It] is based on the conviction that only in address to God does the Christian's life become meaningful."); L. JACOBS, *supra* note 106, at 248-50 (prayer in Judaism may involve a petition to God to grant his requests or an act of "self transcendence in the presence of God"); R. WEIR, THE RELIGIOUS WORLD, *supra* note 92, at 322 (goal of worship in Islam is to bring "believers into daily communication with the Creator" and thereby achieve "a state of purity, closer to God"). *See generally* Ingber, *supra* note 110.

123. *See supra* note 28 and accompanying text.

124. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

pressive. Man's relationship to the divine is not a matter of logical argument, direct proof, nor, least of all, majoritarian decisionmaking.[125]

The argument that religion and speech are distinct constitutional interests should not obscure the fact that they do overlap. The dignitary and autonomy aspect of free speech will in some situations provide equivalent protection to speech and religious activity. Similarly, religion-based arguments in favor of or against particular public policy choices play a part in the marketplace of ideas and will be protected as such.

This overlap, however, has fixed constitutional parameters. Religious expression is governed by two additional constitutional commands which are not directed at generic speech itself. The autonomy right dimension of the free exercise clause requires that certain forms of expressive religious practice, despite their conduct-intensive and noninstrumental nature, will receive maximum constitutional protection, while most other nonreligious conduct-intensive and noninstrumental expression is at the bottom of the hierarchy of speech values.[126] Even more importantly, the establishment clause, as will be detailed shortly,

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125. Certainly few religious people would accept the thesis that the unpopularity of their religion relates to the truth of its principles. More importantly, the minority's rejection of majoritarian consensus is much more defensible on religious matters than secular ones. Since religious propositions can often neither be observed nor tested, the force of the majoritarian position is much more a question of power than reason.

This lack of a reality test undermines the persuasiveness of the majority's agreement on religious matters in a fundamental way. Unlike matters of public policy, the consequences of particular religious points of view cannot be examined as means of evaluating their merit. If *A*'s monetary policies are adopted and a depression results, one would expect *A*'s ideas to be rejected in the future after open debate. Thus, the continued majority support of a policy long-term at least implies that some of the reasons for endorsing the policy are vindicated. *See* M. YUDOF, *supra* note 21, at 104-05 (describing John Dewey's belief that pluralistic democracy reduces the risk of erroneous social values because "social consequences were the criterion people used for choosing among values. . . ."). If the issue is going to heaven or hell after one dies, however, continued majority support for one position or another does little to validate the majority's theory over alternative views.

This distinction between the goals of the speech and free exercise clause is implicitly alluded to in Buckley v. Valeo, 424 U.S. 1, 92-93, 93 n.127 (1976) in its rejection of the argument that the public financing of election campaigns violates the first amendment. The Court explained that state action supporting private expression generally enhances first amendment values by helping to assure a society in which " 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *Id.* at 93 n.127 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Government support of religion, on the other hand, is historically linked to religious persecution and intolerance rather than enhanced democratic interaction. *Id.*

126. The Court usually refers to history and tradition in explaining the special status religion receives in constitutional doctrine. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963):

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.

Id. at 226. McConnell, *Accommodation, supra* note 2, at 1-28.

The same conclusion can also be defended from a more contemporary perspective, in terms of the role of religion in determining a person's identity and sense of self. Religion is not important to everyone, but neither is family life, procreation, sexuality, or other core autonomy concerns. One need not believe in God to acknowledge the elemental force of such a belief in the lives of those that do, any more than one must have children to understand what it means to be a parent.

For many individuals the role religious beliefs play in their lives is of unparalleled value. Both at a personal level and as a collective tie between co-religionists, religion is involved in the core experiences of existence, including the birth of children, marriage and the death of loved ones. Although the issue is certainly open to argument, in terms of identity-defining criteria, the special sanctity of religious conviction which the Constitution recognizes is strongly supported by the reality of religious experience. *See supra* note 30.

constrains government expression on the subject of religion in sharp contrast to the free-wheeling discretion which the first amendment permits the government as speaker on other subjects.[127]

The first distinction between dignitary speech interests and the expressive practice of religion may be overlooked because in particularly personal and private locations, such as one's home, autonomy rights of expression and religion are both so strongly defended against state interference that they seem to be fully equal. Thus, for example, *Stanley v. Georgia*[128] suggests that an individual's home library is immune from criminal sanction whether it includes pornographic works or religious tracts or anything in between.

The lack of fungibility of these two interests becomes apparent, however, as soon as autonomous behavior extends beyond a person's intimate environment. *Stanley* provides special protection only to the personal consumption of expressive material in one's home. Private expressive activity which involves an association of individuals, or conduct as well as speech, or the commercial distribution of expressive materials, is a more circumscribed autonomy right.[129] It is in this, context that religious worship and secular expression should be compared and the result favors religious activity.

Thus, secular clubs will be more vulnerable to antidiscrimination laws than are religious congregations.[130] Ingesting controlled substances may be permitted in religious ceremonies while they are prohibited in other contexts.[131] In a rare case even ostensibly tortious behavior may be excused or at least made much more difficult to remedy if it occurs in the performance of religious worship or

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127. *See* M. NIMMER, *supra* note 25, at § 4.96 n.284 (citing Supreme Court authority implicitly rejecting any basis for extending constitutional restraints limiting government expression relating to religion to government speech on other subjects); *see also infra* notes 137-42 and accompanying text.

128. 394 U.S. 557 (1969).

129. *See generally* City of Dallas v. Stranglin, 109 S. Ct. 1591, 1594-95 (1989); Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545-46 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 618-20 (1984); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973).

130. While larger secular associations receive minimal protections under the first amendment, usually due to their size and limited criteria for selecting members, *see, e.g., Roberts*, 468 U.S. at 621; *Rotary Int'l*, 481 U.S. at 546-47, a religious day care center's freedom is so protected that it may require exemption from state licensing requirements to avoid any undue burden on religious beliefs. *See* Forest Hills Early Learning Center v. Grace Baptist Church, 846 F.2d 260, 263 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 837 (1989).

Similarly, the religious status of an associational group typically invokes a "hands off" attitude from the Court and an unwillingness to delve into otherwise justiciable disputes. *Compare, Rotary Int'l*, 481 U.S. at 543 (local Rotary chapter disenfranchised after admitting women in accordance with state law obtains injunction to stop international association from revoking charter) *with* Sebian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713-15 (1976) (Court refused to interfere with church's decision to fire priest and review internal church procedures since church actions are "strictly and purely ecclesiastical" in nature and "secular notions of 'fundamental fairness' or impermissable objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance."). *See generally* Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1521 (1979) [hereinafter *Discrimination*] ("The freedom of a church to control its membership is more fundamental than the freedom of nonreligious groups to control their membership.").

131. *Compare* Employment Div. Dept. of Human Resources v. Smith, 485 U.S. 660 (1988), State v. Wittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *and* People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) *with* Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989), State v. Rocheleau, 142 Vt. 61, 451 A.2d 1144 (1982) *and In re* Grady, 61 Cal. 2d 887, 39 Cal. Rptr. 912, 394 P.2d 728 (1964).

duties.[132] No comparable protection is provided to noninstrumental expressive activities devoid of religious content.[133]

Religious activity and secular expression are also distinct interests at the other pole of the private-public continuum when the community speaks through government instrumentalities. With regard to secular speech, commentators and judges have worried about the power of government speech to drown out, or at least skew, debate on public issues.[134] Yet there have been few cases in which the government's general power to express secular positions has been seriously challenged.[135] The decision of *Board of Education v. Pico*[136] and the limits it imposed on the removal of books from school libraries may be the best example, although its four vote plurality opinion is cast in the narrowest possible terms.

When the government speaks on religious subjects, however, courts' attitudes toward state expression change dramatically. Such expression is rigorously scrutinized and often invalidated as unconstitutional. There are few other subjects on which government actors in their official capacity are subject to comparable constitutional constraints.[137]

Constitutional limits on government religious speech can be explained in part from a free speech perspective. The government's role as speaker is accepted, despite the risk that it will drown out opposing views, because its voice is valued among the many powerful interests in society which compete for the

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132. *See* Paul v. Watchtower Bible and Tract Soc'y, 819 F.2d 875, 880-83 (9th Cir. 1987) (Jehovah Witness church shunning of disassociated member in accordance with religious beliefs is constitutionally exempt from liability for intentional infliction of emotional distress); Lynch v. Universal Life Church, 775 F.2d 576, 579 (4th Cir. 1985) (no fraud liability for church representations that its ministers could perform marriages where plaintiff knew basis of minister's ordination and powers); *cf.* United States v. Ballard, 322 U.S. 78, 86-88 (1944) (free exercise clause barred consideration of truth or falsity of faith healing claim in fraud action against church and limited litigation as to sincerity of defendants' belief in their claims).

133. This distinction can be further illustrated by the Court's recent decision in City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989) in which it upheld a municipal ordinance restricting admission to dance halls to persons between the age of 14 and 18. While recognizing that there is a "kernal of expression" in most common social interactions, the Court concluded that activities such as "coming together to engage in recreation dancing—is not protected by the First Amendment." *Id.* at 1595. Dancing as a form of religious ritual, *see supra* note 117, however, would almost certainly receive far greater constitutional protection. A law prohibiting adults from dancing with teenagers as part of a religious celebration or ceremony would be subjected to much more rigorous scrutiny than the rational basis test applied in *Stanglin.*

134. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 409 (1984) (Stevens, J., dissenting) (noting "insidious evils of government propaganda favoring particular points of view"); M. YUDOF, *supra* note 21, at 6-10; Shiffrin, *supra* note 21, at 595.

135. *See, e.g.*, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (upholding school censorship of high school newspaper if "actions are reasonably related to legitimate pedagogical concerns"); *League of Women Voters*, 468 U.S. at 398-99 (invalidating ban on editorials at government funded public broadcasting stations); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552, 554 n.7 (1975) (municipally-owned theatre could not limit access to facility based on subjective judgments as to cultural "content and quality of production" and in absence of "required minimal procedural safeguards").

136. Board of Educ. v. Pico, 457 U.S. 853, 861-63 (1982) (first amendment limits on school board's authority to *remove* "objectionable" books from school libraries applies only to book removal not acquisition, and requires proof by claimants that Board's intent to suppress ideas was a decisive factor in reaching its decision).

137. One commentator argues that the establishment clause is the only substantive constitutional restraint on what the government may say. M. YUDOF, *supra* note 21, at 214. While it is certainly the most commonly asserted restraint on government expression, *see, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (forbidding teachers from leading prayer); Edwards v. Aguillard, 482 U.S. 578, 590-94 (1987) (forbidding teaching of creationism in public schools), it is also arguable that the equal protection clause imposes limits on government speech, *see infra* notes 277-80 and accompanying text.

public's attention. The government may speak to explain its own institutional interests.[138] More importantly, government may have a special perspective on public issues not advanced by other power centers. Inchoate or marginal groups may find they have no other spokesperson than the government to espouse their concerns with vigor.[139] Finally, the government's voice may be that of the people as a whole, advocating positions that would otherwise be neglected because they are so universal that they are no one interest group's special concern.[140]

None of these justifications apply with regard to religious speech. Religious communities are not inchoate groups. Religious sentiments are not a uniform and common feeling which government can express for all people, as it does when it expresses patriotic and nationalistic feelings. Instead, religion is a subject on which the government has no special expertise. Little seems to be lost by government refusing to don the garb of national cleric as one of its speaker personas.

The more strongly rooted basis for distinguishing between government religious speech and government secular speech is, of course, the requirements of the establishment clause. Indeed, this limitation on government speech can be derived directly from the equal protection concerns underlying establishment clause doctrine. If, as will be discussed shortly, the Constitution protects the "hearts and minds" of both religious and racial minorities from the indirect messages of inferiority and outsider status communicated by the segregation of public facilities, surely the state is prohibited from communicating the exact same message directly through government speech.[141] Just as public schools teaching the superiority of the white race would raise substantial equal protection concerns, schools endorsing the superiority of approved religious beliefs invoke establishment clause scrutiny.

This distinction between the strict constitutional constraints imposed on state religious speech and the much more limited restrictions applied to state secular expression constitutes a larger gap between speech and religion than may be realized at first. On the surface it appears to limit only government expression, but leaves private speech on religious issues unhampered by constitutional requirements. The problem with this conclusion, however, is that it is often difficult to distinguish private from state action for constitutional purposes. If ostensibly private activity crosses the state action line, establishment clause limitations on religious speech will of necessity apply to that expression as well. An illustration of this more complex situation involves speech on public property which suggests that an apparent affiliation exists between government

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138. *See* M. YUDOF, *supra* note 21, at 265-66, 299; J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 849 (3d ed. 1986) ("[T]here is a valid public interest; and first amendment value, in the government conveyance to the public of information regarding government programs.").

139. *See* M. YUDOF, *supra* note 21, at 92 ("If pluralism falters, it is natural to look to government to provide the opportunities and resources to those who find it difficult to be heard.").

140. *See generally* T. LOWI, THE END OF LIBERALISM (1969); G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966); R. WOLFF, THE POVERTY OF LIBERALISM (1968). The idea that a republican government can identify and assert the public good and avoid the narrow concerns of "factions" was, of course, one of Madison's important arguments in support of the adoption of the Constitution. *See* THE FEDERALIST No. 10, at 77-84 (J. Madison) (Arlington House ed. 1966).

141. *See infra* notes 277-80 and accompanying text.

and speaker. A speaker may be invited to address a high school audience, or a display, paid for by private sources, may be mounted on the walls of city hall. The problem, of course, is that the line between the private actor permitted to speak on public property and the government actor expressing state positions on the same platform may be transparently thin and easily crossed.[142]

In doctrinal terms the issue is determining when a private individual's expression constitutes state action for the purpose of the establishment clause. This is too complex a question to be discussed in detail here.[143] All that must be accepted for the purposes of this Article is that there is a fundamental dissonance between speech and religious practice with regard to governmental affiliation. The closer nonreligious speech gets to being identified as government speech, the fewer constitutional constraints there are on the speaker's content and viewpoint choices. The exact opposite analysis, however, applies to religious expression. The closer religious speech gets to being identified as government expression, the more constitutional contraints will be imposed on the government's message.[144] Thus the constitutional rules respecting expression and religion pull in opposite directions when speech occurs on public property used for expressive purposes.

While speech and religion are separate and unique at both poles of the private-public continuum, they do converge for constitutional purposes in circumstances involving neither personal privacy nor government affiliation. The traditional public forum is the primary example.[145] This is quintessential public life. Accordingly private autonomy rights receive no special status and the free exercise clause has reduced significance. Moreover, it is public life in a place which, although government property, is "held in trust for the use of the pub-

142. *See* M. NIMMER, *supra* note 25, at §§ 4.98-.99 discussing the difficulty in distinguishing between government as speaker and government as regulator of private speech.

143. *See infra* notes 233-36.

144. This can be illustrated by comparing two high school speech cases involving nonreligious expression, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) and Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988). In *Tinker*, the Court held that school efforts to prohibit the wearing of black arm bands by students to protest the Viet Nam war violated the first amendment. Students' private speech could not be restricted unless it threatened to materially disrupt the school's educational mission. *Tinker*, 393 U.S. at 509. In *Hazelwood*, however, the Court upheld the right of the school principal to censor articles in the school newspaper under the much lower standard of review of mere reasonableness because the public "might reasonably perceive [the paper] to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. Thus the closer the students' secular speech is identified or affiliated with government, the less rigorous are the constitutional limits imposed on government regulation of their speech. If *Tinker* and *Hazelwood* involved religious speech, however, a contrary principle would clearly apply. Government regulation of students wearing religious symbols would be evaluated under a standard at least as rigorous as that of *Tinker*. School authorities could not interfere unless the student's expression was disruptive. Government supported student religious speech, such as a high school newspaper preaching the one true religion, on the other hand, would be reviewed under even *more* rigorous scrutiny and presumptively invalidated, the exact reverse of the Court's holding in *Hazelwood* in which the principal's control of the high school paper's content was largely discretionary and free from judicial intervention.

145. The traditional public forum is public property such as "streets, sidewalks, parks, and other similar public places [which] are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." Hudgens v. NLRB, 424 U.S. 507, 515 (1976) (quoting Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 315 (1968)).

lic."[146] Because the government is prohibited from exercising control over the content of speech in such areas,[147] there is no connotation of government sponsorship or support in the use of traditional public forums by private speakers[148] and no establishment clause concerns arise when such access is permitted.[149] Here, all speech, religious or secular, stands on an equal footing, and it is not surprising to find that many traditional public forum cases involve the protection of religious speech under orthodox first amendment principles.[150]

It is only in this type of circumstance, when religious expression and secular speech are fully fungible constitutional interests, that one can speak meaningfully of government neutrality toward religion. In a public park, for example, the government cannot exclude speakers who want to express their religious devotion, but it also can not provide them greater access than that made available for nonreligious speech purposes. The first amendment's content neutrality requirement controls.

The traditional public forum is not the only occasion when a speech clause, rather than a religious clause, analysis should apply. Designated all-purpose public forums at universities should receive similar treatment.[151] Another example would be private speech on private property (property of no special religious significance) which is directed at a public audience. A highway billboard rented by a religious congregation which urges passersby to worship God must be

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146. Hague v. CIO, 307 U.S. 496, 515-16 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

147. In a traditional public forum the government may enforce only reasonable time, place, and manner restrictions that are content neutral. Content discriminatory legislation of speech in public forums is subject to strict scrutiny. Carey v. Brown, 447 U.S. 455, 461-62 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972).

148. Courts have frequently upheld the rights of racist groups to use public facilities designated as public forums on the grounds that doing so created no inference of state endorsement of the views expressed. *See, e.g.*, Knights of KKK v. East Baton Rouge School Bd., 578 F.2d 1122, 1127-28 (5th Cir. 1978) ("[T]he weight of authority seems to be that merely permitting the occasional and temporary use of state facilities by racially discriminatory groups along with all others does not constitute significant state involvement in their practices."); Cason v. City of Jacksonville, 497 F.2d 949 (5th Cir. 1974); National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1016 (4th Cir. 1973) ("No case suggests that in maintaining a street, park or public meeting place, a state espouses the views which may be there expressed."); Invisible Empire, KKK v. Mayor of Thurmont, 700 F. Supp. 281, 286-87 (D. Md. 1988); NAACP v. Thompson, 648 F. Supp. 195, 225 (D. Md. 1986).

149. Justice Blackmun makes essentially the same point in Allegheny County v. ACLU, 109 S. Ct. 3086 (1989). Responding to Justice Kennedy's criticism that the majority's position would constitutionally prohibit the singing of Christmas carols on all public property, Blackmun explained, "It obviously is not unconstitutional, for example, for a group of parishioners from a local church to go caroling through a city park . . . . The reason is that activities of this nature do not demonstrate the government's allegiance to, or endorsement of, the Christian faith." *Id.* at 3111.

150. *See supra* note 29.

151. While universities are not traditional public forums, the nature of the institution itself, in terms of its history and function, requires a similar independence from government, and that fact is widely recognized. *See* Healy v. James, 408 U.S. 169, 180-81 (1971) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' and we break no new constitutional ground in reaffirming the [N]ation's dedication to safeguarding academic freedom.") No one would mistake student speech on Sproul Hall's steps in Berkeley for the expression of Ronald Reagan's administration in California. Thus, a case like Widmar v. Vincent, 454 U.S. 263 (1981), may be correctly decided, not simply because the university designated a public forum to which religious groups sought access, but because of the attenuated relationship between university student organizations and state policy. When school administrations and student activities are more interdependent and related to each other, however, a very different analysis should apply. *See generally* Teitel, *supra* note 111.

treated no more or less favorably by government than a political billboard urging people to vote for a particular candidate.[152]

Finally, religion and speech clause requirements will arguably overlap when the government distinguishes between people on the basis of their belief systems alone. This issue is not the equal protection problem that arises when the government prefers one religious group over another. As noted, that analysis only applies to groups defined by the beliefs they hold which can be analogized to suspect classes.[153] But what of people for whom suspect class status is probably inapplicable, who are subject to discrimination based on what they believe? While traditional establishment clause doctrine would rigorously prohibit any promotion of religion generally, if that result is not required from an equal protection perspective, it is of uncertain validity under the analysis proposed here. Why should distinctions between those holding religious and nonreligious beliefs be evaluated differently than state discrimination among those holding competing secular beliefs?[154] Thus, if the government, in allocating benefits and bur-

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152. Similarly, the Court was clearly correct in Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989) in holding unconstitutional a Texas law providing a sales tax exemption for publicly circulated religious magazines, but not secular journals. Justice Brennan's plurality opinion concluded that this preference for religion violated the establishment clause. *Id.* at 894. Under the thesis of this Article, however, since the tax exemption did not conflict with equal protection principles by discriminating among religions, the law was more appropriately invalidated as content discrimination prohibited by the press clause of the first amendment. *Id.* at 905 (White, J., concurring). For further discussion of this case see *infra* notes 315-16 and accompanying text.

153. *See supra* notes 77-109 and accompanying text.

154. There are several answers to this inquiry that are fully consistent with the equal protection orientation of the establishment clause suggested in the text. First, the original intent of the drafters of the establishment clause may have required a strict wall of separation between the state and religion prohibiting any support or preference for religious activity. *See e.g.*, Everson v. Board of Educ., 330 U.S. 1, 26-27, *reh'g denied*, 330 U.S. 855 (1947) (Jackson, J., dissenting); *Id.* at 31-32 (Rutledge, J., dissenting). If the history of the establishment clause does demonstrate such original intent it is no response to argue that the equal protection clause has rendered that history irrelevant. For while equal protection principles may require the courts to prohibit preferential aid to one religion over another, despite such favoritism having been tolerated under the original understanding of the establishment clause, they certainly do not require the reverse conclusion. Nothing in equal protection suspect class analysis directly requires the courts to reject as superseded historically grounded establishment clause doctrine which prohibits government from promoting or favoring religion.

Second, religious liberty concerns may suggest that certain forms of nonpreferential governmental support of religion are unconstitutional. Using tax funds to support all religions arguably coercively interferes with religious freedom by forcing individuals to contribute funds to a church not of their own choosing. *See* McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 938 (1986) [hereinafter *Coercion*]. Third, there is the often repeated concern that governmental support for religion is divisive, and risks creating tension and discord among citizens along religious lines. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971).

While none of these contentions can be lightly dismissed, they do not persuasively support a constitutional standard rejecting any governmental advancement of religion. The issue of historical intent is substantially weakened by the serious uncertainty which exists as to the "true" purpose of the establishment clause. See generally the materials cited in Laycock, *Nonprefential Aid*, *supra* note 9, at 876, suggesting that the establishment clause was not intended to bar all support for religion, and Laycock's critical response. *Id.* at 877-923. It is also undercut by the general rejection of original intent as a dispositive determinant of the Constitution's meaning. Unless one is willing to return all constitutional provisions that do not reflect the original intent of the drafters as currently interpreted to their 150 or 200 year old meaning, the argument must be made as to why the establishment clause should be particularly tied to an historical anchor.

The difficulty with the argument that nonpreferential aid to religion must be prohibited to protect religious liberty against coercion is that it fails to explain why only aid to religion should be restricted. If forcing someone to pay taxes to support a church other than one's own is coercive and interferes with religious liberty, why isn't it equally coercive to force someone to contribute to any secular governmental activity which is inconsistent with the tenets of one's faith? A doctrine based solely on religious liberty lacks a basis for distinguishing between taxing

dens, distinguishes between people who believe the world is flat and those who do not, the constitutional principle governing the judicial review of that discrimination should arguably be equally applicable to similar allocations between religious and nonreligious persons, practices, and institutions.

Clearly, some kind of constitutional scrutiny should apply to this kind of discrimination. At a minimum there is a fundamental autonomy right grounded in the speech clause of the first amendment which prevents the government from punishing or penalizing persons solely because they hold unpopular secular beliefs. As has been noted, however, autonomy rights only protect individuals against penalty. They do not prevent the government from positively reinforcing conduct inconsistent with the exercise of rights.[155] The remaining question, then, is how to evaluate government conduct which does not penalize those who hold nonreligious beliefs, but rather supports or subsidizes religion in a nonsectarian way. What standard of review is applied to this kind of belief system discrimination, whether it be between the religious and the secular or among competing secular philosophies or points of view?

Leaving traditional establishment clause doctrine aside, there is no simple answer to this inquiry and very little case law to be of assistance. There are decisions such as *Elrod v. Burns*[156] which prohibit the awarding of certain government employment positions on the basis of a person's political beliefs and party affiliation. It is uncertain how far the analysis in *Elrod* can be extended beyond partisan political beliefs, however, or how strong of a showing the government must make to justify belief system discrimination in employment (or with regard to other governmental benefits). Presumably, a lesser standard of review than strict scrutiny will be appropriate, but total deference to the state's judgment if it is minimally rational would also be unacceptable.[157]

Indians to build a road through their sacred sites, apparently a noncoercive activity, or the publicly supported teaching of evolution, and the use of tax dollars to build a church.

Finally, while religious divisiveness is a significant concern, surely it loses some of its threat if government support for religion must operate within strict constitutional constraints requiring full equality among all faiths, prohibiting the penalizing of the nonreligious, and requiring some justification for discrimination among belief systems, religious or otherwise. *See infra* notes 307-12 and accompanying text.

155. *See supra* notes 31-33 and accompanying text.

156. 427 U.S. 347 (1976).

157. Academic departments in public universities, for example, might refuse to hire someone whose views were so unorthodox that they cast doubt on the applicant's ability to perform his or her duties. Similarly, police departments might refuse to hire individuals who believed in the special criminal propensities of racial minorities. It is not altogether clear how those governmental choices should be constitutionally evaluated. The Court has held that if a government employee comments upon a matter of public concern and is discharged for doing so, the Court must balance "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). That rule is a narrow one, however, in that its focus is on expression not belief, it relates only to matters of public concern, and it applies to employment, not to government benefits or burdens in general.

The *Pickering* rule has also been highly controversial in its application. In Rankin v. McPherson, 483 U.S. 378 (1987) a five vote majority held that the constable of Harris County, Texas violated the first amendment rights of a clerical employee. *Id.* at 392. The employee was fired for saying "[I]f they go for him again, I hope they get him" upon hearing of an unsuccessful assassination attempt against then President Reagan. *Id.* at 381. The four dissenting justices expressed astonishment that the government must allow police employees to "ride with the cops and cheer for the robbers," or that employees of the EEOC might "be permitted to make remarks on the job approving of racial discrimination." *Id.* at 394, 401 (Scalia, J., dissenting). *See also* McMullen v. Carson, 754

This final overlap between speech and religion is again a narrow one. This is so for three reasons. First, whatever standard of review is to be applied to belief system, discrimination presupposes that the government is distinguishing between persons or institutions on the basis of belief systems alone. It is not always clear, however, when religious and nonreligious activities can be considered the equivalent of each other so that government discrimination against either must be based solely on the beliefs of the participants. Perhaps there is no true secular counterpart, for example, to a house of worship or to the observance of a Sabbath day. In that event courts may determine that these religious practices can be distinguished from secular ones by nonbelief characteristics that are routinely the subject of government regulation, and, therefore, there is no need to review the government's decision to treat the religious and secular activity differently under even moderate scrutiny.[158]

Secondly, there are occasions when the state may legitimately distinguish between persons and institutions because of the differing level of importance which people attribute to their respective beliefs. Religious convictions may be much more critical to the identity and lifestyle of religious individuals than are corresponding secular preferences. This distinction would be irrelevant if the government refuses to hire nonreligious workers for an employment position; that would be a clear case of belief discrimination where it is unlikely that any rational distinction could justify the government's decision. However, the government cafeteria could elect to offer at least one nonpork dish at lunch time to meet the religious requirements of Jews and Moslems while rejecting purely personal menu requests from other customers because of the special importance to religious persons of their need to comply with their faith's dietary regulations.[159]

Thirdly, the predicate for applying less than strict scrutiny to legislative belief classifications is that the government is discriminating between religious and nonreligious orientations but not among religions. If this condition is considered with any rigor, however, it will often be extremely difficult to meet. This may not require a rigid prophylactic rule prohibiting all government recognition

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F.2d 936, 940 (11th Cir. 1985) (recognizing "the dangerousness of any principle conditioning employment upon a person's beliefs or association" but nonetheless upholding the firing from the sheriff's department of an active Ku Klux Klan member).

Indeed, the rule of *Elrod* itself has been very narrowly construed by some lower courts. *See, e.g.*, Messer v. Curci, 881 F.2d 219 (6th Cir. 1989) (rule of *Elrod* applies only to the discharge of government employees; it does not preclude state hiring discrimination on basis of applicant's political affiliation).

158. Thus, for example, it may reasonably be argued that a city could allow houses of worship to be constructed in single family residential districts pursuant to conditional use permits while denying that same privilege to secular institutions such as a fraternal lodge building. There would be no establishment clause violation in doing so, as lower federal courts have suggested there might be, if a house of worship is viewed as a distinct use of much greater value and importance to the population it serves than is a site intended solely for casual social interaction. *See, e.g.*, Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303, 307-08, *cert. denied*, 464 U.S. 815 (6th Cir. 1983). The city would simply be applying the same kind of criteria it regularly utilizes in deciding which uses to allow in a residential area, as when it provides zoning preferences for day care centers but not a roller skating rink. A decision to provide conditional use permits for day care centers with religious affiliations, but not others, however, would raise serious constitutional concerns regarding belief discrimination.

159. *See* McConnell, *Accommodation*, *supra* note 2, at 10-11.

and support of religion as some separationists urge, but it will certainly significantly restrict the situations in which such general support may occur.[160]

V. The Doctrinal Consequences of an Autonomy Right-Equal Protection Orientation of the Religion Clauses

A. *Current Establishment Clause Doctrine Through an Equal Protection Prism*

Recognizing that the establishment clause has a significant equality dimension to it and that religion as a status has many of the attributes of suspect classes can help to clarify prevalent establishment clause doctrine. The Court's current approach to establishment clause cases begins by focusing on the purpose and effect of challenged legislation. Under the first two prongs of the *Lemon* test, the Court inquires whether the state action at issue has a secular purpose and whether its primary effect is one that neither advances nor inhibits religion.[161] Unfortunately, the Court is racked with controversy as to what each of these inquiries entails.

One principal uncertainty relates to how much of a religious purpose must be found to exist in order to invalidate a statute. The Supreme Court's attempts to answer this question are as disparate as they are confused. Justices Scalia and Rehnquist reject the purpose prong of the *Lemon* test in its entirety. Religious motives, they argue, are irrelevant to a law's constitutionality.[162] Other Justices argue that a statute may be constitutional if it is motivated in part by religious purposes, but they disagree as to how dominant the religious motive must be to invalidate the law. Former Chief Justice Burger would require that the legislature's intent be wholly to advance religion; that there be no secular

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160. Even advocates of a diluted establishment clause which only protects religious minorities against government coercion have recognized this difficulty. Thus Justice Stewart wrote in his dissent in the bible-reading case, Abington School Dist. v. Schempp, 374 U.S. 203 (1963):

> What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Free-Thinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government. It is conceivable that . . . school boards might eventually find it impossible to administer a system of religious exercises during school hours in such a way as to meet this constitutional standard—in such a way as completely to free from any kind of official coercion those who do not affirmatively want to participate.

Id. at 319-20 (Stewart, J., dissenting). The problem becomes much more exacerbated when the constitutional standard prohibits not only coercion but also aspersions of inferior or outsider status. *See also infra* notes 212-27 and accompanying text.

161. *See supra* note 1. Some commentators argue that the language of the *Lemon* test notwithstanding, the application of the test is limited to policies that promote or benefit religion and does not cover state action that inhibits religion. *See* Lupu, *Where Rights Begin, supra* note 58, at 983 n.172. Accordingly, a law that denied discretionary benefits to the members of one religious group such as Catholics could not be invalidated as establishing a religion since it benefitted all religious groups indiscriminately other than Catholics. Lupu would require a separate equal protection analysis to deal with such a law. There seems to be no reason, however, why these same equal protection concerns cannot be subsumed under establishment clause doctrine as the literal language of the *Lemon* test suggests. As thus stated the issue is one of semantics and the same substantive results would be reached under either approach.

162. *See* Edwards v. Aguillard, 482 U.S. 578, 614-17, 636-40 (1987) (Scalia, J., joined by Rehnquist, J., dissenting) stating "I think it time we sacrifice some 'flexibility' for 'clarity and predictability.' Abandoning *Lemon's* purpose test . . . would be a good place to start." *Id.* at 640.

purpose at all.[163] Justice Brennan, recognizing that the Burger position taken literally would essentially eliminate the secular purpose prong of the test, suggests that a "primary" or "pre-eminent" religious purpose will suffice to invalidate a law on establishment clause grounds.[164] Justice O'Connor's approach is the most complex. She agrees that the religious purpose must "predominate."[165] She adds, however, that she will apply the secular purpose test only to the extent that the government motive alters the effect of the statute. That is, a religious purpose is unconstitutional if it increases the likelihood that people will perceive the state's action as endorsing religion.[166]

A comparable range of opinions exists with regard to the effects prong of the test. Justices Brennan and Marshall, for example, give the test its most literal interpretation. They would invalidate laws which have the effect of aiding "one religion . . . all religions or prefer one religion over another" in order to ensure "that the organs of government remain strictly separate and apart from religious affairs."[167] Justices O'Connor and Blackmun would only invalidate state action which a neutral and reasonable observer would understand to have the effect of endorsing religion generally or a particular faith. These unconstitutional effects are least likely to result if the challenged action is nonsectarian, of long-standing practice, and occurs in a context which dilutes the risk of en-

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163. Lynch v. Donnelly, 465 U.S. 668, 680 (1984) ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.").

164. *Edwards*, 482 U.S. at 590-93; Stone v. Graham, 449 U.S. 39, 41 (1980).

165. *Edwards*, 482 U.S. at 597 (Powell, J., joined by O'Connor, J., concurring).

166. While Justice O'Connor does not state this standard explicitly, it seems to be the reasonable inference to be drawn from her concurrence in Wallace v. Jaffree, 472 U.S. 38, 74-75 (1985). In that opinion O'Connor initially explains that judicial inquiry into legislative purpose should be:

> deferential and limited. . . . If a legislature expresses a plausible secular purpose . . . in either the text or the legislative history [of a statute] . . . then courts should generally defer to that stated intent. . . . Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence.'

Id. at 74-75 (quoting from Epperson v. Arkansas, 393 U.S. 97, 108 (1968)).

Then, in response to Justice Rehnquist's criticism in dissent that such a deferential standard of inquiry serves no function because it is so easily circumvented by the state, O'Connor argues that forcing the state to remove "all sectarian endorsements from its laws" does serve the useful purpose of "assuring that government not intentionally endorse religion." *Id.* at 75. Moreover, should "a legislature . . . enunciate a sham secular purpose for a statute" O'Connor concludes, "I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt." *Id.*

At first reading O'Connor's statements seem to contradict each other. If courts are to be highly deferential and circumspect in conducting an inquiry into the legislature's purpose, just how are they supposed to look behind a purported secular purpose to determine whether it is sham or sincere? A closer reading suggests that she is defending a consistent standard. The goal of the secular purpose prong of the *Lemons* test is to prevent the state from communicating its purpose in enacting a law in a way which results in the endorsement of religion. The state's purpose is only constitutionally problematic if it causes such an effect, and it is in that context that forcing the state to eliminate manifestations of religious endorsement serves some practical goal. Similarly, when O'Connor argues that courts can distinguish sham purposes from sincere ones without intrusively inquiring into legislative thought processes, what she may be suggesting is that courts can recognize those cases in which a secular preamble does not mask the common understanding of the polity that the challenged law is endorsing religion and, therefore, they can invalidate such laws.

167. Lynch v. Donnelly, 465 U.S. 668, 698 (Brennan, J., dissenting).

dorsement because of its location and surroundings.[168] Justices Kennedy, White, Rehnquist, and Scalia apply a more permissive standard, prohibiting only those actions which proselytize and at least indirectly coerce nonadherents or which benefit religion in a more direct and substantive way than long-standing and accepted traditional activities.[169]

A significant source of this confusion is the *Lemon* test's lack of a conceptual foundation. Why does the Court ask these two particular questions in interpreting the establishment clause? If that issue was forthrightly addressed, the nature of the purpose and effects test to be applied could be intelligibly determined.

With regard to the secular purpose prong of the *Lemon* test, current equal protection case law provides a clear doctrinal foundation for the Court's inquiry. State action intended to serve racially discriminatory purposes is unconstitutional.[170] If, as is suggested, the intent to promote one religion over another is indistinguishable from the intent to promote one race over another,[171] then wherever religious favoritism is determined to be a motivating factor in state action, that action is also constitutionally invalid.[172]

This conclusion for the establishment clause seems fully consistent with a central rationale for the Court's emphasis on motive in recent equal protection cases. All governmental decisions, whether administrative or legislative, involve a process which must be free from the taint of unacceptable bias.[173] From that perspective favoritism and discriminatory motives along religious lines are as unacceptable an influence in governmental decisionmaking as are comparable attitudes with regard to race and gender.[174]

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168. Allegheny County v. ACLU, 109 S. Ct. 3086, 3103-05 (1989); *Id.* at 3118-22 (O'Connor, J., concurring in part and concurring in the judgment).

169. *Id.* at 3136-39 (Kennedy, J., concurring in the judgment in part and dissenting in part).

170. *See* Hunter v. Underwood, 471 U.S. 222, 227-28 (1985); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976).

171. *See infra* notes 212-27 and accompanying text.

172. Under this analysis it is not necessarily an invidious purpose to enact a law that is in accord with one's religious beliefs. It would be unconstitutional, however, to enact a law for the purpose of reserving general benefits for the members of one's faith alone, or to promote and endorse the superiority or validity of one faith over another. This means that enacting laws which have both secular and religious foundations such as antimurder statutes are unlikely to be invalidated under a purpose test. On the other hand voting to fund government loud speakers on every corner reciting sectarian religious tracts would be recognized as serving a purpose of religious endorsement.

173. *See* J. ELY, *supra* note 70, at 103:

> In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when . . . though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

See generally id. at 135-79 (emphasis in original).

174. *See infra* notes 209-27 and accompanying text. See also J. ELY, *supra* note 70, at 140-41, noting that "[t]here is nothing in the reasoning that establishes the relevance of unconstitutional motivation that limits it to cases involving racial discrimination." Thus, Ely explains, the anti-evolution law invalidated in Epperson v. Arkansas, 393 U.S. 97, 109 (1968) was held to be unconstitutional because its motivation was to promote religion, not because of the effect of not teaching evolution to students. *Id.* at 141. Ely also uses the example of "Winken, Blinken and Nod," three National Guard officers selected for a dangerous assignment. The selection process is presumptively constitutional if each is selected based on his or her shooting ability or if chosen randomly. But if

With regard to the effects prong of the *Lemon* test, the analogy is more attenuated. The Court has held that disproportionate effects alone are an insufficient basis for invalidating state action on equal protection grounds.[175] Superficially that would suggest that there should be no effects test applied if the establishment clause is rooted in equal protection principles.

Closer analysis, however, demonstrates that this oversimplifies the case. First, the Court is only reluctant to apply an effects test to legislation which is facially neutral. State action which classifies on the basis of race will be evaluated to see if it indeed produces constitutionally unacceptable inequality among the races. Thus, if state action facially discriminates among religions it may be evaluated as to its effect just as the Court examined the effect of segregation on black people in *Brown v. Board of Education.*[176]

Even if ostensibly neutral state action is at issue, the Court will not ignore disparate effects entirely. If the effects of a statute are sufficiently discriminatory so that only an invidious motive could explain its enactment, the Court may draw that inference and invalidate the law.[177] Moreover, the Court has demonstrated that its willingness to infer illicit motives in race discrimination cases varies by context. In school segregation, voting rights, and jury selection cases it is easier to draw an inference of illicit motive than it is if employment discrimination or land-use regulations are at issue.[178] A similar rubric could be fashioned for the establishment clause so that in particularly problematic circumstances objective effects promoting a particular religion would more easily be found to be motivated by religious favoritism.[179]

"they were selected because they were Poles, *or Methodists,* or Republicans . . . our intuition tells us that Winken, Blinken, and Nod have been treated unconstitutionally . . . . It is inconsistent with constitutional norms to select people for unusual deprivation on the basis of race, *religion,* or politics . . . ." *Id.* at 137 (emphasis added).

175. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 ("official action will not be held unconstitutional solely because it results in a racially disproportionate impact"); Washington v. Davis, 426 U.S. 229, 239 ("our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.") (emphasis in original).

176. 347 U.S. 483 (1954). Citing findings at trial, the Supreme Court noted:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of the law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id. at 493.

177. *See Village of Arlington Heights,* 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960); Yick Wo v. Hopkins, 118 U.S. 356, 363 (1886).

178. *See, e.g., Village of Arlington Heights,* 429 U.S. at 266 n.13 ("Because of the nature of the jury selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extreme of *Yick Wo* or *Gomillion.*"); Ortiz, *The Myth of Intent in Equal Protection,* 41 STAN. L. REV. 1105, 1119-34 (1989); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 557-62 (1st ed. 1986).

179. For example, the promotion of religion in public elementary and high schools poses special problems. The audience is young and more vulnerable to the effects of any messages conveyed. Also, the children of religious minorities are captive listeners and participants either by direct regulation, peer pressure, or the indirect coercive

Finally, an argument can be made that the Court's refusal to consider discriminatory effects alone in race discrimination cases should be narrowly construed; and that attempts to extend this position to other suspect or quasi-suspect classes or to the establishment clause are misguided. At best the Court's reluctance to apply heightened scrutiny to legislation adversely impacting on racial minorities represents an attempt to avoid having wealth discrimination bootstrapped up into suspect class status because of the disproportionately large number of racial minorities in the lower economic classes.[180] In other situations, such as those involving religious discrimination where minority status does not correlate with economic class, such fears are unwarranted, and substantially disproportionate effects alone may be considered adequate grounds for invalidating state action.[181]

Such an argument has merit, but it must be limited in one critical respect. While an effects test applied to religious groups would not make wealth classifications vulnerable to constitutional challenges, it could undermine the validity of any statute inconsistent with a religious belief or practice of a particular faith. All such laws would disproportionately impact on one religious group more than another. To avoid this result, disproportionate effects in this analysis must be predicated on inequality among religions with regard to their economic, political, and even psychological status. It cannot apply, however, to the equal liberty to practice one's religion. Thus state funding of private schools, including

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power of official endorsement. *See* M. YUDOF, *supra* note 21, at 215. Accordingly, the intent to endorse religion might be more readily inferred from facts susceptible to multiple interpretations in the public school setting.

180. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 248 (1976):

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

See also San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (footnotes omitted):

> However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness. . . . [T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.

Ortiz, *supra* note 178, at 1137-39. This rationale is not persuasive to everyone and the Court's failure to look at the discriminatory effects of state action regardless of the government's intent in acting has been criticized. *See* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

181. One can take this argument several steps further. Ortiz suggests that the Court's reliance on the intent standard in racial equal protection cases is predicated on the intent standard serving two functions. It both condemns invidiously biased laws while it protects facially neutral market structures and legislative allocations from judicial intrusion. In performing this latter task, the intent standard furthers traditional norms of liberalism, which, at its libertarian core, seeks to allow each "individual to pursue her own vision of the good" rather than collectively proscribing some uniform pattern of conduct or belief that everyone must obey. *See* Ortiz, *supra* note 178, at 1139-42. If the Court's reliance on intent in racial equal protection cases is based on Ortiz' premise, then it seems clear that the equal protection of religious groups need not be as limited as the race cases. This is in part because religious groups lack the correlation with wealth distributions in American society which make a racial effects test so threatening. Additionally, and more fundamentally, prohibiting state action which has the effect of promoting religious favoritism and uniformity directly serves the same liberal goals of individualism and pluralism that the intent standard supports in race cases. Limiting equal protection doctrine to intent alone is thus not only unnecessary when religious groups are the subject, it is actually inconsistent with the underlying principles which justified the more narrow holdings in the race cases in the first place.

those which are overtly religious in nature, might have the effect of favoring certain religions while it isolated and threatened others.[182] Such decisions could be properly evaluated under an effects test. However, it could not be argued that all facially neutral laws that make it more difficult for the members of some religions to practice their faiths than others violate the establishment clause. Laws of this kind raise only free exercise concerns as to which no direct equality requirement applies.[183]

B. *Basic Free Exercise Doctrine Through an Autonomy Right Prism*

Under early Supreme Court precedent, a private, autonomy right orientation of the free exercise clause was emphasized to such a degree that the clause provided minimal protection to religious individuals. The Constitution prevented government from interfering with religious beliefs, but it tolerated without significant review the burdening of religious practice and behavior.[184] The discrediting of this belief-action distinction in the 1960s, however, resulted in an uncertain line of cases seemingly devoid of doctrinal coherence. More than mere beliefs merited constitutional protection, but no clear parameters were placed on the scope of religious autonomy recognized by the Court's revitalized free exercise concerns.

On one hand, in *Sherbert v. Verner*[185] and *Wisconsin v. Yoder*,[186] the Court applied strict scrutiny to laws which infringed on plaintiff's free exercise rights of immunity from state regulation. Unless the state could demonstrate that its actions served a compelling state interest in the least restrictive way possible, it could not punish Amish parents for following their religious convictions in not complying with the state's compulsory education laws,[187] nor could it deny unemployment benefits to a Seventh Day Adventist because she refused to accept employment which required her to work on Saturday.[188] On the other hand, in *Bowen v. Roy*,[189] a 1986 case, the Court's plurality opinion refused to apply strict scrutiny to the denial of Aid to Families with Dependent Children (hereinafter AFDC) benefits to an otherwise qualified applicant because she refused on religious grounds to provide the state her social security number.[190] Instead, the plurality argued that "absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[191] The very next year, however, in *Hobbie*

182. *See infra* notes 299-316 and accompanying text.
183. *See supra* notes 34-42 and accompanying text.
184. *See* Reynolds v. United States, 98 U.S. (8 Otto) 145, 161-67 (1879); Lupu, *Where Rights Begin*, *supra* note 58, at 937-38.
185. 374 U.S. 398 (1963).
186. 406 U.S. 205 (1972).
187. *Id.* at 234.
188. *Sherbert*, 374 U.S. at 410.
189. 476 U.S. 693 (1986).
190. *Id.* at 707-08.
191. *Id.*

v. Unemployment Appeals Comm'n of Florida[192] the Court rejected the plurality standard of *Bowen* and reiterated its commitment to the holding of *Sherbert*.[193]

Most recently in *Lyng v. Northwest Indian Cemetery Protection Association*,[194] the Court upheld the right of a state to build a road through government land that was sacred and intrinsic to the exercise of an Indian religion. In an ambiguous opinion Justice O'Connor rejected the Indians' free exercise claims on two related grounds. The free exercise clause prevents government from prohibiting or penalizing the exercise of one's religion or coercing people into acting contrary to their religious beliefs, but the government is not otherwise prevented from making it more difficult or even impossible to practice one's religion.[195] More particularly, the government is not required to use its own land or other resources in a way that will facilitate the religious practices of any group.[196]

Under an autonomy rights analysis, many of these recent cases would be resolved the same way, but with a stronger and more consistent doctrinal foundation. The government may not penalize, prohibit, or create obstacles to the exercise of a fundamental autonomy right, but it may refuse to subsidize the exercise of the right and it may positively reinforce alternative behavior. From that perspective, Justice O'Connor's opinion in *Lyng* is correct when she argues that the free exercise clause provides no entitlement to religious groups as to what they " 'can exact from the Government.' "[197] The state is not obligated to make its own resources available as a site for religious worship. However, the extraneous suggestion in her opinion that state action making it more difficult to exercise one's religion does not implicate the free exercise clause is mistaken. Government action that makes it increasingly difficult for individuals to use their own private resources to worship as they see fit (such as padlocking the entrance to a church because it failed to meet a building and safety code) raises free exercise concerns because it creates additional obstacles to the practice of that faith's religion.

Sherbert and *Bowen* are harder cases to evaluate on the issue of whether the state is burdening or penalizing a right or merely failing to support or subsidize its exercise. In striking down as incompatible with free exercise guarantees the state's refusal to pay unemployment compensation to a Sabbatarian who declined to accept employment requiring her to work on her Sabbath, the Court expressed concern that the denial of these benefits would coerce the plaintiff

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192. 480 U.S. 136, 141-42 (1987).

193. The suggestion in the plurality opinion in *Bowen* that the existence of a good cause exception in *Sherbert* distinguishes that case from *Bowen* is not persuasive. *Bowen*, 476 U.S. at 708. There seems to be no reason to construe the denial of benefits as penalizing one's right to worship only in those cases where some nonreligious ground, no matter how narrow, might be accepted as an exception to the general conditions to be met before the benefit could be obtained. The problem is more complex than that. *See infra* note 203.

194. 485 U.S. 439 (1988).

195. *Id.* at 448-53 ("[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification for its otherwise lawful actions.").

196. *Id.* at 450-53.

197. *Id.* at 451 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

into violating her religious beliefs.[198] The problem with this conclusion is that the experience of feeling tempted or coerced by the state's denying an individual positive reinforcement should not by itself constitute a burden or penalty on petitioner's autonomy rights. Certainly the indigent women whose abortions were not funded in *Harris v. McRae*[199] felt coerced to carry their fetuses to term, but the Court in that case still ruled that their autonomy rights to terminate their pregnancies were not abridged.

What the Court fails to address in these free exercise cases is when the denial of benefits (which will always have a coercive effect) should be considered a penalty for constitutional purposes. One possible answer to this question is that it should never constitute a penalty in that by definition all the state is doing is refusing to provide a benefit; it is never taking anything away from the petitioners. That contention, however, smacks of the discredited right-privilege distinction of older days[200] and seems fundamentally inconsistent with the "new property" world of a modern social welfare state.[201]

A more acceptable, but also more open-ended, doctrine would require the Court to distinguish between generally available baseline entitlements, the denial of which would constitute a penalty, and specific extra benefits the state might provide or refuse to provide at its discretion, regardless of their coercive effect on the exercise of fundamental rights. Under this approach, for example, it might not violate the free exercise clause to offer state employees double time if they work on Sunday while it would be unconstitutional to terminate a welfare mother's AFDC payments if she sends her child to Sunday school.[202]

Even under this latter approach, however, it is not clear that *Sherbert* is correctly decided. Unemployment compensation regulations which provide benefits to only those people who are willing to work all the time, are not typically understood to penalize the exercise of constitutional rights which happen to be inconsistent with the legitimate work requirements of employers. Surely the state is not constitutionally obliged to pay unemployment compensation to an individual who declines to work in order to stay home and write poetry or who wants time off to campaign for the political candidate of his choice, although both of these activities involve the exercise of protected activity. Thus, *Sherbert* is either wrongly decided or the Court must conclude that what constitutes an unconstitutional burden or penalty will vary according to the nature of the fundamental right which is at stake with the free exercise clause receiving the most broadly protected status.[203]

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198. Sherbert v. Verner, 374 U.S. 398, 404-06 (1963).

199. 448 U.S. 297 (1980).

200. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("The Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights.").

201. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

202. Determining such a baseline with precision is likely to be a difficult task. *See* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1300-01 (1984).

203. By avoiding the common doctrinal basis of all dignitary and autonomy rights, commentators often circumvent the difficulty of the problem presented in *Sherbert*, the conditional grant of the discretionary benefit. Lupu, for example, attempts to resolve the *Sherbert* issue by asking whether the denial of unemployment benefits

Finally, the *Yoder* decision also becomes much more intelligible under an autonomy right analysis. The Amish religious practices at issue were directed inward towards the membership of their own religious community. The Amish petitioners sought to avoid, and not to change, the outside influences which they found to be inconsistent with their faith, and were willing to accept all the costs of doing so. Therefore, the education of their teenage children was properly protected as a private autonomy decision of more importance to the individual's or religious group's identity than it is to the society at large.[204]

Recognizing that the free exercise clause must be understood as an autonomy right directs the Court's inquiry in religious liberty cases to the appropriate threshold question, whether the government is penalizing or unduly burdening the exercise of religion or is only reinforcing behavior inconsistent with a person's religious beliefs. Answering that inquiry, of course, still leaves many critical questions unanswered. With regard to any autonomy right, the Court must decide how much of a burden on the exercise of the right warrants constitutional scrutiny.[205] It must map out how much emphasis to place on the specificity (or generality) of the challenged law and the state's motive in enacting it. Finally, it must decide on an appropriate standard of review to apply to abridgments of the right.[206]

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interferes with an entitlement belonging to the petitioner. *See* Lupu, *Where Rights Begin, supra* note 58, at 977-82. Changing the terminology used from penalty to entitlement, however, does not help to determine the scope of free exercise rights unless one can persuasively explain when an entitlement should be found to exist. Here, unfortunately Lupu provides us little assistance. All he tells us is that if unemployment benefits are universally available to all of the involuntarily unemployed, we may view the denial of benefits to the petitioner in *Sherbert* as an abridgement of her entitlement. On the other hand, if unemployment benefits are subject to forfeiture for good cause, petitioner suffers a loss of a property interest when the benefits are denied because she refuses to work on Saturday. *Id.* at 979-80.

The difficulty with such an analysis is that it simply avoids the problem. Generally, and in South Carolina, the state in which *Sherbert* arose, unemployment benefits are not universally provided to all of the unemployed. They are only provided to people who are found to be available for suitable work which they cannot obtain. Accordingly, how availability is defined determines the scope of a potential beneficiary's interest. But how do we know when that interest should be recognized as an entitlement to which the free exercise clause applies? If no excuse for refusing to accept offered work is acceptable, does petitioner have an entitlement? What if only physical inability to perform available work is an acceptable excuse or if what constitutes good cause is left entirely to the discretion of the Unemployment Commission? Certainly the Court's procedural due process entitlement cases will be unhelpful in resolving the problem since they focus on two factors, state law and the meaning of due process. *See* Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904 (1989). Looking to state law suggests that no entitlement exists if the state clearly refuses to recognize an exception for religious obligations or if it gives the Unemployment Commission significant discretion in determining who should receive benefits. That is hardly a convincing basis for deciding when a person who refuses to work on their Sabbath should receive unemployment benefits. As to the meaning of due process, it seems both indeterminate and irrelevant to the issue.

Most importantly, is every exercise of a protected right unconstitutionally burdened under Lupu's analysis whenever an individual's refusal to work, because it would interfere with the exercise of a "right," is the basis for denying him unemployment compensation? Does denying unemployment compensation to an individual who refuses work because it interferes with his vacation plans burden the right to travel? We need to know much more about how an entitlement doctrine works before it can provide a solution to the problem of discretionary benefits.

204. *See generally* Bowers v. Hardwick, 478 U.S. 186, 205-06 (1986) (Blackmun, J., dissenting).

205. This concern might include an examination of the centrality of the religious belief or practice to the exercise of the individual's religion, the sincerity with which the belief is held, as well as the effect of the challenged law on the practice in question. *See* Bagni, *Discrimination, supra* note 130, at 1515-20.

206. For interesting and up-to-date discussions of the problems these issues present, *see, e.g.*, Lupu, *Where Rights Begin, supra* note 58, at 947-66; Ingber, *supra* note 110, at 291-304. Lupu's analysis of the Sixth Circuit's decision in Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) in which he demonstrates the

Acknowledging the autonomy right foundation of the free exercise clause does not answer these questions, but it does put them in a constitutional framework in which they can be addressed in a straightforward fashion and in light of relevant constitutional analogies. It also, as will be seen, is instrumental in reconciling establishment clause and free exercise concerns.

C. *The Uncharted Area—Reconciling Free Exercise Accommodations or Exemptions with the Prohibition Against Religious Preferences Required by the Establishment Clause*

1. *The Core Distinction Between Equality Among Religious Groups and Religious Freedom*

The problem with reading the *Lemon* test as incorporating equal protection standards and interpreting the free exercise clause as an autonomy right is that both analyses are one-sided and incomplete if they are viewed in isolation. The *Lemon* test speaks in absolute terms. It makes no reference to autonomy rights or free speech aspects of religion. Nothing in it suggests that religion may in some circumstances be accommodated by the state. Similarly, pursuant to an autonomy right analysis, regulatory burdens may be lifted from a particular religious group without regard to the inequality and favoritism that such a decision may demonstrate. As stated, neither one of the religion clauses provides intrinsic limits on its scope in relation to the other. In a sense, that should come as no surprise since there is nothing in the notion of equality or liberty that intrinsically makes room for alternative objectives.

One response to this basic dissonance in values is to attempt to subsume the equality interests of religious groups under an expansive understanding of religious liberty. If religion is essentially a liberty interest and that is primarily what the free exercise clause and the establishment clause protect, one can understand the argument of judges[207] and commentators[208] who insist that to violate the Constitution the state must act coercively to prohibit or compel worship. It should be clear, however, that much is sacrificed under such an analysis. Equal protection of a group's status involves a much broader mandate than protecting the right to worship. Unlike autonomy rights which permit the state to affirmatively encourage alternatives to the exercise of the right, equal protection doctrine requires equality of treatment among suspect and nonsuspect groups.[209] Whites cannot be given benefits unavailable to blacks even though blacks may

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extreme difficulty of balancing government interests against free exercise claims is particularly informative. *See* Lupu, *Where Rights Begin, supra* note 58, at 948-53.

207. *See, e.g.*, Allegheny County v. ACLU, 109 S. Ct. 3086 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

208. *See, e.g.*, McConnell, *Coercion, supra*, note 154, at 941; Paulsen, *Religion, supra* note 19, at 348.

209. *See* Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949) ("The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.").

not technically be penalized by such disparate treatment.[210] Similarly, literal coercion is not essential to a finding of unconstitutional state action under equal protection review. The black victim discriminated against in education, housing, and employment is not being coerced as to his racial status. He cannot change that condition. He is being injured or burdened in a different way than coercion, but one which is recognized, nonetheless, to be a constitutional violation.[211] Thus, acknowledging both the liberty and equality interests of religious groups recognizes the importance of having the right to practice the religion of one's choice protected *and* having one's status as a member of a minority faith affirmed as being of equal worth as the status of members of a majority religion.

Perhaps the most significant conclusion that results from acknowledging that religious groups have equal protection as well as liberty interests is that the seminal breakthrough in equal protection doctrine, the overruling of *Plessy v. Ferguson*'s[212] separate but equal rationale by *Brown v. Board of Education*[213] and its progeny, applies with rigor to religious groups. Presumably, few people would argue to the contrary. State segregation of public schools according to one's religious faith is surely unconstitutional. The striking down of a state miscegenation statute in *Loving v. Virginia*[214] is also directly on point. Religious miscegenation laws prohibiting Moslems from marrying Catholics, for example, are invalid. The list could be extended without raising serious debate.

If these analogies are accepted, however, one can see how far away the law has moved from a liberty oriented understanding of the religion clauses. For most people, the freedom to exercise their religion does not *require* attending school with people of different faiths, much less marrying them. Indeed, the latter act is regularly denounced by many religions.[215] Accordingly, these decisions cannot be derived from religious liberty and autonomy rights alone. The protection of religious groups in equal protection terms must be assumed.

That understanding has important ramifications. The new and demanding message of *Brown* is that for obvious minorities with a history of prejudice, separate is not and cannot be equal.[216] Unacceptable inequality can arise from the impact of ostensibly equal conditions on the "hearts and minds" of the ex-

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210. Watson v. Memphis, 373 U.S. 526, 533, 538 (1963) (city could not deny blacks the benefit of using parks and recreation areas on basis of race). *See also* Palmer v. Thompson, 403 U.S. 217, 220 (1971) (closing pools to entire community following court desegregation order was constitutional but case would have been different if "whites [were] permitted to use public facilities while blacks [were] denied access"). Similarly, in most cases, citizens cannot be given benefits denied to aliens. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 374 (1971); Nyquist v. Mauclet, 432 U.S. 1, 12 (1977).

211. *See generally* Karst, *Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) [hereinafter *Equal Citizenship*].

212. 163 U.S. 537, 548 (1896) (holding "separate but equal" is equal for constitutional purposes).

213. 347 U.S. 483, 495 (1954) (overruling *Plessy* since "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

214. 388 U.S. 1, 11 (1967) (Virginia miscegenation statute violates equal protection clause prohibition against race-based distinctions).

215. *See, e.g.*, J. KANE, *supra* note 78, at 154-55; B. OLSON, *supra* note 107, at 156-57; L. ROSTEN, *supra* note 42, at 146 ("Practically all religions are opposed to marriage outside their faith.").

216. *See supra* note 213.

cluded group.[217] And the impact of the conditions must be understood from the out group's perspective. The inability to understand this point was the most glaring weakness of the *Plessy*[218] Court. You cannot ask the majority if their sensibilities are offended by being separated from the minority and act as if their responses are objectively applicable to everyone. That is how the negative black response to segregation could be viewed as minority hypersensitivity in *Plessy* rather than the authentic misery that results from pejorative isolation.[219]

Moreover, it is important to remember the breadth of the *Brown* holding as it was applied to segregation outside of the classroom context. All segregation is unconstitutional—water fountains, park benches, bathrooms, and swimming pools.[220] The message here could not be more insistent. The equal protection clause requires that the entire public life of our society must be open and accessible to people of all races on equal terms. State recognition of individual preferences and associational liberties that have the effect of extolling one race as "superior" over and above other "inferior" races are invalid under this overriding constitutional command.[221]

If the establishment clause subsumes basic equal protection principles, that same imperative should apply to religious groups as well as racial groups. The government cannot promote one religion over another, nor can it operate in a way that effectively segregates minority religious groups from majority faiths.[222] The "hearts and minds" of the children of minority religious faiths are as vulnerable to enforced ostracism and being assigned a subordinate status as are the "hearts and minds" of the children of racial minorities.[223]

Perhaps the language in recent establishment clause cases which seems to reflect this core understanding the closest is that of Justice O'Connor in her concurrences in *Lynch v. Donnelly*[224] and *Wallace v. Jaffree*.[225] "Direct government action endorsing religion or a particular religious practice is invalid," O'Connor writes because "it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[226]

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217. *Brown*, 347 U.S. at 494 ("To separate . . . [children] solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

218. Plessy v. Ferguson, 163 U.S. 537 (1896).

219. *Brown*, 347 U.S. at 494-95; *Plessy*, 163 U.S. at 556-57 (Harlan, J., dissenting).

220. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 138, at 576.

221. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country . . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

222. *See* Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 531 n.214 (1986) (suggesting that "the true spiritual guide of the school prayer decisions was not the first amendment but rather Brown v. Board of Educ.").

223. For a thoughtful description of the kinds of injuries exclusion and subordinate status produces, see Karst, *Equal Citizenship, supra* note 211, at 5-9.

224. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

225. 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

226. *Id.* at 69 (quoting Lynch v. Donnelley, 465 U.S. at 688 (O'Connor, J., concurring)). *See also* Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 896 (1989) stating as follows:

Unfortunately, Justice O'Connor's statement is of little help to us in explaining why the establishment clause should be given this meaning and what the consequences of such an analysis would be. She never fully explains the origin of her "endorsement" approach. Even more problematic, O'Connor suggests that the Court is supposed to determine when the endorsement of religion occurs by virtue of what an objective observer, cognizant of both the free exercise clause and the establishment clause, determines.[227] Her theory thus stated lacks both a foundation and an analytic framework. It seems to identify the parameters of the establishment clause with the scope of O'Connor's personal empathy for the sensibilities of religious minorities.

Ultimately the validity and utility of O'Connor's basic insight depends on its being predicated on a firm equal protection footing. If a "hearts and minds" analysis of the establishment clause can be derived from accepted race and nationality based equal protection holdings, it will acquire the doctrinal support and elaboration it is currently lacking. The result may not coincide with all of O'Connor's views in recent establishment clause cases. It will, however, insure that her central concern about insiders and outsiders is implemented.

2. *The Race—Religion Analogy: The Balance Between Liberty and Equality*

Under a constitution that affirms both equality and antidiscrimination principles and rights of personal liberty and autonomy, courts must balance the independence afforded the individual to be a self-defined and self-directed person against the Constitution's commitment to the equal dignity and worth of suspect classes. In cases of race and national ancestry, in public life the antidiscrimination and antiexclusionary constraints of the equal protection clause are dominant. Government cannot favor one preferred race or nationality, disfavor others, or discriminate among racial and ethnic groups. In private life, at its core, however, associational, privacy, and property rights protect the individual's autonomy to discriminate on the basis of race or nationality without government interference. It is because of this basic value allocation that the discriminatory autonomy decision not to invite a black person home to dinner is constitutionally permissible, while government can not provide parents the choice to send their white children to an all white public school.

Two serious problems arise when one attempts to apply this same analytic framework where religion, rather than race or national origin, is the source of

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[G]overnment may not be overtly hostile to religion but also . . . it may not place its prestige, coercive authority, or resources behind a single religious faith or religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

227. *See* Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) ("To ascertain whether the statute conveys a message of endorsement, the relevant issue is . . . [whether] an objective observer, acquainted with the text, legislative history and implementation of the statute . . . [would] perceive it as an endorsement . . . ."); Wallace v. Jaffree, 472 U.S. 38, 83 (1984) (O'Connor, J., concurring) ("in determining whether [a] statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the 'objective observer' . . . is acquainted with the Free Exercise Clause and the values it promotes.").

the tension between liberty and equality objectives. The first is the simpler problem. The analogy between religion and race and ethnicity is accepted with regard to the equal protection side of the equation. Just as it is restricted in its conduct with regard to racial minorities, the state should not overtly discriminate against the members of minority faiths or act in ways that suggest that they are inferior or of lesser status than the members of majoritarian religions.[228] It is forcefully argued, however, that there is much less of an equivalence on the autonomy side of the balance. Religious liberty is more highly valued and respected than are nonreligious autonomy interests relating to race and national origin. Indeed, rights of racial homogeneity receive almost no constitutional recognition other than in the most intimate of circumstances.[229] The collective autonomy of religious institutions and associations is much more vigorously protected. Therefore, the balance between equality and liberty values should shift in favor of religious freedom rather than simply paralleling the lines that are drawn in race cases.

But just how is this greater respect for religious autonomy to be demonstrated? As valuable a liberty interest as it is, religious freedom is still essentially an autonomy right. As such it cannot undermine the dominance of equality concerns in the public sector. That at least must be certain. No claim of religious liberty for example will entitle parents to send their children to a racially homogenous public school regardless of how important beliefs of racial supremacy or isolation might be to their faith. Nor may those same parents insist that public schools affirm the superiority of whites over blacks, men over women, or Protestants over Catholics.

The ways in which the free exercise clause alters the balance between liberty and equality for religious groups in contrast to race and national origin are more limited, but they are hardly inconsequential. To begin with, the Constitution can be used as a shield to protect the autonomy of private religious institutions against decisions by the political majority that would interfere with their religious integrity and homogeneity.[230] Thus, the free exercise clause allows discrimination and inequality in private religious life that would not be tolerated in nonreligious institutions. The scope of this immunity is not absolute, but it is far

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228. Van Alstyne argues the point much more eloquently than the text. The Constitution requires a "civil public square that represents a civil polity of many citizens, all of whom come and who are treated on equal and on mutually reassuring terms." For the state to do otherwise would:

> '[D]egrade from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.' It likewise tends to 'banish' those thus made to feel their difference or their alienation within this place. This iconographic, self-sanctifying state is not equally each citizen's own civil, accessible government.

Van Alstyne, *What is "An Establishment of Religion"?*, 65 N.C.L. REV. 909, 915 (1987) (quoting James Madison).

229. Norwood v. Harrison, 413 U.S. 455, 469-70 (1973) ("although the Constitution does not proscribe private [racial] bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause").

230. *See* Bagni, *Discrimination, supra* note 130, at 1540-49; Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 261-66 (1982); Lupu, *Employment Discrimination, supra* note 26, at 431-38.

greater than that afforded secular groups seeking to escape politically enacted antidiscrimination requirements.[231]

Indeed, the need of religious organizations for special protection of their collective autonomy is derived in part from the establishment clause's own constraints on state involvement with religion. Since sectarian religious institutions will be denied direct governmental support in many cases, their ability to foster and reinforce the religious identity of the members of their faith is necessarily circumscribed. The relative disadvantage religious groups experience from the secular orientation of public sector institutions deserves some offsetting recognition. While that can seldom include direct subsidies, it should provide sufficient opportunities for private religious institutions to fulfill their goals within their own communities as a reasonable part of the constitutional balance between religious liberty and religious equality.[232]

A corollary way in which the liberty equality balance may be modified for religious groups relates to the government's accommodation of private religious activity. Most of the institutions which we associate with public life today, schools, parks, streets, court houses, libraries, and the like may all be duplicated as private sector activities. Individuals can decide to withdraw from these public institutions and participate only in their private analogues. This fragmentation of public life is a substantial concern for both racial and religious minorities in that it results, ultimately, in their isolation from the majority. The privatization of public life may create a public sector ghetto as opposed to a geographical one. But it still will be a ghetto.

The substitution of private institutions for public ones raises the issue of state action particularly if the state is implicated in encouraging this transformation. That doctrine cannot be discussed in any detail here,[233] but it is not suggested that it applies with any lesser scope for religion than for race. One should reasonably assume that state action for establishment clause purposes is consistent with state action for equal protection purposes. Thus the enforcement of restrictive covenants that preclude the sale of real property to members of either racial or religious groups should constitute state action.[234] Christian primaries are as unconstitutional as white primaries.[235] And a restaurant in a

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231. *See* Lupu, *Employment Discrimination*, *supra* note 26, at 431-38.

232. *See infra* notes 341-65 and accompanying text.

233. The state action issue has been discussed at great length elsewhere. *See generally* Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

234. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 258 (1953); Shelley v. Kraemer, 334 U.S. 1, 19-20 (1948) (judicial enforcement of discriminatory restrictive covenant against willing parties to agreement is state action which violates equal protection clause).

235. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 469-70 (1953) (all-white association election to select candidates for state election unconstitutional since "private" election dispositive of outcome in county election thus stripping blacks of any influence in election outcome); Smith v. Allwright, 321 U.S. 649, 662-64 (1944) (Democratic party primary conducted under statutory guidance so intricately "tied up in" official state elections that it constitutes state action as "part of the machinery for choosing officials.").

state parking garage that refuses to serve food to the members of a particular religious faith or to a particular race is a state actor in both cases.[236]

Religion is distinct from race not with regard to whether state action exists, but rather as to whether certain state action is constitutional or not. There are many important aspects of collective religious activity which are recognized as being intrinsically private in nature. In certain circumstances the government may accommodate such private sector religious activity without running afoul of constitutional equality guarantees. Unlike group racial autonomy which receives no constitutional respect in its own right, there is nothing inherently invidious in constitutional terms about the government's structuring its own affairs to facilitate religious individuals and groups in exercising their autonomy through private institutions.[237] This is particularly the case when religion can be treated generically, as opposed to with reference to particular faiths or practices.[238]

The accommodations permitted pursuant to this analysis are limited in several important respects. Obviously, the government must operate in an even-handed manner among religious individuals and groups to the extent that they are similarly situated. This in itself is an extremely difficult burden to meet.[239] More importantly, the discretion to accommodate religion becomes more restricted as the activities in question move from private to public life. Facilitating the ability of religious persons to go to their respective houses of worship on religious holidays does not risk the isolation and exclusion of religious minorities from public life the way that state encouragement of the privatization and fragmentation of all elementary and high school education along religious lines would. Government support for those latter kinds of religious activities would be much more comparable to government support for racially exclusive private schools and, accordingly, much more suspect.[240]

While the parameters of the basic balance suggested here must remain abstract until discussed in detail in Part VI, the approach adopted is a conventional one. The analogy between race and religion places issues in a familiar framework. Thus sidewalks need not end at the curb in front of churches, for example, any more than they must be removed from the front of a segregated white academy.[241] Similarly, there is nothing problematic about the decision

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236. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-25 (1961) (restaurant that was integral part of public building built and maintained to serve public purpose so interdependent with state that restaurant is jointly responsible with the state to abide by fourteenth amendment guarantees).

237. *See supra* note 158. *See infra* notes 317-22 and accompanying text.

238. *See supra* notes 153-60 and accompanying text.

239. Laycock puts it succinctly:

> [N]onpreferential aid is plainly impossible. No prayer is neutral among all faiths. . . . Government-sponsored religious symbols or ceremonies, whether in schools, legislatures, courthouses, or parks, are inherently preferential. . . . It is theoretically possible to award equal and nonpreferential financial aid to every religious group, or perhaps to every religious leader. But the experience of the eighteenth century again suggests that workability problems are inevitable.

Laycock, *Nonpreferential Aid, supra* note 9, at 920-21.

240. *See infra* notes 299-316 and accompanying text.

241. *See* Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947) (state not prohibited by establishment clause from providing parochial schools "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks"); *see also* Knights of KKK v. East Baton Rouge School Bd., 578 F.2d 1122, 1128 (5th Cir.

that public schools cannot discriminate on the basis of race or religion in their facilities, classrooms, and curriculum.[242] The additional conclusion that the state, in an even-handed manner, may facilitate opportunities for religious groups to develop private institutions for their religious needs (such as granting conditional use permits to houses of worship that seek to be located in residential areas)[243] may be subject to challenge. It is, however, an intelligible attempt to try to accommodate religious autonomy interests in a way that is consistent with equal protection guarantees. Thus, the balance proposed here for religion may shift incrementally from that between equality and liberty in race cases (racially exclusive fraternal lodges need not be provided conditional use permits in every circumstance in which houses of worship are accommodated), but it can be understood in similar terms. It suggests that if the accommodation of religion is to be constitutionally permitted, it must be accomplished in a way that carefully balances the goal of avoiding the fragmentation of public life along sectarian religious lines with the need to provide religious groups a sufficient opportunity to develop private autonomous institutions in a legal framework that denies them direct public support.

The second problem with the race and religion analogy is much more complex. In race and national origin cases, the defining characteristic of the suspect class and any liberty interests in conflict with it are conceptually distinct. There is no right to "be" Irish or to "be" white which exists as a separate protected interest along with the groups' racial or ethnic identity. This means that for constitutional purposes all persons are similarly situated without regard to their race or national ancestry. To treat these groups equally the government simply has to ignore their suspect differences.

The same approach cannot be applied to religion. The practice of one's faith is a fundamental right which the Constitution protects and cannot ignore. Particularly in cases in which facially neutral laws are challenged as interfering with free exercise rights, the Constitution seems to defy Aristotelian logic and commands the government to ignore and affirmatively protect the religious status of individuals at the same time. For example, if the members of faith A seek to avoid paying income tax on religious grounds, and the members of faith B are under no similar religious obligation, how can the members of both faiths be treated equally and have their religious freedom respected at the same time. If the members of faith A avoid the tax that members of faith B must pay, each religious denomination is treated equally with regard to their freedom to practice their faith. However, it is also clear that as a discrete group each sect will be subject to substantially different legal burdens and obligations. On the other hand, if everyone is required to pay the same tax regardless of their religious

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1978) (racially exclusive groups may not be denied use of public sewers, streets or police and fire protection); National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (4th Cir. 1973) (analogizing right of exclusive racial group to use public facilities despite equal protection clause requirement to right of religious schools to receive general governmental benefits despite establishment clause).

242. *See supra* notes 212-26 and accompanying text.

243. *See supra* note 158.

affiliation, members of the two faiths will be treated similarly *except* that the religious beliefs of one and not the other will be transgressed.

The only way to resolve this dilemma is to balance the competing values at stake. On the free exercise side the proposed evaluation is familiar. In weighing the importance of a free exercise autonomy right, courts should consider traditional criteria. They will ask how central the belief or practice is to the believers' religion. They also may inquire into the sincerity of the beliefs which are at issue. Finally they consider the impact of an exemption on the interests of third parties and the state.[244] This latter concern helps to effectively locate the autonomy right on a private-public continuum.

The more problematic evaluation occurs on the equal protection side of the scale. Courts no longer have available the luxury of ignoring the suspect characteristic as a prophylactic rule. Instead they must probe more deeply into the reasons why suspect classifications are rejected and the costs to society of making allocations based on religious beliefs and affiliation. Answering these questions, however, requires a digressive analysis because the historical foundation of equal protection doctrine is typically discussed in process terms.

The classical understanding of equal protection doctrine, grounded on the *United States v. Carolene Products* footnote,[245] provides for the heightened scrutiny of laws that disadvantage discrete and insular minorities. The justification for the rigorous review of such laws is that the results of the legislative process cannot be trusted, and therefore are entitled to much less deference, when the majority acts to benefit its own interests at the expense of a victimized minority.[246] Taken to its logical conclusion, this disfavored class model would provide special protection to racial minorities, women, aliens, and illegitimates, but would not apply heightened scrutiny to laws that disadvantage powerful majoritarian groups. The theory, being, of course, that these more powerful groups are capable of looking out for their own interests in a democratic, pluralistic political system.

Equal protection case law has never fully endorsed this disfavored-class model, as recent affirmative action cases make clear.[247] Additional concerns, problems with racial classifications other than the fear that they are based on prejudice and bias, may justify applying heightened scrutiny to a law that discriminates against white people, for example, even though whites are more

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244. *See supra* notes 205-06.

245. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); L. TRIBE, *supra* note 46, at 1465.

246. *See* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072 (1980).

247. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Wygant v. Jackson Board of Educ., 476 U.S. 267, 273 (1986) ("[T]he Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 290 (1978) (strict scrutiny should be applied to cases involving discrimination against white males as well as blacks since discrete and insular status "has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreetness and insularity constitute necessary preconditions to a holding that a particular classification is invidious."). *See also* Craig v. Boren, 429 U.S. 190, 197-99 (1976) (same standard of review applied to laws burdening men as is applied to laws burdening women).

likely to be privileged, rather than disfavored, by the political process.[248] Nonetheless, the model has had a substantial influence on equal protection doctrine and it must be recognized as a factor to consider in resolving equal protection issues, even though it will not always be dispositive in determining the result in a specific case.[249]

This same quandary occurs in establishment clause cases which adopt an equal protection orientation. The political process can be trusted least when it provides benefits to a majority religion or imposes burdens on a minority faith. That is the paradigm situation in which judicial intervention is warranted. Again, as in equal protection cases, there seems much less reason to doubt the results of the political process when a weak minority is given a special benefit or exempted from a general regulation that interferes with its religious precepts.[250] However, as with the equal protection doctrine, a preference provided to a minority may create other costs and risks which require constitutional review. Just as judicial liberals support applying intermediate level scrutiny to race specific affirmative action programs,[251] preferential treatment of even small and powerless religious minorities should receive some form of serious scrutiny.

This process analysis suggests that not all discretionary exemptions provided by the legislature to small minority religions are necessarily unconstitutional. This is so because a primary fear that the equal protection clause exists to prevent, the prejudice inspired abuse of minorities by the majority, is unlikely to occur in this circumstance. This conclusion will be useful to courts when they

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248. Justice Scalia, for example, opposes all racial classifications because they foment divisiveness. *See* Richmond v. J.A. Croson Co., 109 S. Ct. 706, 739 (1989) (Scalia, J., concurring) (" 'The history of a racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.' ") (quoting A. BICKEL, THE MORALITY OF CONSENT 133 (1975)).

See also Justice Powell's contention in *Bakke* that a disfavored class doctrine is both conceptually and practically incoherent. Since "[t]he concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments," Powell argues, "[t]here is no principled basis for deciding which groups would merit 'heightened judicial solitude' and which would not." *Bakke*, 438 U.S. at 295, 296. Further, such distinctions and ranking of groups "does not lie within judicial competence — even if they were . . . politically feasible and desirable." *Id.* at 297.

249. For example, the Court clearly uses a disfavored class analysis in determining initially whether or not a particular group gets suspect class status, *see* Hernandez v. Texas, 347 U.S. 475, 479-81 (1954) (Mexican-Americans are a distinct class subject to a history of discrimination and therefore fall within coverage of equal protection clause), and in determining the level of scrutiny to apply to laws that burden the disadvantaged group, *see* Mathews v. Lucas, 427 U.S. 495, 506 (1976) (laws burdening illegitimates receive lower scrutiny than laws burdening blacks and women because of stronger history of disadvantagement of latter groups). Also groups such as the aged are denied suspect class status under a disfavored class analysis. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)) (aged not a suspect class since they "have not experienced a history of purposeful unequal treatment"). *See also supra* notes 63-65 and accompanying text.

250. *See* Paulsen, *Religion, supra* note 19, at 345 n.152 (noting the analogy between noninvidious race specific and religion specific state action). Determining the standard of review to be applied to religion specific exemptions is likely to be a complex undertaking. Unlike the race cases, in which the court inquires whether a challenged affirmative action program is narrowly tailored to serve an acceptable remedial goal, one can hardly require that the state only demonstrate that the exemption it grants is necessary to allow the beneficiary religion to practice its faith without state interference. That would give the state virtually free rein to grant any exemption it chose to the minority religion of its choice. Instead, courts will have to consider the constitutionally relevant costs of granting such exemptions.

251. *See, e.g.*, Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 359 (1978) (Brennan, J., concurring and dissenting in part).

review such cases, but it will not be dispositive. Not every discretionary exemption granted to a minority religion will be upheld. But the reasons for refusing to accept all such exemptions must be based on the substantive costs of permitting them since the political process pursuant to which the exemptions were granted is not in dispute. These costs are derived from the same substantive values the Court must weigh in determining whether the free exercise clause requires that a religious exception to general regulations must be provided when the legislature is silent.

Identifying these values will not be easy. Given the uncertainty and controversy surrounding the equal protection review of laws which *benefit* traditional discrete and insular minorities at the expense of the majority, the analogies suggested here for the religion clauses can only serve as a doctrinal beginning. Still some specific points can be listed.

For example, if racial divisiveness is likely to result from the use of race based affirmative action preferences, religion specific exemptions from regulatory burdens are also likely to breed resentment.[252] This will be particularly true when specific individuals feel that they are receiving an increased burden because the religious objector is not carrying his fair share. Exemptions may also make one faith more attractive than another and thereby assist it in proselytizing efforts.[253] Additionally, certain exemptions will have the direct or indirect effect of increasing the fragmentation of society along religious lines, thereby isolating other religious minorities, or otherwise confirming their differences from the general population. While there are no hard and fast formulas which reflect all of these criteria, it seems clear that exemptions should be more easily accepted when they preserve private options for religious believers that are of little secular benefit to others. Thus, excusing an orthodox Jew from public employment responsibilities on Yom Kippur so that he may spend the day fasting and in prayer at a synagogue hardly suggests that non-Jews will feel that they are treated unfairly by not being allowed to stand in his shoes. On the other hand, religious exemptions from paying income tax will most likely raise resentment and proselytizing concerns.

While these same factors must be considered when courts evaluate the grant of a legislative, discretionary exemption to a minority faith, as well as when the religious believer seeks judicial exemption from general regulations, the former situation adds a process dimension to the courts' analysis. The legislative grant of the dispensation creates at least an inference that the majority has done some balancing of its own and found the exemption to be fair. Certainly a long history of political toleration of an exemption without protest at least implies that majoritarian groups feel little fear that the grant of relief to a minority sect will breed unacceptable envy or that their own members will convert to the exempted sect to avoid the regulatory burden at issue.

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252. *See supra* note 248. Divisiveness along religious lines has long been recognized as a potential evil that might result from governmental support of religion. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971); Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); School Dist. of Abington v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring).

253. *See* McConnell, *Accomodation, supra* note 2, at 35-37.

This process "thumb" on the side of the balance upholding discretionary exemptions should not always control a court's decision. There remains the possibility that legislative relief from regulatory requirements is provided, not out of respect for a group's religious conviction, but rather as a political benefit, shifting undesired burdens from a more powerful special interest group to a less powerful one. Courts should be suspicious of exemptions which directly burden minority groups of even less political status than the benefited religion.[254] When an exemption seems to be available to all similarly situated groups, however, and its cost is being evenly spread among all nonexempt groups impartially, the decision by the polity merits some deference by the courts.

VI. THE PRACTICAL CONSEQUENCES OF AN EQUAL PROTECTION—AUTONOMY RIGHT ORIENTATION TO THE RELIGION CLAUSES

A. *State Endorsement of a Religious Faith*

This problem involves the direct promotion by the state of a religious faith. It may include the conducting of religious worship by state officials, as in teacher sponsored prayer in the public schools, or the adoption and display of religious symbols by the state, as in, the display of a crèche and cross in front of city hall to commemorate Christmas and Easter. Its resolution under the proposed model is straightforward, but requires some discussion.

With regard to free exercise concerns there is no serious issue here at all. An individual has no autonomy right to have the state endorse his or her particular belief system. Rights of this type are intended to prevent the government from burdening or penalizing a choice. They do not require affirmative encouragement from the state.

Determining that state endorsement of religious beliefs violates the establishment clause requires more attention, however. The argument in favor of invalidating teacher directed school prayer or the display of religious symbols in public facilities seems to track an orthodox equal protection analysis. Members of the religion whose prayer is adopted are given a benefit not provided to children of other faiths. Alternatively, and more seriously, the message of inclusion to some students, which the authorities communicate by their choice of prayers to recite, constitutes a message of exclusion to other children of different faiths.[255] The exact same analysis applies with regard to the display of religious symbols such as the cross or the Star of David. Under the modified *Lemon v.*

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254. In race cases those justices supporting a lower standard of review for affirmative action laws nonetheless expressed concern that such programs might "single[] out those least well represented in the political process to bear the brunt of a benign program." *See* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 361 (1977) (Brennan, J., concurring and dissenting). Justices less favorably disposed toward benign discrimination raised similar arguments. *See Bakke*, 438 U.S. at 297 n.37 (quoting from Justice Douglas' dissenting opinion in DeFunnis v. Odegaard, 416 U.S. 312, 337-40 (1974)). The Court has also rejected benign discrimination when the burden on particular members of majoritarian groups was found to be excessive. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 281-84 (1986).

255. Even if schools authorized the release of students from participating in state sponsored prayer, the stigmatizing consequences of being labelled a disbeliever would remain as the Court has explicitly recognized. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure put on religious minorities to conform to

Kurtzman test,[256] the material motive and effect of religious endorsement would require the cancellation of the prayer and the removal of the display, a conclusion consistent with the Court's holdings over the last three decades, particularly in school settings,[257] but arguably in conflict with the recent decisions of *Lynch v. Donnally*[258] and *Allegheny County v. ACLU*.[259]

Arguments against invalidation of either teacher directed school prayer or state sponsored religious displays may take one of several tacks. The most extreme position simply accepts blatant religious favoritism and suggests that religious minorities should just develop thick skins and learn to live with the fact of their outsider status.[260] A modestly more moderate position, but one which is generally accepting of religious endorsements by the state, is expressed in Justice Burger's majority opinion in *Lynch*[261] and Justice Kennedy's dissenting opinion in *Allegheny County*.[262] The two Justices' arguments have a great deal in common. Both ignore any equal protection dimension to the establishment clause[263] in the context of state sponsored religious representations. In doing so, they insist that religious promotions consistent with historical practices and traditions must be upheld.[264] Both opinions also allow endorsements of particular faiths up to the point that they actually constitute an "establishment" of religion.[265] Kennedy goes further than Burger in explaining when a prohibited establishment would occur. State action that carries endorsement to the point of proselytizing or other forms of indirect coercion, such as organized school prayer, would be unconstitutional to Kennedy. Burger only suggests he would

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prevailing officially approved religion is plain." Such backing leads to "hatred, disrespect and even contempt of those who [hold] contrary beliefs.").

256. *See supra* notes 161-83 and accompanying text.

257. *See, e.g., Engel*, 370 U.S. at 430 (1962) (invalidating state created, voluntary, non-denominational school prayer); Abington School District v. Schempp, 374 U.S. 203, 223 (1963) (striking daily recitation of Lord's Prayer and scriptural readings in school); Stone v. Graham, 449 U.S. 39, 42-43 (1980) (mandating removal of Ten Commandments display from school wall).

258. 465 U.S. 668 (1984).

259. 109 S. Ct. 3086 (1989).

260. Many of the critics of the school prayer decisions, for example, were overtly ethnocentric. *See, e.g.*, Griswold, *Absolute is in the Dark: A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167, 176-77 (1963) (proclaiming that "[t]his [is] . . . a Christian country, in origin, history, tradition and culture" which, while willing to tolerate minorities "out of Christian doctrine and ethics," cannot be expected to give up the prerogatives of the majority to satisfy the "absolutist" demands of minority group members).

261. 465 U.S. 668 (1984). The text refers to the first part of Justice Burger's opinion. He also argues in the alternative that the *Lemon* test, properly applied, supports the constitutionality of the Christmas crèche in question. *Id.* at 679-85. That analysis is discussed *infra* at notes 285-92 and accompanying text.

262. 109 S. Ct. 3086, 3134 (1989). Justice Kennedy's dissent was joined by Justices White, Rehnquist, and Scalia. Burger's opinion in *Lynch* was joined without concurrence by Justices Powell, White, and Rehnquist. Justices Scalia and Kennedy replaced Justices Powell and Burger to form this new coalition. Justice O'Connor voted to uphold the crèche in *Lynch*, but not to uphold the more isolated display in *Allegheny County*.

263. Chief Justice Burger noted, without further explanation, that "The Court of Appeals viewed Larson v. Valente . . . as commanding 'strict scrutiny' of a statute or practice patently discriminatory on its face. But we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*." *Lynch*, 465 U.S. at 687 n.13. Justice Kennedy never mentions equal protection concerns in his analysis.

264. *Allegheny County*, 109 S. Ct. at 3141-44 (Kennedy, J., concurring in part and dissenting in part); *Lynch*, 465 U.S. at 673-78.

265. *Allegheny County*, 109 S. Ct. at 3135-37 (Kennedy, J., concurring in part and dissenting in part); *Lynch*, 465 U.S. at 678.

uphold "indirect, remote, and incidental" benefits to particular religions.[266] State sponsorship of a display celebrating the birth of Christ as the son of God would be acceptable to both Justices.[267]

The Burger and Kennedy positions are, of course, completely inconsistent with the equal protection oriented analysis propounded in this Article. Nor is there much that can be added here in response to their contentions. Neither Justice explains why equal protection principles do not require a more even-handed approach to the issue of state religious endorsements. The justifications for an equal protection oriented analysis of religion clause issues, presented earlier in the text,[268] are never discussed.

There are alternative arguments to those of Burger and Kennedy, however, which may be raised against the invalidation of state sponsored religious displays. Within an equal protection framework two challenges may be offered. The first relates to the nature and extent of the state's actions being subjected to constitutional review. Is government speech so directly constrained by the establishment clause that it cannot even mildly recognize or acknowledge the dominant religious propensities of the American people? Does even limited state affirmation of religious beliefs cause a sufficient injury to plaintiffs to warrant constitutional review? After all, no one is being physically excluded from public institutions. National origin constitutes a suspect classification, for example, yet the government may promote a variety of ethnic celebrations without violating the Constitution. If the state can support Cinco de Mayo Day and paint a green line down the center of the street on St. Patrick's day, why does the sponsorship of religious symbols or prayer in the public schools cause so much controversy?

The answer to this challenge must begin by reiterating the unique nature of religious affiliation with regard to its impact on a person's sense of identity. Religion is a core part of one's sense of self. Other mutable attributes, such as political affiliation, are generally viewed as more tangential and ephemeral. For an opinion poll to list the percentage of Catholics who voted for Reagan in '84 and Dukakis in '88 seems rational. To ask how many Dukakis supporters converted to Catholicism this year sounds absurd on its face.

Indeed, a person's religion is often a more central aspect of their identity than their national origin. This is particularly true because in the United States the prior national ancestry of citizens has been superceded by a new national allegiance. Where our ancestors come from is a fading part of our identity often generations in the past and sometimes so commingled among various nationalities that it is too diffuse to be meaningful.[269] Thus, the importance of religion to an individual may transcend questions of origin and ancestry because the former is an attribute of continuing vitality and reaffirmation, while the latter pro-

266. *Allegheny County*, 109 S. Ct. at 3137-38 (Kennedy, J., concurring in part and dissenting in part); *Lynch*, 465 U.S. at 683.

267. *Lynch*, 465 U.S. at 685-86; *Allegheny County*, 109 S. Ct. at 3140 (Kennedy, J., concurring in part and dissenting in part) (noting that *Lynch* recognized "the clear religious import of the crèche.").

268. *See supra*, Part II, of this Article.

269. The author, for example, is part Rumanian, part Russian, and part Polish, a combination that provides little in the way of a core identity based on ancestry.

gressively becomes more attenuated as it is replaced by the individual's new nationality of being American.[270]

Our religious commitments, on the other hand, in many instances are a contemporary ongoing part of who we are. They influence directly how we live. When members of different religious faiths intermarry, for example, they typically confront the immediate problem of one or the other converting to the religion of their spouse or, alternatively, they must negotiate a range of decisions with regard to how their divergent religious beliefs can be reconciled in a single family. Thus, religion is not only part of our personal history, it is a determining factor of our future behavior.[271] For these reasons, when a religious person participates in his own form of worship, he often experiences a special feeling of acceptance and community.[272] Any benefit a person receives by having his ethnic ancestry recognized or honored is often less substantial. Thus, the public celebration of different nationalities and different religious faiths may both constitute an unequal allocation of psychological benefits among citizens, but the latter is of much more substantial weight.

Religion differs from other important personal characteristics such as one's ethnic origin in another critical respect. There is no other facet of our existence which is at the same time so foundational *and* so vulnerable.[273] National ancestry, being an immutable characteristic, differs from religious faith in that it is

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270. Several sociologists suggest that while ethnic groups originally provided new immigrants to the U.S. with a sense of communal identification, second and third generations rejected membership in their ethnic subcommunities because they seemed alien and a barrier to assimilation and success as Americans. Continuation of one's traditional religious affiliation, however, over time seemed to provide an alternative communal base with which the individual could identify without sacrificing to any significant degree the security of their new Americanized status.

This thesis is originally identified with the classic essay of W. HERBERG, PROTESTANT-CATHOLIC-JEW (1955), but it has been carried forward in more recent works. Thus, Lenski writes "with the disintegration of the old ethnic subcommunities, Americans have a growing need for some new group to serve as an anchorage in modern society. Increasingly, this anchorage is supplied by the religious groups." G. LENSKI, *supra* note 94, at 44.

Greeley takes the analysis one step further in identifying religious denominations as a form of ethnic group. He explains his use of the term ethnic to mean:

> a phenomenon by which the members of a religious denomination are able to obtain from their religion a means of defining who they are and where they stand in a large and complex society. In some cases, this self-definition in social location may be the most important thing that religion does for a person. For other individuals, however, self-definition and social location are mixed with the belief system and ethical code according to which the person lives.

A. GREELEY, DENOMINATIONAL SOCIETY, *supra* note 30, at 108. Taking this analysis to its ultimate conclusion suggests that in the U.S. national ancestry and religion reverse their role in an individual's identity. Thus Greeley surmises "The early Irish immigrants were . . . Catholics because they were Irish. The present American Irish may more likely be Irish because they are Catholics." *Id.* at 114.

271. A. GREELEY, DENOMINATIONAL SOCIETY, *supra* note 30, at 232 ("America is a denominational society . . . in which denominational loyalty profoundly affects much of what a person learns as he grows up, many of the decisions he will make in his life, and the kind of relationships he will have with other Americans.") R. JOHNSTONE, *supra* note 27, at 100 (religious groups are primarily concerned with identifying and readjusting the groups' goals, norms of behavior, and roles for participants).

272. *See, e.g.*, W. SALISBURY, *supra* note 88, at 60-61 (describing feelings of "sharing," "belonging," "fellowship," and "community" identified by individuals as a core aspect of their religious expression); E. NOTTINGHAM, *supra* note 30, at 19 ("The very process of sharing symbolic rites and beliefs strengthens a group's sense of its own identify, accentuates its 'we feeling.' ").

273. E. NOTTINGHAM, *supra* note 30, at 8 ("Worship in common—the sharing of the symbols of religion—has united human groups in the closest ties known to man; yet religious differences have accounted for some of the fiercest group antagonisms").

fixed and it cannot change, and its value or worth is not relational. Recognizing the virtues of the Irish says nothing about Italians who may well be equally praise worthy. Ethnic self-esteem is not a zero sum game, religious truth is. Nor are two individuals' respective ancestry in competition for the control of their identity and self-esteem. The celebrations of citizens of Polish ancestry are not intrinsically a threat to people of German ancestry. There is no danger that through a mixture of burdens, benefits, and influence the state may convince German-Americans to become Polish-Americans.

Conversely, the promotion of one religious belief is often a direct repudiation of another faith, a statement differentiating unavoidably between we and they.[274] This distinction is critical. Religions represent communities as well as individual identities. They are a bridge to collective intimacy.[275] Government support for the symbol of one faith will inevitably be construed to be a conclusion as to the respective place in society of those who identify with the belief system represented and, necessarily, the lesser status of those whose faith is contradicted by that message. Indeed, it is difficult to imagine how a different interpretation of the state's promotion of one faith's symbols and not another's can be defended. No one seriously suggests that government entities have any special expertise in ascertaining the divine and the transcendent. The symbols selected to be promoted reflect the religious beliefs of political constituents and are controlled by the religious demographics of the community. As such, and given the dissonance of many faiths, what occurs is the public affirmation of one group with greater power over other groups with less power. Thus, the endorsement of religion by government is inherently self-congratulating to the majority and deprecating and threatening to the minority.[276]

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274. "[Religious] symbols are capable of invoking in the minds of the worshippers almost instantaneously a whole network of memories and sentiments. Such associations activate and intensify the shared loyalties of the group members and make them more keenly aware of the ways in which they differ from other groups." E. NOTTINGHAM, *supra* note 30, at 23. *See also* A. GREELEY, DENOMINATIONAL SOCIETY, *supra* note 30, at 216 ("Growing up religious in America means growing up not only as a member of one's religious group but also as someone distinct from and distinctly in opposition to members of other religious groups.").

275. Lenski explains that while religious groups are in one sense mere associations they are much more than that. Because religious group members often marry people of the same faith, interaction within the family is commonly interaction "among members of the same religious group." G. LENSKI, *supra* note 94, at 19. This means that early childhood experiences are typically spent in a religiously homogeneous environment. Furthermore, "friendly cliques (the other major type of primary group in our society) also tend to be religiously homogeneous." *Id.* Accordingly, he concludes "There are a vast number of very generalized, highly personal, and very basic social relationships . . . which constitute an integral part of every religious group." In short, religious groups are communal as well as associational groups. *Id.* at 19-20.

276. This conclusion is inescapable if one accepts Greeley's thesis of the "we"-"they" function of religious culture in the United States. Greeley explains:

> [W]e are active in our churches both as a means of associating with our own kind and also avoiding too intimate association with others. We reinforce those symbolic differences between us and others that happen to be important in our society at the time we are alive. These symbolic differences are important not so much because of their doctrinal content but because they differentiate those who are committed to our traditions from those who are committed to another tradition.

A. GREELEY, DENOMINATIONAL SOCIETY, *supra* note 30, at 230.

From this perspective it is clear that the endorsement of religious symbols by government cannot help but constitute an identification of the state with one "we" group and the isolation of the nonendorsed group as the outsider "they."

When it is clear that the source of religious promotion is government and not private, a violation of the establishment clause must occur. It does not matter that the message of favoritism is minor or avoidable. The communication of that message is offensive to the sensibilities of minority religionists in much the same way that segregated drinking fountains and bathrooms burdened the participation of black people in the public life of the Jim Crow South. These restrictions were constitutionally invalid because of their symbolic content alone.

Plessy v. Ferguson[277] was rejected at the micro-level as well as at the macro-level. Separate but equal is unequal not simply because black facilities would generally not be true physical equivalents to those of whites. It is not only a matter of inferior opportunities in education or recreation. If all the benefits of a public school were equally available to all the students except that one water fountain out of fifty was reserved for whites alone and one fountain, to be equal, was reserved for blacks alone, that single act of segregation would be unconstitutional. But surely in this example it trivializes reality to argue that the burden of finding a different water fountain is what makes those two segregated water fountains unconstitutional. It is the message of exclusion and alienation that any act of segregation communicates that is unacceptable. The impropriety of that message does not change if it is conveyed by words or symbols instead of action[278] or if it is only expressed some of the time.[279] Accordingly, the feelings of exclusion experienced by religious minorities when they are confronted by expressions of religious favoritism by the State should be constitutionally unacceptable just as assaults on the self-esteem of racial minorities violate constitutional norms of equality.[280]

The second challenge to establishment clause invalidation of state-sponsored religious exercises or messages raises a different but related issue. In cases such as *Edwards*,[281] *Lynch*,[282] and *Allegheny County*,[283] the question before the Court was not only whether the state endorsement of sectarian beliefs was con-

277. 163 U.S. 537 (1896).

278. *See* Knights of K.K.K. v. East Baton Rouge Parish School Bd., 578 F.2d 1122, 1127-28 (5th Cir. 1978) (state prohibited from "acting to forward KKK's views and policies" but allowing racist group access to public forum does not constitute such support).

279. Thus, Justice Kennedy's position that an establishment clause violation would only occur "if a city chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays of all other faiths," Allegheny County v. ACLU, 109 S. Ct. 3086, 3139 n.3 (Kennedy, J., concurring in the judgment in part and dissenting in part), but not if some lesser degree of religious favoritism occurs is difficult to justify from an equal protection perspective. Nothing in the case law suggests, for example, that while racial minorities must be protected against a total system of exclusion and segregation, occasional examples of state endorsement of the white race would be acceptable. One assumes Justice Kennedy recognizes this and that he simply does not believe that the Constitution requires equality of treatment among religious groups.

280. As with state-sponsored segregation, messages of exclusion or inferiority can only be properly evaluated if the perspectives of the minority group are respected. *See supra* notes 217-19 and accompanying text on the failure of the *Plessy* Court in this regard; *see also Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1648 (1987) ("If the establishment clause is to prohibit government from sending the message to religious minorities or nonadherents that the state favors certain beliefs and that as nonadherents they are not fully members of the political community, its application must turn on the message received by the minority or nonadherent.") (emphasis omitted).

281. 482 U.S. 578 (1987).

282. 465 U.S. 668 (1984).

283. 109 S. Ct. 3086 (1989).

stitutional, but also whether the particular state action in question, the required teaching of creation science, or the public sponsorship of a Christmas crèche or Chanukah menorah, did in fact constitute a prohibited endorsement.

Arguably, the issue before the Court in all these cases was that of allegedly facially neutral state action which incidentally promoted religion. If that characterization of the state's conduct was correct, under an equal protection influenced interpretation of the *Lemon* test, the Court should determine whether the enactment of the creation science law and the financing of the Christmas crèche and Chanukah menorah were intended to endorse or promote particular religious faiths or had such an effect. The Court correctly found such a material religious motive in *Edwards*.[284] It found neither a sufficient religious motive or effect in *Lynch*.[285] In *Allegheny County* it found an effect of endorsement with regard to one symbol, the crèche standing in isolation, but found no endorsement resulting from the menorah standing next to a Christmas tree.[286]

The *Lynch* decision is the most problematic. It is difficult to understand the suggestion in Justice Burger's majority opinion that a Christmas crèche replete with angels and kings is somehow a nonreligious secular statement by the state.[287] In every circumstance other than their promotion by the state, intrinsically and originally religious beliefs such as the biblical creation of the world, the granting of the ten commandments by God to Moses, and the birth of Christ as the Son of God would be recognized as having substantial and sectarian religious significance. While the argument can plausibly be made that some holiday related paraphernalia are so attenuated from the religious foundations of celebrations as to be neutral in meaning, that exception can not encompass

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284. *Edwards*, 482 U.S. at 585-94.

285. *Lynch*, 465 U.S. at 685.

286. *Allegheny County*, 109 S. Ct. at 3103-05, 3111-15.

287. Justice Burger argues in *Lynch* that the challenged crèche should not be construed as endorsing Christianity because it is part of the celebration of the national holiday of Christmas. Since the recognition of Christmas day as a holiday itself is not taken to endorse Christianity, neither should this particular symbol of the event. *Lynch*, 465 U.S. at 682-87. Justice O'Connor also noted the relevance of the holiday celebration in her concurrence in *Lynch* which provided the critical fifth vote to uphold the financing of the crèche in that case. *Id.* at 692-93 (O'Connor, J., concurring). The holiday factor, however, was clearly of secondary significance in her analysis as her vote to invalidate the crèche in *Allegheny County* demonstrates. *Allegheny County*, 109 S. Ct. at 3118-19. The problem with Burger's argument, of course, is that it blissfully ignores the question of why the government's celebration of the Christmas holiday should not be construed as endorsing the Christian religion. But surely the answer to that question must depend on whether or not the government emphasizes the religious significance of the holiday in its public activities.

Despite its religious origin, the Christmas holiday, like the designation of Sunday as a day of rest, can be understood in secular terms. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 444-45 (1961) (Sunday closing laws upheld as secular day of rest). That conclusion, however, depends on the government's continued secular attitude toward the holiday. Thus, Sunday can be construed to be a secular day of rest only as long as the state recognizes it as such, not because of its religious significance, but for secular reasons of efficiency and convenience. *See infra* notes 317-19 and accompanying text.

What is constitutionally unacceptable is the suggestion in *Lynch* that the secularization of the decision to celebrate a holiday on Christmas day somehow justifies the state's endorsement of the full religious significance of Christmas on the grounds that everything associated with the holiday no longer conveys a message of religious preference. Under that analysis, the state could also now declare Sunday to be the Lord's day and emphasize its religious significance. The conclusion in *McGowan* that Sunday had become secularized would justify bootstrapping into constitutional acceptability whatever religious significance the government chose to associate with the day of rest.

the whole. There is a difference between the Easter cross and the Easter bunny.[288]

Once the religious nature of the display or symbol is acknowledged, a presumption of endorsement necessarily follows.[289] It is a rebuttable presumption. Religious events, symbols, and images may be included in state promotions of art, literature, and history without conveying a message of endorsement. However, the fact that facially religious state action may possibly not endorse a particular religious faith on some occasions hardly detracts from the strong suspicion that in normal circumstances it is understood to do so. In cases of this kind the state must bear the burden of decisively demonstrating that its actions were not intended to communicate a message of inclusion or exclusion and that the context of its promotion would be commonly understood in strictly secular terms. The state easily will be able to make such a showing when there is a clear secular common denominator that explains and justifies its conduct (as in the hypothetical case where the government is challenged for displaying the Pieta in a national museum which also displays sculptures of Zeus and other non-Christian deities). In cases such as *Lynch*[290] and *Edwards*,[291] and the

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288. Several commentators emphasize what they view to be the extraordinary difficulty courts will encounter in distinguishing between the secular and the religious and in deciding whether the state has endorsed the latter. *See, e.g.*, Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 792-95 (1984); Marshall, *supra* note 222 at 533-37; Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 999-1007 (1989).

It is difficult to understand, however, why distinguishing the religious from the secular becomes such a special problem of legal epistemology in establishment clause cases, but not in free exercise clause cases. For free exercise purposes, presumably no one would argue that extolling the divinity of Christ was a nonreligious act or that the Jewish Torah was a secular document. On the other hand, if a person insisted that he deserved unemployment compensation under Sherbert v. Verner because going to baseball games was his primary form of religious worship (which required him to decline employment conflicting with the Giants' schedule), one would expect courts to invoke the common understanding of mankind and demand further explanation.

Moreover, it is not only free exercise and establishment clause doctrine which becomes unknowable to courts under these criticisms. If courts cannot tell when conduct endorses religion, how will they determine when a "clear and present danger" exists, or "fighting words" are uttered, or "expectations of privacy" are defeated. More to the point, how can they determine that the state is conveying a message of inferiority to minorities such that their "hearts and minds" are adversely affected. Ultimately, if courts must avoid basing their rulings on common understandings of human behavior and language, much of constitutional law becomes unintelligible.

289. *See supra* notes 269-77 and accompanying text; *see also* Allegheny County v. ACLU, 109 S. Ct. 3086, 3131 (1989) (Stevens, J., concurring in part and dissenting in part) ("the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property").

Justice O'Connor also concedes in her concurrence in *Lynch* that "intentional discrimination among religions . . . should give rise to a presumption . . . that the challenged government conduct constitutes an endorsement of the favored religion or a disapproval of the disfavored." Lynch v. Donnelly, 465 U.S. 668, 688 n.13 (1984) (O'Connor, J., concurring). She then contends, however, without elaboration, as does the majority opinion, that the state sponsorship of the crèche is not discriminatory. How the state sponsorship of religious symbols of only one faith in a religiously pluralistic community can be viewed as nondiscriminatory is simply never explained. *Id.*

290. *See Lynch*, 465 U.S. at 694, 699, 702 (Brennan, J., dissenting) (noting that all of the state's "valid secular objectives" in celebrating Christmas could be achieved by other means than sponsoring a crèche and that in doing so the state "singled out Christianity for special treatment" without "extending similar attention" to other religious and secular groups).

291. *See* Edwards v. Aguillard, 482 U.S. 578, 588, 593 (1987) (noting that "[i]f the . . . legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind" not just creation science and that "[o]ut of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects.").

crèche component of *Allegheny County*,[292] however, where isolated promotions of beliefs consistent with only certain religious faiths are challenged so that no even-handed explanation can justify the narrowness of the state's choices, this type of rebuttal would be unavailing and rightly so.

The mixed symbol display of the menorah and Christmas tree in *Allegheny County* should also have been held unconstitutional under this analysis. While more than one religious holiday was celebrated, religious festivals of some faiths were obviously ignored.[293] Even if all religions were recognized, however, it is inordinately difficult to determine what would constitute equal treatment with regard to the state's promotion of symbols and holidays. Christmas is a much more important holiday to Christians than Chanukah is to Jews, but the menorah itself is a more religious symbol than a Christmas tree.[294] Thus, the case for inequality here is at least as strong as it is for equality. Finally, while the effect of location and additional holiday paraphernalia may dilute the endorsement connotations of displays like these, they do not eliminate them. The message of pluralism and religious freedom which might be read into this mixed display "is not sufficiently clear to overcome the strong presumption that the display [is a] . . . double establishment" of religion.[295]

Constitutional presumptions rarely work with absolute accuracy, of course. They risk being over-inclusive. The above doctrine may result in the state occasionally being precluded from sponsoring religious representations or symbols that have neither the purpose nor effect of preferring one religious group over another. That cost, however, is a tolerable one in constitutional terms. As noted, free exercise doctrine does not require the state to promote the religious beliefs of its citizens. The constitutional principle of religious equality in public life is balanced against nothing more than the state's interest in displaying ostensibly religious symbols and representations for reasons other than the prohibited promotion of particular religious beliefs. The weight of that balance must shift heavily in favor of the Constitution's equality concerns.[296]

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292. *Allegheny County*, 109 S. Ct. at 3104 (explaining that no part of the challenged crèche display detracts from or alters its basic message "that it supports and promotes the Christian praise to God that is the crèche's religious message.").

293. *Allegheny County*, 109 S. Ct. at 3086, 3132-33 (Stevens, J., joined by Brennan, J., and Marshall, J., concurring in part and dissenting in part).

294. *Id.* at 3125-29 (Brennan, J., joined by Marshall, J., and Stevens, J., concurring in part and dissenting in part).

295. *Id.* at 3133-34 (Stevens, J., joined by Brennan, J., and Marshall, J., concurring in part and dissenting in part).

296. The entire thrust of this argument is disputed by those who contend that there is no middle ground in public life. If public facilities are devoid of religious promotion, they become a secular environment as to which particular religious groups will feel alienated or excluded. *See, e.g.*, Smith, *supra* note 288, at 1007-11.

If the establishment clause is oriented along equal protection lines, one response to this challenge is to analogize it to that of the individual who does not want to participate in racially integrated public facilities (perhaps even for religious reasons). That person might also insist that it is neither fair nor equal to subordinate his interest in not associating with black people to the rights of others who insist on an integrated public environment.

The analogy can be disputed, however, on the grounds that a secular public square is not equally accessible to all in the way that racially neutral public accommodations are. Since everyone has some racial identity, the race neutral facility gives no group special treatment. Religion is different in that there is an additional perspective, the nonreligious, which has no racial counterpart. Thus nonreligious public life discriminates against religious groups

The necessity of this last conclusion is emphasized if one reflects at all on the history of religious interaction in this country and abroad. It simply cannot be assumed that religious displays will always be of a benign nature or reflect an ecumenical spirit. The arguments used by the Court to uphold the crèche in *Lynch v. Donnelly* and by the dissent in *Allegheny County v. ACLU* would also seemingly sustain the government's promotion of a traditional, and often antisemitic, passion play such as those presented in Oberammergau, Germany,[297] as part of the Easter holiday.[298] If the promotion of sectarian religious symbols does not presumptively constitute an endorsement of particular faiths, the Court must either accept the role of policing the content of state-sponsored religious displays to determine their offensiveness to the members of other faiths or it

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in favor of their ideological opponents, those adopting secular philosophies, while a racially integrated environment treats everyone the same.

This criticism views equal protection doctrine too narrowly, however. While everyone may be a member of one race or another, people strongly disagree whether race or national origin are important characteristics deserving social or political recognition. Thus, in terms of the message that government may constitutionally communicate with regard to race there are more choices than there are races. Government cannot proclaim the superiority of whites over blacks, nor can it proclaim the reverse. It may, however, endorse racial neutrality as a normative principle. That creed may be offensive in varying degrees to racial supremacists of every color. And it is certainly true that the government's support of such a position may make public life more accessible and inclusionary for people for whom a person's race is unimportant. The benefit that those people receive from current equal protection doctrine, however, does not undermine the basic egalitarianism of the Court's antidiscrimination cases. Similarly, a constitutional system insisting on the equal worth of religious groups may make public life more inviting to those persons for whom religion is least important as well as those religious persons who support religious pluralism. Conversely, public life will be less accessible to those who are only comfortable with a society oriented toward the promotion of their own religious beliefs. That result, however, does not undermine the religious egalitarianism of establishment clause decisions prohibiting the state's endorsement of particular faiths. *See generally Allegheny County*, 109 S. Ct. at 3110-11.

A corollary argument also supports this conclusion. The dissonance between religious and secular groups is often less direct and more easily circumvented than that among religions. In part this is simply a question of the difference between silence and affirmative repudiation of one's beliefs. A public school teacher's failure to instruct children that God exists is less problematic than the teacher's proclaiming that there is no God or that the true God is the object of one faith's worship but not another's. Even where secular theories conflict directly with religious beliefs, the resulting conflict may be less severe than that among religions. Going to a public school in which evolution is taught may be much less alienating to those who believe in the biblical creation of the world than would attending a school in which idols of Baal are enshrined in each classroom. For a useful discussion of the secular preference issue see *Developments in the Law*, *supra* note 280, at 1659-75.

297. New York Times, Sept. 2, 1984, § 2, at 3, col. 1 (noting Hitler's praise of the Passion Play as "a convincing portrayal of the menace of Jewry.").

298. Justice Kennedy in his dissenting opinion in *Allegheny County* emphasizes his approval of Justice Burger's argument in *Lynch* that religious displays that serve to celebrate holidays such as Christmas do not raise establishment clause concerns. *Allegheny County*, 109 S. Ct. at 3137-39. Indeed, the only state promotion of religious messages Justice Kennedy acknowledges to be constitutionally problematic are those that extend beyond the holiday season (*e.g.*, a permanent cross on city hall) or those which involve an unmistakable and continual preference for a single religion by celebrating its holidays alone. *Id.* at 3137, 3139 n.3. What is totally ignored, however, is any consideration of *how* a religious holiday is celebrated and the message conveyed by the state-sponsored symbols which are displayed. Justice Kennedy pointedly does not comment on Justice Blackmun's forceful example of a highly sectarian Thanksgiving Proclamation by the governor of South Carolina in 1844 which provoked protests by the Jewish community in that city. *Id.* at 3106-07 n.53. Indeed, nothing in Justice Kennedy's opinion suggests what grounds might exist to challenge an aggressively sectarian and intolerant celebration of a majority religion's holiday. *See, e.g.*, Judefind v. State, 78 Md. 510, 514, 516, 28 A. 405, 406-07 (1894) (defense of Sunday closing laws proclaiming that:

> Ours is a Christian community, and a day set apart as the day of rest is the day consecrated by the resurrection of our Savior . . . [and] [i]f the Christian religion is . . . benefited or fostered by having this day of rest, as it undoubtedly is, there is all the more reason for the enforcement of laws that help to preserve it.)

must agree to tolerate state sponsored messages of ill will toward religious minorities.

B. *Affirmative Use of Government Power Through Regulation or the Spending Power to Promote Religion*

1. *Financial Grants to Religious Institutions and Schools*

The government is under no constitutional obligation to financially support religious worship or religious institutions. As is true with other autonomy rights, the government may not burden or penalize the exercise of the right, but it need not provide the resources to enable individuals to take advantage of their freedom.[299] Of course, as has been noted, distinguishing between the imposition of a burden and a penalty and the mere failure to provide support for an activity is often a complex undertaking. Clearly government funds need not be provided for the construction of houses of worship or the teaching of religious dogma. That would constitute the direct financing of the exercise of the right. But what of the harder questions? Must the government, for example, pay the salaries of instructors who teach secular subjects in religious schools? Since the government provides funding for the teaching of secular subjects in public schools, its refusal to provide comparable funding for religious schools, it is argued, constitutes a penalty. A benefit extended to everyone is denied to students of a particular religious faith because they exercise their constitutional right to attend a religious school.[300]

Not surprisingly, arguments of this type are grounded on the case of *Sherbert v. Verner*.[301] As explained earlier, there is good reason to question whether *Sherbert* is soundly decided.[302] Even if *Sherbert* continues to be accepted as sound precedent, however, it cannot be extended to support direct aid to religious schools. That argument is in error for two reasons. First, the claim that the autonomy right of religious freedom is being burdened is a weak one. Autonomy rights, it must be reiterated, are focused on withdrawing private decisions from public control, not privatizing public life by using public resources to subsidize private choices. The essence of the right is that individuals have the power to make a choice despite the state's attitudes on the subject. I have the right to be a Democrat or a Republican, or a Nazi or a Communist. That does not entitle me, however, to have every service provided by public institutions including the judicial adjudication of disputes, lending libraries, secular education, recreational facilities, and health care, duplicated in comparable Republican or Communist institutions for the exclusive use of individuals who support those belief systems.[303] Moreover, the provision of unemployment compensation

299. *See supra* notes 31-33 and accompanying text.

300. *See* Paulsen, *Religion, supra* note 19, at 356-59.

301. 374 U.S. 398 (1963).

302. *See supra* notes 198-203 and accompanying text.

303. A less extreme version of this argument that the government must provide comparable goods and services in a religious setting to religious groups whenever goods and services are provided in a secular setting suggests that whenever the government takes over an area of life, such as education, and refuses to fund private

to the Seventh Day Adventist in *Sherbert* constitutes a stronger free exercise claim than that urged by supporters of religious schools because it can be accommodated without any redirection or fragmenting of the public life of society. There is also much less of a sense that the funds received by the petitioner in *Sherbert* in any way contribute to or subsidize the cost of petitioner observing her Sabbath.

Not only is the autonomy interest in having government provide support to religious schools a weak one in free exercise terms, it also is strongly at odds with the equal protection concerns underlying the establishment clause. An analogy may be drawn between the provision of government financial support to private religious schools and the provision of financial support to racially discriminatory white academies. To the racial or religious minority the problem with such funding is that at worst it constitutes state action in direct violation of equal protection guarantees[304] and at best it promotes the privatization of public life in a way that risks circumventing constitutional constraints.

Many people reject instinctively the suggestion that religious private schools are in any way equivalent to white only institutions. The argument usually raised is that there is a good reason to send one's children to a religious school. That decision serves a worthwhile purpose, the education of children into one's religious faith, while there are only immoral racist reasons for sending children to racially exclusive institutions. Inclusionary attitudes towards one's co-religionists are good, but inclusionary attitudes toward one's racial group are bad.

The problem with this type of argument is that it misconceives the value of religion for constitutional purposes. What must be accepted is that the protection provided to religious freedom by the Constitution is content neutral. We value and protect a person's religious choices *regardless of the substance or merits of their faith.* Religious beliefs are not necessarily good or praiseworthy; they may be hurtful and offensive to many of us. We do not protect religious freedom because we presume the tenets of different religions are better belief systems than others. Indeed that conclusion is a constitutionally offensive one. What is respected is the autonomy right—the choice—the opportunity to adopt one's personal sense of identity and one's own conception of the divine without state interference. As with the right to terminate a pregnancy, the woman's choice is not protected because it is morally correct. It is protected because the choice more properly belongs with the individual rather than with the government.

Religious denominations have in the past proclaimed the inferiority of black people and recognized a divine mandate to segregate them.[305] Religions

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religious alternatives, it is obliged to "seek out ways to accommodate religious practice." *See* McConnell, *Neutrality, supra* note 18, at 163. This issue is discussed *infra* notes 320-21.

304. *See generally supra* notes 232-36 and accompanying text.

305. *See, e.g.*, N. BRINGHURST, SAINTS, SLAVES AND BLACKS: THE CHANGING PLACE OF BLACK PEOPLE WITHIN MORMONISM 230 (1981); G. KELSEY, RACISM AND THE CHRISTIAN UNDERSTANDING OF MAN 107-08 (1965) (quoting address by Rev. Gillespie to the Mississippi Synod of the Presbyterian Church stating that the Bible "furnish[es] considerable data from which valid inferences may be drawn in support of the general principle

routinely proclaim their exclusive sovereignty over divine truth.[306] Nonbelievers and those who transgress religious proscriptions may be castigated as infidels, anti-Christs, evil, idolaters, cursed, satanic, Christ killers, and damned to burn in hell.[307] The Constitution respects each individual's liberty to adopt such beliefs as a matter of private right, not because it values such ideas, but because it respects and protects individual freedom.[308]

What makes direct grants of financial aid to religious schools unconstitutional then is that the institution at issue is one in which public life equality constraints preclude government support of sectarian domination. Schools operate within the constitutional framework of *Brown* as to which separate is not equal. If the same protection against hierarchy and dominance is to be provided to minority religious groups as well as racial groups, institutions which, because of their public nature, cannot endorse racial supremacy must also reject any commitment to religious priorities.

It should be understood, however, that this type of equality constraint, which prohibits the derogation or exclusion of suspect classes through the state-supported fragmentation of public life, becomes less and less forceful the further one moves along the public-private continuum towards the private autonomy pole. To take a less than obvious example, if the government financially subsidizes first time homeowners in any of a variety of different respects, there is every reason to believe that some of those families will discriminate against

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of segregation as an important feature of the Divine purpose and providence through the ages."); H. SMITH, IN HIS IMAGE BUT . . .: RACISM IN SOUTHERN RELIGION, 1780-1910, at 11-12 (1972).

306. *See* R. JOHNSTONE, *supra* note 27, at 152 stating that many religious groups are:

> convinced they have a corner on truth and have more perfectly than any other group formulated and practiced the message and will of God . . . [T]raditional Roman Catholic doctrine states that unless a person is a member of the Roman Catholic church he cannot be saved. One branch of Lutheranism maintained for many years that it was the one pure, true visible church of God on earth. Jehovah's Witnesses yet today insist that unless you join their ranks you will not be among the 144,000 that alone will be saved.

307. *See, e.g.*, THE RELIGIOUS WORLD, *supra* note 92, at 303 (Christian faith proscribes that "for those who are unrepentant and do not attain the goal of salvation, eternal perdition is the fate"); M. MARTY, *supra* note 109, at 37-42 (describing characterizations of the nonreligious as heretics and infidels); R. MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS 7 (1986) (describing nineteenth century protestant view of the "abominable" Mormons); B. OLSON, *supra* note 107, at 31, 94 (describing conservative Protestant educational materials which "in discussing Roman Catholicism . . . tend to create a monolithic picture of the religion as a network of evil" and which teach that "Jews live under a curse they brought upon themselves"); H. QUINLEY & C. GLOCK, ANTI-SEMITISM, *supra* note 77, at 94-109 (describing religion-based hostility toward Jews stigmatizing them as "Christ-killers" . . . "heretics, defilers, and murderers"); R. ROY, APOSTLES OF DISCORD: A STUDY OF ORGANIZED BIGOTRY AND DISRUPTION ON THE FRINGES OF PROTESTANTISM 116-17, 165 (1953) (describing extremist Protestant references to Jews, Catholics, and the Pope as the anti-Christ); London Times, May 22, 1989 at 14, col. 8 (discussing Free Presbyterian religion which "consider[s] the Pope to be the anti-Christ and the Roman Catholic mass idolatrous"); N.Y. Times, July 4, 1988, at A28, col. 3 (describing Catholic dissident Archbishop who instructs his followers that the Vatican is run by "Anti-Christs" and the Catholic Church has taken "Satanic" . . . steps . . . [in] seeking to improve the . . . Church's relations with Protestants, Jews and others.").

308. A corollary point is also important here. Whatever value an activity or a belief system may have as a matter of private choice is transformed for constitutional purposes if the activity or belief becomes a matter of public policy and state action. Thus, the private decision to marry a member of one's own race, a decision that the overwhelming majority of Americans make for better or worse, changes dramatically in its constitutional implications if it is endorsed or facilitated by the state. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (noting in the context of a custody dispute involving an interracial couple that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). The same value transformation occurs with regard to the promotion of religious beliefs.

various racial, religious, and ethnic groups with regard to whom they allow into their homes. No one suggests, however, that such conduct by a family makes government aid to its residence unconstitutional. Thus, some institutions because of their private nature can be supported by the state despite the fact that they operate in a discriminatory or exclusive manner. Even if it does implicitly communicate a cumulative message of inferiority or outsider status, such discrimination is permitted to do so in the name of basic liberty and autonomy principles.

The kind of analysis envisioned here can be illustrated by examining the question of whether property tax exemptions for houses of worship and income tax deductions for contributions to houses of worship are constitutional.[309] The first step in such an inquiry is a surprising and counterintuitive one. It is that direct financial grants to houses of worship themselves are, in an important sense, consistent with equal protection influenced establishment clause guarantees. There can be no public life argument here. These institutions are private associations in which the autonomy of selection and choice is paramount. More importantly, at least for religious groups, antiexclusion concerns are at a very low level. Few people feel stigmatized by not participating in some other faith's private religious ceremonies.[310]

This is not to say that direct grants of financial aid to houses of worship are clearly constitutional. While the "hearts and minds" message of *Brown* precluding the fragmentation of public institutions along religious lines is of limited applicability here, a host of other constitutional restrictions must be met. To begin with, from an equal protection perspective, all grants of this type would have to be allocated equally among religious groups. Separate may be acceptable, but it must be truly equal. This by itself raises a significant problem in determining what kind of allocations of funds would constitute an equal distribution among religious groups.[311]

Secondly, and even more problematically, the funds could only be used for religious activities such as private worship as to which there are no separate but unequal connotations. Government supervision over grant funds to be certain they were used for only those purposes would, obviously, intrude into church autonomy.[312] If these limitations could be satisfactorily accepted and implemented, additional objections might be raised that the grants penalized those

309. *See generally* Mueller v. Allen, 463 U.S. 388 (1983) (upholding tax deduction for expenses incurred in sending children to religious school); Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (upholding property tax exemptions for religious organizations)

310. The author realizes that this suggestion is totally inconsistent with traditional establishment clause analysis. Indeed, it explicitly reverses common assumptions. Thus, in cases dealing with state aid to religious schools, courts struggle to differentiate the schools' secular functions, as to which aid might constitutionally be provided, from the schools' religious functions which cannot receive state assistance. *See* Norwood v. Harrison, 413 U.S. 455, 468-70 (1973), and the cases cited therein. From the perspective suggested here, it is state aid to religious institutions providing secular instruction which raises the more problematic equal protection and establishment clause concerns. State support of purely religious education, if it could be provided in a nonpreferential manner, is less problematic. *See supra* notes 153-60 and accompanying text.

311. *See supra* note 239.

312. *See* Aguillar v. Felton, 473 U.S. 402, 413-14 (1985); Lemon v. Kurtzman, 403 U.S. 602, 619-20 (1971)

individuals and organizations which exercised their autonomy right not to be religious.

The Court's decision to uphold tax exemptions for religious institutions and tax deductions for contributions to them, but not direct subsidies, alleviates many of these concerns.[313] The right to worship is facilitated in a way that operates with relative equality among religious groups. Further, since so many secular, nonprofit institutions also receive favorable tax treatment, it is difficult to argue that belief neutrality principles or the autonomy rights of the nonreligious are transgressed. Finally, by tying financial support to individual contributions, the intrinsically private nature of religious institutions is accentuated, and the potential problem of limitless and competing claims for support is eliminated in a prophylactic fashion. Although the issue is not free from argument, narrow tax deductions and exemptions for religious institutions may be a reasonable constitutional compromise to resolve the problem.

It must be reiterated, however, that a public-private continuum exists here. Ancillary activities of a religious community such as running a camp, day care center, or school are more a part of public life than the house of worship itself. With regard to these institutions the balance between equal protection concerns and autonomy interests will shift incrementally toward the former. The degree of religious involvement with the institution would also be relevant. Thus, a purely religious educational program, such as a Sunday school, would be treated much like a house of worship with regard to its tax status. A Methodist hospital with virtually no connection between its religious affiliation and the provision of medical services other than its name would raise few tax problems as well. The difficult cases would include institutions both deeply religious in operation and solidly lodged in the public domain such as a religious high school.[314]

The public-private continuum is also critical in differentiating between religious clause requirements and those of the speech and press clause. In *Texas Monthly, Inc. v. Bullock*,[315] for example, a sales-tax exemption for religious

313. *See supra* note 309.

314. The Court has never expressly held that tax deductions for racially discriminatory schools are unconstitutional, although it did uphold the right of the government to withdraw such deductions as a matter of tax policy, see Bob Jones Univ. v. United States, 461 U.S. 574, 598-99 (1983). Several lower federal courts have ruled that it is unconstitutional to provide tax-exempt status to religious private schools which discriminate on the basis of race. *See, e.g.*, Goldsboro Christian Schools v. United States, 436 F. Supp. 1314, 1320 (N.C. 1977) (using *Lemon* test, Court upheld denial of tax exemption to racially discriminatory school); Coffey v. State Educ. Fin. Comm., 296 F. Supp. 1389, 1392 (Miss. 1969) (state tuition assistance to private, nonsectarian, racially segregated schools is unconstitutional violation of equal protection clause). The Supreme Court has been able to avoid the issue, since in 1970, in response to lower court cases, the I.R.S. changed it regulatory policies to deny tax-exempt status to schools that practice racial discrimination. *See Bob Jones Univ.*, 461 U.S. at 577-79.

In Norwood v. Harrison, 413 U.S. 455 (1973) the Court did prohibit a state from lending textbooks to racially discriminatory, secular, private schools but it pointedly distinguished the facts of that case from the "leeway for indirect aid to sectarian schools," *id.* at 464 n.7, which it had previously upheld. Also in Mueller v. Allen, 463 U.S. 388 (1983), the Court upheld tax deductions for tuition at religious elementary and high schools. *Id.* at 390-91. Under the thesis proposed here, if tax deductions for a segregated high school are unconstitutional, tax deductions for religious high schools should also be unconstitutional. *See generally*, Miles, *Beyond* Bob Jones*: Toward the Elimination of Governmental Subsidy of Discrimination by Religious Institutions*, 8 HARV. WOMEN'S L.J. 31 (1985). Given the composition of the current Court it is, of course, highly unlikely that tax exemptions for religious schools generally will be held unconstitutional under the theory proposed in the text.

315. 109 S. Ct. 890 (1989).

periodicals was successfully challenged. In reaching that result, the members of the Court had to struggle to determine if tax exemptions for religion expression established religion, invaded free exercise rights or violated speech and press clauses prohibitions against content discrimination.[316]

Under this Article's thesis the tax exemption at issue in *Bullock* should not violate the establishment clause in that it did not discriminate among religions in terms of material benefits or subjective status. It did, however, flagrantly and unconstitutionally allocate financial burdens based on the content of a private speaker or writer's expression in direct violation of the first amendment. This does not mean, however, that speech and press clause neutrality requirements prohibit all favorable tax treatment of religious expression. Regardless of how secular institutions are taxed, the state could not impose a flat business or occupation tax on a preacher in the pulpit "for the privilege of delivering a sermon" or on a clergyman's distribution of a newsletter to the members of his congregation. The free exercise clause would protect religious autonomy in those circumstances. All that *Bullock* demonstrates is that the parameters of the free exercise clause end, and those of the speech and press clauses begin, when religious expression enters the public arena either through generally circulated magazines, door-to-door solicitations, or other types of public proselytizing.

2. *Regulations that Promote Religious Faith*

Unless a governmental regulation facially classifies on the basis of religious affiliation, it is unlikely to transgress equal protection guarantees. (The free exercise clause applies to laws that require the performance of religious rituals or acts of worship or interfere with such activities.) Most general police power regulations simply have no clear correlation with particular religious faiths. It would be difficult to argue, for example, that increasing the speed limit from fifty-five to sixty-five miles per hour on interstate highways unconstitutionally promoted one religion over another. In the rare event when neutral laws which further the health, safety, or general welfare of the community do distinguish between religions to a significant degree, the state's interest is usually sufficiently strong to outweigh any disproportionate religious effect that may result. Thus, health requirements related to testing for Tay Sachs disease might disproportionately affect Jews but would and should probably be upheld in any case.

Some problems with regulations do arise, however. Typically they involve a technically neutral law with strong sectarian overtones that incidentally promotes religion or a law that accommodates religion by affirmatively facilitating its private exercise. (This leaves aside for later discussion laws that accommodate religion by exempting religious groups from generalized regulations.)

McGowan v. Maryland,[317] the case upholding the constitutionality of mandatory Sunday closing laws or "Blue Laws" is a good example of both con-

316. *Id.* at 905 (Blackmun, J., concurring) (statute at issue implicates both religion clauses and the press clause and "harmonizing these several values is not an easy task").

317. 366 U.S. 420 (1961).

cerns. The requirement itself is facially neutral. Under the motive prong of the *Lemon* test if the purpose of Blue Laws was to endorse obedience to the prescriptions of the Christian Sabbath it would clearly be unconstitutional. A purely secular decision to have a uniform day of rest to avoid the health and welfare consequences of seven day work weeks is equally clearly constitutional. If the choice of Sunday was purely arbitrary (that is, if the governor drew lots and Sunday was picked) Blue Laws would serve an exclusively secular purpose.

The harder "purpose" question arises if Sunday, as opposed to other days, is chosen as the day of rest to facilitate the observance of the Christian Sabbath, not because that is the true Sabbath (an obviously unconstitutional governmental conclusion), but because most Americans are Christians, and are predisposed to observe that day as one of rest anyway. The argument would be that selecting a neutral day (*e.g.*, Monday) would make it more difficult for most people who observe some Sabbath to exercise their religious faiths, and might unacceptably reduce the productivity of society by forcing all Sabbath observers to take two days off. Moreover, in absolute terms, Sabbatarians do not suffer any additional burden if Sunday is designated instead of Monday. In either case they would be confronted with having to take two days off. True, a relative inequality results from choosing Sunday as the day of rest, but the only way to avoid it is to accommodate no one person's religious beliefs and maximize the burden to everyone.[318]

The question is not an easy one particularly because the owners of businesses who are Sabbatarians contend that being closed two days while their competition are closed on only one day places them at a competitive disadvantage.[319] Thus, there is an arguably impermissible effect here as well as a problematic motive. Nor will analogizing the establishment clause to equal protection doctrine make the difficult balance required in this case a simple one. This type of a case is a difficult one to evaluate under the equal protection clause as well. Equal protection analogies will broaden the perspective of a reviewing court, however, by illustrating how similar conflicts were resolved in other circumstances. Perhaps the best equal protection analogy to Blue Laws might be that of a school board guaranteeing students the right to be assigned to their neighborhood schools. This policy serves the autonomy interest of parents, but it may also place minority children at a disadvantage. If they want to attend an integrated school they will have to travel across town since so many neighborhoods are de facto segregated. The most equal solution, however, that of random assignment without regard to the neighborhood in which a child lives, maximizes the inconvenience to everyone.[320]

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318. A similar argument can be, and frequently is, raised by religious persons who contend that a secular public life devoid of religious symbolism burdens everyone in order to avoid inequality among religious faiths. The distinction between the two contexts depends primarily on the message conveyed by the state's action which in turn depends on the strength of a neutral rationale for justifying the regulation. On both counts recognizing Sunday as a day of rest in secular terms is less problematic than is direct governmental support for the public display of facially religious symbols and representations.

319. Braunfeld v. Brown, 366 U.S. 599, 602 (1961).

320. *See* W. HAWLEY, R. CRAIN, C. ROSSELL, M. SMYLIE, R. FERNANDEZ, J. SCHOFIELD, R. TOMPKINS, W. TRENT & M. ZLOTNICK, STRATEGIES FOR EFFECTIVE DESEGREGATION 50-51 (1983) (noting the unfortunate rela-

In both these cases different groups in a community act differently; in the racial context they live in different areas, in *McGowan* they have different Sabbath days. Equality concerns would require that the government makes policy choices that avoid the consequences of these differences favoring one group or another. Other neutral, general welfare concerns point in the other direction. At best, a difficult balancing test must be used to review the government's decision. Under orthodox equal protection analysis, the government's decisions in favor of efficiency and convenience would probably be upheld.

An easier case of accommodation and facilitation is the hiring of military chaplains or the provision of clergy to prisons. Here, for compelling reasons, the government has extended public control over what would ordinarily be understood to be exclusively private spheres of conduct in which autonomy rights are at their maximum. Since virtually all of a soldier's or prisoner's existence becomes public life on government property, the provision of religious services in that context simply rights the balance that has been distorted.[321] Military and prison chaplains do not extend religious favoritism into public life, they primarily maintain its availability (as privately as possible) in circumstances where private life has been subsumed by public needs.[322]

A state law requiring private employers to honor an employee's request to have his or her Sabbath off from work, on the other hand, is probably unconstitutional as the Court ruled in *Estate of Thornton v. Caldor, Inc.*[323] The equal protection standard of the establishment clause is applicable since religionists who observe a Sabbath are granted a specific entitlement not available to those

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tionship between the length of bus rides used to integrate schools and the amount that racial isolation will be reduced by busing).

321. McConnell, *Neutrality*, *supra* note 18, at 161 ("[W]hen the government so dominates and controls a particular area that private activity and initiative are crowded out . . . religious elements . . . must deliberately be introduced by the government.").

322. McConnell extends this argument beyond prisons and the military to include the public schools although he concedes that schools constitute a less extreme example of the problem. Because of compulsory education laws and the government's constitutional inability to fund private religious schools, he argues, the government's pervasive involvement in education requires that it take affirmative steps to accommodate religious practices in the public school environment. *Id.* at 161-63.

Part of the problem with this contention is that it is not easily isolated in its application to public schools alone. If the compulsory nature of public education is a critical premise in the argument, it should be clear that government imposes numerous obligations on citizens which require their presence in public institutions. Hospitals, for example, might fall into this category since parents are legally obliged to take their children to medical centers if they become injured and require professional assistance.

Indeed, if compulsory attendance is really McConnell's core concern, courthouses should raise a more egregious constitutional problem than schools do. The school dilemma can be completely satisfied by relieving religious parents of any legal obligation to provide their children a secular education. It is hard to think of a way to provide for similar private alternatives to the adjudication process. Yet moments of silence for meditation and prayer, for example, are not typically provided in courtrooms.

Moreover, one suspects that the compulsory nature of public education is really beside the point. The fact is that, unlike prisons, most people send their children to school for the same reason they send them to a clinic if they are ill—not because they are told to but because they think it will be in the child's best interests to do so.

Viewed objectively, public education is really more of a benefit than it is an obligation. It is certainly true that by providing benefits like free educational services in a nonreligious environment, the government provides no assistance to parents who want to teach their children the tenets of their faith. That does not impair their religious liberty, however. It simply does not facilitate it, and the government is not constitutionally bound to do that. *See supra* notes 31-33 and accompanying text.

323. 472 U.S. 703 (1985).

faiths which do not designate a day of rest and worship. Thus, certain minority faiths (*e.g.*, those with a Saturday Sabbath) are arguably given a benefit at the expense of even smaller faiths (those with no Sabbath at all). The autonomy rights of the nonreligious are similarly burdened. So many Americans are members of religions that recognize Saturday or Sunday as the Sabbath day that all other employees would have substantial difficulty in getting desirable weekend days off. Finally, no nonreligious obligation to abstain from work was recognized by the challenged law, notwithstanding any similarity that might be drawn between a secular occasion or holiday and the Sabbath day, raising a possible first amendment violation of discrimination among belief systems. Given these objections, the Court correctly concluded that the challenged regulation went too far in favoring specific religious groups and religious believers in general, and that it imposed too heavy a burden on minority faiths and nonbelievers.[324]

C. *Accommodating the Exercise of Religion by Exempting Members of Religious Faiths From General Regulatory Obligations*

1. *Judicial Denial of Free Exercise Claims on Establishment Clause Grounds*

Many free exercise claims will of necessity be denied by a reviewing court because the state action in conflict with petitioners' religious beliefs and practice is held to serve a sufficiently important state interest that justifies the abridgment of fundamental autonomy rights. Another reason for denying free exercise claims is that they conflict with the establishment clause. A difficult case involving both limits on the free exercise clause is *Goldman v. Weinberger*.[325]

Captain Goldman, a Jewish Air Force officer, sought to be excused from the military's uniform dress requirements so that he might wear a yarmulke at work. The Supreme Court's majority opinion determined that the Air Force's uniform dress requirements outweighed the petitioner's free exercise rights.[326] That conclusion might be challenged on the grounds that it understated the officer's autonomy right and over-valued the military's legitimate, but hardly compelling, interest in conformity. Certainly, if some other operation of government had been at issue, the Post Office for example, it is difficult to believe that the government's interest in uniformity would be important enough to justify prohibiting a letter carrier from wearing a yarmulke or other innocuous religiously required dress accessory.

Three concurring Justices in an opinion authored by Justice Stevens raised an additional reason why Captain Goldman's claim must be denied.[327] Even if a yarmulke was sufficiently unobtrusive and consistent with an officer's professional appearance that on balance the Air Force's interest did not outweigh the

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324. *Id.* at 710.
325. 475 U.S. 503 (1986).
326. *Id.* at 509-10.
327. *Id.* at 510 (Stevens, J., concurring).

petitioner's free exercise rights, other religious requirements as to appearance including; turbans, saffron robes, and dreadlocks[328] would certainly create a stronger case for the Air Force in which its uniformity requirements might be upheld. Thus, the recognition of a free exercise exemption from Captain Goldman's yarmulke could not be extended to all religious dress requirements. This would put the Air Force in the business of distinguishing among religious claims, a position for which it and other Government operations was not well-suited and which by implication raised serious establishment clause concerns.[329]

Justice Stevens's argument is consistent with his concurrence in *United States v. Lee*[330] in which the Court denied a free exercise exception to an Amish farmer who sought to be excused on religious grounds from paying social security taxes. The problem with such exemptions, Justice Stevens explained, was that they created a "risk that governmental approval of some [religious claims] and disapproval of others will be perceived as favoring one religion over another[,]" a risk ". . . the Establishment Clause was designed to preclude."[331] The logical conclusion of this argument, as Justice Stevens forthrightly concedes and recommends, is that virtually any exemption to "a valid and neutral law of general applicability" will be beyond the scope of free exercise clause protection.[332]

Stevens's contention totally subordinates free exercise concerns to those of the establishment clause in the name of equal treatment and neutrality. In doing so he misunderstands and underestimates both the autonomy rights that the free exercise clause protects and the religious equality that the establishment clause commands. As noted, overt disparate treatment is not the only way to unduly burden a fundamental right.[333] Clearly, general prohibitions can also seriously interfere with a person's ability to comply with religious obligations. Free exercise rights are not predicated on nor restricted to equality of treatment. If they were, the freedom to worship of minority religions would be unacceptably vulnerable to impairment when these are the very groups who need the protection of the free exercise clause the most. Religious majorities or powerful religious groups do not really need a free exercise clause to protect their beliefs and practices from general laws. They can use the political system to ensure that laws of general applicability do not transgress their spiritual concerns and that "neutral" rules are carefully drafted to avoid any interferences with their faith.[334] These general laws, however, which have been designed to accommodate majoritarian religions, may ignore the religious requirements of lesser

328. *Id.* at 512.

329. *Id.* at 512-13.

330. 455 U.S. 252, 261 (1982) (Stevens, J., concurring).

331. *Id.* at 263 n.2.

332. *Id.* at 263 n.3.

333. *See supra* notes 34-35 and accompanying text.

334. It is hard to believe for example that Mormons in Utah would need to seek the protection of the free exercise clause as did the Indians in *Lyng* to try to prevent a road from being constructed through the Mormon Tabernacle.

known faiths.[335] Such laws impose equal burdens on all religious groups only by ignoring the religious obligations of minority faiths.[336]

Justice Stevens is correct that religious discrimination concerns arise whenever an exemption is provided that distinguishes the treatment of one religious group from another. And the resulting tensions may preclude the granting of exemptions in particular cases. But surely the Court's job is to confront the difficult balancing of values that the adjudication of religious exemptions requires, and not to sweep the problem under the rug by denying religious liberty concerns any constitutional recognition whatsoever.

While Justice Stevens's repudiation of most free exercise exemptions in the name of the establishment clause in *Goldman* is too draconian a principle to adopt, he is correct that Captain Goldman's claim raises establishment clause concerns. Indeed, the Court's holding in *Goldman* may be correct because of establishment clause ramifications of permitting Captain Goldman the immunity he sought that are not discussed in the majority and concurring opinions. The problem is not that if Captain Goldman's claim is vindicated, both the Air Force and the courts will have to consider exemption requests from other religious groups. That logic denies all claims for exemption except when there is a sufficient common denominator among all minority faiths so that neither the government nor the courts must choose among them. It would deny Jewish postmen the right to wear yarmulkes as well, as long as some other faith's religious obligations required wearing religious paraphernalia that was inconsistent with being a mailman. The real difficulty with Captain Goldman's request is that it raises substantial concerns regarding religious endorsement and sectarian fragmentation in a governmental institution in which neither should be tolerated.

The military is a rigidly hierarchical organization in which the views and endorsements of officers in their official capacity receive substantial respect. In that context the line between private autonomy and public endorsement is often uncertain. Military commanders should not be promoting partisan political positions on their uniforms (a "Bush for President" button for example)[337] nor should they unduly emphasize their national ancestry or display prominent indications of religious affiliation while on duty.[338] The officers who enlisted men and women to salute and obey should hold their rank exclusively as neutral national figures, not as representatives or proponents of any of the diverse groups which comprise our society.[339] There should never be any fear that their judgments are swayed by sectarian concerns.

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335. *Goldman*, 475 U.S. at 523-24 (Brennan, J., dissenting) ("[I]nstitutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority").

336. *Id.* at 522 (uniform treatment of all religions "is illusory, unless uniformity means uniformly accommodating majority religious practices and uniformly rejecting distinctive minority practices").

337. *See generally* Greer v. Spock, 424 U.S. 828, 839 & 839 n.12 (1976) (noting American tradition of political neutrality of military and citing Army regulations which reflect that policy).

338. The existence of both religious proselytizing and prejudice in the military has caused concern among religious minorities. *See, e.g.*, J. KANE, *supra* note 78, at 41-42 (1955); M. SELZER, *supra* note 77, at 26-28.

339. *But see* Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 901 n.8 (1989) (arguing that allowing officer to wear yarmulke would not violate establishment clause).

2. *Legislative Accommodations Not Required by the Free Exercise Clause*

A religious institution may seek an exemption from general regulations from the legislature, not from the courts. Of course that exemption must be granted if the free exercise clause requires that result. An exemption may also be provided, however, that goes beyond the autonomy entitlement mandated by the Constitution. Since the government's decision to grant such an exemption to a minority religion at least implies that many of the costs of legally recognizing this religious affiliation are judged to be tolerable ones by the polity, the courts may allow some room for legislative discretion here.[340] Still, all discretionary immunities granted to religious groups must be carefully scrutinized.

a. *Exemptions for Particular Faiths*

If an exemption is granted to a particular religion or group of religions that is not equally available to all similarly situated denominations, the risk of unacceptable favoritism is acute and the decision should be strictly scrutinized. There would also be an obvious inequality if a particular religious faith is relieved of any painful regulatory burden, such as paying income tax, that all others must share because their faiths do not prohibit them from obeying such requirements. Not all exemptions which are available to only certain sects are necessarily unconstitutional, however. A blanket prohibition on discretionary exemptions that cannot be generally available to all religious groups raises the same common denominator problem that undermined Justice Stevens's position in the *Goldman* case. While the exemptions here would be legislatively recognized, unlike *Goldman* which dealt with court enforced, constitutionally required releases from regulation, a parallel tension exists between nonpreferential equality principles and liberty interests in these cases as well.

The political nature of the discretionary exemption does, however, give the problem a process dimension as well as a substantive one. As alluded to previously,[341] a central theme of suspect class doctrine is that the judiciary should defer to legislative judgments except when there is some reason to mistrust the political system. This creates a potential window of opportunity to accommodate the religious obligations of smaller sects. When the idiosyncratic beliefs of a small and powerless religious minority are given special respect, it is unlikely that the majority is discriminating against itself for invidious and prejudicial reasons.[342] Thus, conscientious objector cases in which individual members of large faiths protest the favorable treatment provided to small pacifist religions involve benign discrimination at worst. Non-Quakers, for example, arguably need no special protection from the judiciary. Moreover, the narrow scope of the exemption means that the burden of not receiving it will be spread among the great majority of people and therefore will be more easily borne. Given the

340. *Id.*

341. *See supra* notes 245-54 and accompanying text.

342. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.").

centrality of nonviolence to the religious beliefs of many pacifist sects and the long history of political acceptance of religiously based exemptions from conscription,[343] a strong case may be made on balance that these exemptions should be sustained against establishment clause challenge.

Secular pacifists might also challenge the award of conscientious objector status to religious pacifists alone. Since secular philosophies do not constitute a suspect class, their argument would be based on first amendment belief system discrimination grounds.[344] The government is differentiating between people solely on the basis of the belief systems they hold. While there are some contexts in which religious and secular activities are predominantly conduct, not speech, and others in which religious and secular activities are simply so different from each other that they need not receive equivalent regulatory treatment, the sole issue here is the nature of one's beliefs. With regard to beliefs alone, the government arguably must stay neutral.[345]

Of course, the burden of proof may be placed on the secular pacifist to demonstrate that his nonreligious convictions have the same significance in his life as do religious beliefs in the life of the religious pacifists. It is not unconstitutional for the government to differentiate between beliefs that are foundational to a person's identity and passing whims, nor to identify religious beliefs generally as involving significant personal commitments. If the secular and religious pacifists are found to be similarly situated, however, perhaps the government should have no more discretion to differentiate between the two any more than it would be allowed to exempt right wing, but not left wing pacifists from military service. Accordingly, unless the state can justify disparate treatment under some serious standard of review, secular pacifists with central belief systems that bind them to obligations similar to those imposed on religious pacifists should have equal access to conscientious objector status, and the Supreme Court has so ruled.[346]

b. *General Religious Exemptions*

Exemptions made available to all religious groups may require a less demanding evaluation. The equal protection concerns of the establishment clause will not be rigorously applied since there is no explicit favoritism among religions, particularly when the exception is generally valuable to all faiths. That does not mean that general exemptions for religious groups have no equal protection implications, however. They may constitute state support and endorsement for institutional arrangements that operate on a separate but equal basis. The release time programs upheld in *Zorach v. Clauson*[347] might be challenged as such since the state seems to be facilitating the fragmentation of children's education on sectarian religious lines.

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343. *See* U.S. v. Seeger, 380 U.S. 163, 169-73 (1965); *See generally* M. SIBLEY & P. JACOB, CONSCRIPTION OF CONSCIENCE, 18-36 (1952); L. SCHLISSEL, CONSCIENCE IN AMERICA (1968).

344. *See supra* notes 109, 153-57 and accompanying text.

345. *Id.*

346. Welsh v. United States, 398 U.S. 333, 343-44 (1970).

347. 343 U.S. 306 (1952).

That appearance may be deceptive. In an important sense release time programs do not endorse religious separatism in public life. Private religious instruction along sectarian lines, like attending one's house of worship, does not raise separate but equal concerns. Moreover, balance and parity principles apply here. Because the establishment clause restricts religious involvement in government and the state's direct promotion of religious beliefs, the constitutional balance between liberty and equality must allow religious individuals and institutions to develop religious lifestyles and communities in the private sector. Release time programs help accomplish that permissible goal. They directly further the autonomy interests of religious communities in private life while only incidentally involving the state in doing so. In light of the conflicting demands of religious autonomy interests and equal protection concerns, the Court's decision to uphold the release time programs is a reasonable one.[348]

A secondary challenge to release time programs could be raised by secular organizations which also seek to have part of consenting public school students' time allocated to their educational mission. Here the secular challenge is weaker than it was in the conscientious objector cases. Religious education is more than the inculcation of a belief system. It is part of an initiation into a community and involves substantial conduct and associational activities as well as the acceptance of particular beliefs. Release time for religious education and release time to study the ecosystem under the auspices of an environmental group may be sufficiently dissimilar that discrimination between them involves more than the preferring of one belief system over another. Moreover, since secular education can be provided by the state during public school hours while religious education cannot, there seems less of an autonomy need for secular groups to obtain private time to supplement their children's education.

If a secular creed, however, did demonstrate the same need for, and commitment to, supplementary educational programs provided on private property and at private expense as religious groups, perhaps they should be included in release time programs as well. Again, the burden should be on the secular activity, however, to demonstrate that it plays the same role in the believer's lifestyle as does the religious belief systems it claims to parallel. It is not unconstitutional to recognize that in some respects at least religion is a uniquely valuable form of belief and association. After all, the Constitution itself does that explicitly.

A particularly difficult accommodation case to evaluate is *Church of Jesus Christ of Latter Day Saints v. Amos*.[349] At issue is section 702 of the Civil Rights Act which exempts religious organizations engaged in nonprofit activities from Title VII's prohibition against discrimination in employment on the basis of religion. The problem raises a complex liberty/equality conflict, but Justice White's majority opinion does little to intelligibly resolve it.

Justice White contends that section 702 is constitutional under both prongs of the *Lemon* test. It has the secular purpose of "alleviating significant govern-

348. *Id.* at 315.
349. 483 U.S. 327 (1987).

mental interference with the ability of religious organizations to define and carry out their religious missions."[350] Further, it does not have the effect of advancing religion because the government itself is not taking any steps to promote religion. Through this law the state simply "*allows* churches to advance religion, which is their very purpose."[351]

While the majority's holding may be correct, it explains its decision in the worst possible way. Justice White's arguments are so broad that one is at a loss to imagine any exemption of a religious organization from a general regulation which would not comply with the *Lemon* test as he construes it. Exempting religious organizations from those civil and criminal laws which prevent them from forcibly converting nonbelievers to their faith also alleviates "significant governmental interference with the ability of religious organizations to carry out their mission."[352] Such an exemption would also do no more than "allow churches to advance their religion which is their very purpose."[353] Surely, however, these exemptions would be unconstitutional on establishment clause grounds even without regard to the free exercise problems they raise.

Justices Brennan and Marshall concur in the Court's holding on the grounds that it is highly likely that the nonprofit activities of religious organizations are religious rather than secular in nature.[354] They also worry that religious organizations might be chilled in identifying particular tasks as religious if they faced the prospect of defending that designation in Title VII litigation.[355] Justice O'Connor, adopting a similar line of analysis, suggests that the probability that nonprofit activity by a religious organization is religious in nature is so high that her "objective observer" would necessarily view this Title VII exemption as an accommodation of religion rather than an endorsement of religion.[356]

While superior to Justice White's majority opinion, these concurrences are also analytically inadequate. Whatever the constitutional definition of religious activity is, it is difficult to understand why it must be intrinsically nonprofit in nature. The concurrences err by gratuitously attributing substantive content to the nature of religion rather than defining it as a type of autonomy choice and belief system.[357]

Equally perplexing is the empirical assumption that nonprofit activities of religious organizations are necessarily religious. The exact opposite argument is regularly raised by those seeking government financial support of parochial schools and other religious institutions. They insist that much of the work done

350. *Id.* at 339.

351. *Id.* at 337.

352. Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 339 (1987).

353. *Id.* at 337.

354. *Id.* at 340-44 (Brennan, J., concurring, joined by Marshall, J.).

355. *Id.* at 344-45.

356. *Id.* at 348-49 (O'Connor, J., concurring).

357. The issue is not so much what kinds of activities are likely to be religious since that question cannot be answered in general terms. Rather, it is how far the autonomy rights of religious institutions may be extended before doing so unacceptably infringes on other constitutionally recognized values.

in religiously affiliated social institutions is intrinsically secular in nature.[358] Indeed, the vast range of nonprofit activities in schools, libraries, hospitals, recreation centers, and the like make the assumption of the concurrences difficult to accept at face value. Do the Justices really believe that at most local gyms there is a Jewish way to give out towels or a Mormon way to sit in the lifeguard's chair?

A more careful analysis would first identify the ways in which the Title VII exemption are constitutionally problematic and then evaluate those situations in terms of the constitutional interests at stake. To begin with there is the equal protection problem of the discriminated against employee. As a result of this amendment to Title VII, members of religious minorities will be vulnerable to employment discrimination, without redress, by nonprofit institutions affiliated with religious groups. Is tolerance of such religious discrimination constitutional? From the most general perspective it almost certainly is. Title VII did not have to be enacted at all. There is no constitutional requirement that government protect any groups, even racial minorities, from private discrimination.

The only way for members of minority religions to constitutionally protest government failure to prohibit religious discrimination in employment in general terms would be to extend the concept of state action even beyond that recognized for racial discrimination. One would have to argue that at some point the Constitution prohibits the fragmentation of organized and productive life in our society along religious lines. This is the kind of substantive state action argument that the Court may have implicitly adopted in *Shelly v. Kraemer*[359] and which it flirted with in *Bell v. Maryland*.[360] Short of that kind of a collapsing of private and state action, the refusal by the state to prohibit religious discrimination in private employment across the board would be constitutional.

The Title VII amendment in *Amos*, however, is one of selective, not general, inaction. It prohibits many forms of employment discrimination while permitting only certain groups to discriminate against particular minorities. The Amendment's discriminatory distinctions are clearly state action which must be justified against constitutional challenge.

Significant equal protection concerns are implicated if the government legalizes harmful conduct among certain groups that is otherwise prohibited as socially unacceptable. A law that legalized stealing from one race by another would certainly be unconstitutional even if the law applied to all races. The vulnerability of minorities to that kind of government withdrawal from law enforcement responsibilities is obvious and intolerable. The Title VII amendment in *Amos*, however, is not as blatantly invidious in effect as the theft example above would be. The government does not prohibit all employment decisions

358. *See, e.g.*, L. MANNING, THE LAW OF CHURCH-STATE RELATIONS 97-99 (1981). Indeed in upholding various forms of state aid to church-related colleges, for example, the Court repeatedly has argued that religion does not pervade such institutions so that their religious and secular functions can be effectively separated. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 681 (1971); Hunter v. McNair, 413 U.S. 734, 743-44 (1973); Roemer v. Board of Pub. Works of Maryland, 426 U.S. 736, 755-59 (1976).

359. 334 U.S. 1 (1948).

360. 378 U.S. 226 (1964).

based on factors other than merit, the way it criminalizes stealing. Private employer discretion in hiring is generally tolerated other than in the special categories established by law. Thus, it would be difficult to argue that the *Amos* amendment facially discriminates on the basis of religion from the employee's perspective. Rather, religion becomes simply another of many nonmerit considerations which certain employers may consider in their hiring decision.

The *Amos* amendment does have negative equality implications for religious minorities, however. Allowing religious organizations more leeway to discriminate on religious grounds and reducing the protection provided to persons fired because of their religious beliefs promotes the religious fragmentation of many public activities in society in a way that impacts most seriously against religious minorities. By definition more job opportunities will be lost to members of minority faiths than will be lost to majority faiths. The isolation of minority faiths will be necessarily increased. Even if a minority faith saw no reason to hire only members of its own persuasion as a matter of religious principle, it could hardly avoid doing so. In practical terms it would be obliged to make some job opportunities available to its own members if they were being systematically excluded from all nonprofit employment affiliated with majoritarian religious organizations.

None of these consequences, however, change the formal status of the *Amos* amendment. Vis-à-vis the religious employee's predicament it is still facially neutral. That other minorities continue to be protected against discrimination because of race or nationality also adds little to the analysis. Equal protection principles do not require that government provide religious groups the exact same level of protection against private discrimination as racial groups receive.

With regard to nonreligious employees, the Title VII amendment does not directly discriminate against them any more than it discriminates against religious workers. The *Amos* amendment does, however, discriminate against nonreligious, nonprofit organizations since they, unlike their religious counterparts, cannot freely refuse to hire employees based on their religious beliefs. This distinction between organizations raises an issue of belief discrimination. Other interests which the Constitution recognizes and respects also operate regularly through nonprofit institutions. Why can't a feminist nonprofit magazine, for example, also refuse to hire clerical workers belonging to religious faiths they consider insensitive to the rights of women?

Moreover, this disparate treatment of religious and nonreligious organizations indirectly burdens nonreligious employees. Consider the situation of the agnostic employee who seeks employment in a field which often involves nonprofit employers, such as athletic clubs or recreational centers. If there are only two clubs in town, one a for-profit secular club and the other a nonprofit community center sponsored by the local church, the nonreligious swim instructor has a legitimate grievance. The secular club cannot discriminate against church member applicants, while the church-run club can refuse to hire agnostics. Thus, nonreligious persons seeking employment will have a smaller job market available to them than exists for religious persons, particularly those of the larger faiths.

Despite these criticisms there are strong arguments in support of the *Amos* holding. One is based on the contention that religious institutions are unique in their need for organizational autonomy.[361] First, the role of religious beliefs in the identity of the believer and in religious associations is special. Most secular lifestyles or philosophies arguably do not require the same degree of communal homogeneity.[362] Secondly, no other dignitary interest requires the same level of independence from state control. By virtue of the establishment clause, religion is divorced from public support and endorsement. Therefore, its support must be exclusively self-generated. There is a fundamental quid pro quo here. The inability of those religious institutions which perform some secular functions to receive state financial support helps justify their claim to special regulatory autonomy,[363] including the right to discriminate on religious grounds.[364]

The same argument can be raised in entanglement terms, the controversial third prong of the *Lemon* test. If state funds cannot be given to religious schools to avoid government supervision to determine whether public funds are being used for secular or religious purposes, the same entanglement concerns require that the activities of religious institutions must be considered to be presumptively religious for employment discrimination purposes.[365]

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361. *See generally* Lupu, *Employment Discrimination, supra* note 26, at 401-04 (1987). Lupu distinguishes between autonomy rights which he argues can only be asserted by individuals and associational rights which may properly be used to exempt religious organizations from antidiscrimination laws. *See id.* at 422-23, 431-38. The point seems unnecessary and confusing. Individuals can define themselves collectively in terms of their membership in a community, *e.g.*, Jews are the chosen people with whom God has made a covenant, and thus require communal autonomy, that is, freedom from state regulation, in order to fulfill their personal sense of religious identity. Indeed, one of the reasons that small intimate groups have their associational rights protected is because the Court recognizes the value of one form of group autonomy, familial autonomy. *See* Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984).

If religious organizations are exempt from discrimination requirements, not because of any special autonomy rights provided to religious communities, but because they are one of many different kinds of expressive associations, it is difficult to understand why any exclusionary recreational, social, or fraternal organizations should have to comply with antidiscrimination laws.

362. *See supra* notes 231-32 and accompanying text. Even if this claim is rejected in its most exclusive form, that religion is unique in its requirements for group autonomy, it is certainly true that religion among other important communal bonds between individuals deserves more constitutional protection than a host of ephemeral and transitory associations such as one's membership in an athletic or social club. For those who argue that rights of collective autonomy should include ethnic and cultural groups as well as religious ones, *see, e.g.*, Karst, *Paths to Belonging, supra* note 30, at 306-11; Marshall, *Discrimination and the Right of Association*, 81 NW. U.L. REV. 68, 84-91 (1986); the exemption in *Amos* might have to be extended to include other cultural organizations, but the essential concern of protecting the homogeneity of particular groups would remain a special constitutional concern.

363. *See, e.g.*, Wolman, *Separation Anxiety: Free Exercise Versus Equal Protection*, 47 OHIO ST. L.J. 453, 471 (1986) (suggesting that religious institutions be exempt from antidiscrimination requirements inversely to the amount of public aid they receive); *see also* Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

364. Under this reasoning it would also be constitutionally permissible, although tragically poor policy, for the states to allow religious organizations engaged in nonprofit activities to discriminate on the basis of race or gender as well.

365. The difficulty of determining the religious component of particular job categories or positions would be extreme. *See* Bagni, *Discrimination, supra* note 130, at 1539-49; Lupu, *Employment Discrimination, supra* note 26, at 392, n.10. It would also be highly intrusive if the courts examined the duties performed by employees to determine in fact whether they did regularly engage in religious activities on the job.

There are some implicit limits to the scope of this kind of argument, however. It should be properly focused on institutions which turn inward toward the membership of a religious community, not outward toward society as a whole. Religious institutions whose function it is to influence debate on public policy for example should not be given greater employment autonomy than secular political institutions. With regard to government regulation of such organizations, the rule of viewpoint and belief system neutrality must be controlling.[366]

A strong argument can also be made that religious employment autonomy should not be extended to for-profit institutions. This would not, however, be because nonprofit activities are so much more likely than for-profit ones to be religious in nature. Rather it would be because the services government provides are typically provided by nonprofit institutions in our society. The state does not regularly compete with profit-making activities in business and industry. Since establishment clause restraints have the substantial effect of secularizing the provision of those services sponsored by government, religious communities in turn may seek to have this inequality offset by demanding rigorous protection of their autonomy in making those same nonprofit services available to the members of their faith. No similar disequilibrium arises in the private sector's provision of goods and services for profit, however. Hence, in the world of profit-making organizations there is no justification for giving religious institutions a preferential exemption in employment that is not equally available to secular groups.[367]

VII. CONCLUSION

The foregoing analysis of religion clause cases demonstrates that, as a whole, the Court's holdings have been consistent with a balanced approach that recognizes both the legitimacy of religious beliefs as a fundamental autonomy right and the equality of religious groups in a pluralistic society. What is missing in the case law is a persuasive rationale for the Court's decisions. Too much reliance is placed on terms such as the separation or accommodation of church and state or religious neutrality, which are ineffective as operational principles, and too little attention addressed to the core constitutional values that religion clause cases invoke.

A new approach is required that forthrightly describes the multifaceted nature of religion itself and recognizes the constitutional values which are implicated when the state and religion intersect. Religion should be understood to involve the status of groups, the autonomy of individuals, and the expression of beliefs. The constitutional review of state interaction with religion should be understood to raise issues of equal protection, autonomy rights, and freedom of speech.

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366. *See generally* Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989).

367. Of course, another reason for limiting the scope of the *Amos* exception is that it would increase the fragmentation of the private sector along religious lines and might substantially isolate minority religions economically. These policy concerns, however, do not necessarily have a constitutional foundation. Congress could after all drop religious groups from the protection of Title VII entirely without violating the Constitution.

The key to harmonizing these divergent principles and doctrines is to accept that what is required is the balancing of important liberty and equality interests. No rigid doctrine can do that unless it ignores critical aspects of the problem. But religion clause decisions need not be made in an analytic vacuum either. Appropriate analogies can be drawn from existing equal protection, speech, and autonomy rights cases.

Building on this foundation will sometimes be difficult. It has neither the ease nor the predictability of a short hand formula. But it is honest both in its portrayal of religion and in its recognition and consideration of the range of values that are relevant to the resolution of church-state issues.