

# THE ELUSIVE MEANING OF RELIGIOUS EQUALITY

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*Raging national debates about the relationship of church and state often find parties sparring over whether the government is treating religious interests equally. This essay endeavors to explain why there is such widespread disagreement about the meaning of religious equality. It explores both jurisprudential and doctrinal sources of dispute, including: the multidimensional nature of equality generally, the uniqueness of religion, the difficulty of defining religion, and the problem of identifying the proper baseline or point of comparison for assessing religious equality. Ultimately, we cannot separate issues of religious equality from disputes about the meaning of the Constitution's religion clauses. The essay presents the thesis that, on a collective level, we may suffer from a long-standing, national uncertainty or ambiguity about religion and the ideal relationship between church and state, accounting in part for our endless conflict over the meaning of the religion clauses. The essay concludes by examining whether it is possible to resolve or avoid questions of religious equality and, if not, what useful lesson can be drawn from our uncertain history.*

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## INTRODUCTION

The notion of equality pervades the law regarding religion. Almost every issue arising in this area is at some point discussed in terms of equality or inequality. For example, in the debate over school vouchers, some maintain that opportunities to use public funds at parochial schools restore equity to religious families, while others argue that they place religious schools or families in a preferred position.<sup>1</sup> Objections to the exemption of religious employers from otherwise applicable civil rights law obligations are often based on the perception that exemptions treat religious entities in a preferred, unequal way.<sup>2</sup> Discussions about public religious displays often address whether certain elements are barred,

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1. Compare *Mitchell v. Helms*, 530 U.S. 793, 842–44 (2000) (O'Connor, J., concurring) (arguing that direct aid to religious schools would constitute government endorsement of religion and place such institutions in a preferred position, while school vouchers that go to parents instead simply place them in the relatively equal position of choosing or declining religious education for their children), with George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 936–40 (1988) (arguing that reimbursement to parents of parochial school students in an amount matching that which is spent in public schools per student would restore equality to the religious); see also Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999) (maintaining that the issue of whether to include or exclude religious schools from generally available government benefit programs is one of equality versus discrimination). Cf. Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 543–48 (2002) (summarizing the positions of four dominant strains of religion clause theory, only some of which focus on equality, on school voucher programs).

2. See, e.g., Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 170–71 (1990) (discussing *Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987), and the case's analysis of Title VII); Christopher Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994) (noting that universal rejection of the state imposing sex- and race-based anti-discrimination rules on the choice of clergy "may seem to support the idea that religion is constitutionally privileged," but ultimately questioning this view); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 417 (1987) (setting forth some inequalities in exempting religious institutions from otherwise applicable employment discrimination laws); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1076–78 (1996) (arguing that "principles of equality and religious freedom seem to conflict . . . in employment discrimination cases filed against religious institutions," because "the state explicitly grants [such institutions] the right to [discriminate] with specific exemptions from civil rights laws").

permitted, or even required in order to maintain equality either among religions or between religious and non-religious speakers and symbols.<sup>3</sup>

Questions about equality abound in a wide variety of religious disputes.<sup>4</sup> Should religious groups be provided equal access to public schools and other facilities,<sup>5</sup> and if so, do any or all restrictions on access render such access unequal?<sup>6</sup> Do equality principles mandate that speakers be permitted to include prayers at government-sponsored events?<sup>7</sup> If government-sponsored prayer is ever permitted,<sup>8</sup> is it possible to fashion a prayer or program of prayers that treats religions equally?<sup>9</sup>

Religious equality is a common point of departure in academic and judicial circles as well. Legal academics from opposite sides of the church-

3. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (adopting the analysis from Justice O'Connor's concurring opinion in *Lynch v. Donnelly* that would hinge a finding of endorsement on the physical setting in which a religious symbol is placed within a holiday display); *Lynch v. Donnelly*, 465 U.S. 668, 680–81 (1984) (discussing whether the inclusion of a creche in a holiday display is constitutionally impermissible because it confers “a substantial . . . benefit on religion in general and on the Christian faith in particular”); *id.* at 692 (O'Connor, J., concurring) (arguing that the creche at issue in the case did not favor Christian beliefs because it was neutralized by other elements of the setting in which it appeared); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 126–27 (1992) (explaining that, under the Court's decisions, public displays may include a religious symbol only if it is in close proximity to a number of secular objects to mitigate the religious message—holdings collectively referred to as “the three-plastic animals rule”).

4. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712, 727 (2004) (Scalia, J., dissenting) (maintaining that a college student otherwise eligible for a state scholarship that he was not permitted to use toward his major in theology “is not asking for a special benefit . . . . He seeks only *equal* treatment . . . .”) (citation omitted).

5. *See, e.g.*, Equal Access Act, 20 U.S.C. § 4071 (2004) (prohibiting public secondary schools that receive federal financial assistance from restricting access to “limited open for[a]” on the basis of religion); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–10 (2001) (holding that an elementary school used as a limited public forum may not discriminate against an extracurricular club that discusses morals and character from a religious viewpoint without engaging in unconstitutional viewpoint discrimination).

6. *See* MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 783 (2002) (raising questions about equality of treatment if, under the Equal Access Act, different rules for faculty sponsors apply to religious clubs as opposed to other clubs).

7. *Compare* *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invalidating a Texas school board policy allowing students to elect a student chaplain to deliver a prayer over the school's public announcement system before home football games), *with* *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) (upholding a county school board's facially neutral policy that would allow a student-elected speaker to pray at a public school's graduation ceremony); *see also* *Doe v. Madison Sch. Dist.*, 147 F.3d 832 (9th Cir. 1998) (upholding a school district's high school graduation speech policy in which student speakers chosen on the basis of academic merit are permitted to deliver an address of their choosing that may include prayer); MCCONNELL, *supra* note 6, at 808–09 (discussing related problems of possibly private speech in government settings).

8. *See* *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the constitutionality of paid state legislative chaplains leading daily prayers).

9. *See id.* at 819–21 (Brennan, J., dissenting) (discussing the difficulty of composing a non-denominational prayer).

state debate may not agree on very much, but they seem largely to agree that equality is a, if not the, central concern of both of the Federal Constitution's religion clauses.<sup>10</sup> The concept takes on particularly great importance today, as the United States Supreme Court has placed religious equality front and center in its interpretation of both the Establishment and Free Exercise Clauses. After years of searching about for the proper principles to apply in implementing these provisions, the Court seems to have settled on a jurisprudence of equality for both.<sup>11</sup> With regard to Free Exercise, the prevailing doctrine since *Employment Division v. Smith*<sup>12</sup> imposes what could be described as an equality-based regime regarding constitutionally required religious accommodations.<sup>13</sup> The latest

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10. See, e.g., Eisgruber & Sager, *supra* note 2, at 1248 (advocating abandonment of the "paradigm of privilege," pursuant to which religion is treated unequally because it is considered uniquely valuable, and substituting instead a notion of equal protection against discrimination for especially vulnerable—that is, minority—religious practices); John H. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 194 (1981) (characterizing the Supreme Court case of *Thomas v. Review Board* as presenting a question of religious equality rather than, as the Court assumed, religious freedom); Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 3 (1992) ("Although the final version of the First Amendment does not explicitly refer to equality, the strong historical association of equality with religious liberty has been an important fixture in the Supreme Court's interpretations of the Religion Clauses."); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 317 (1991) (pointing out the distinction between his and McConnell's views on the role that equality plays in understanding free exercise exemptions, impliedly acknowledging that both see equality, however they understand it, as the issue); McConnell, *supra* note 3, at 117 (maintaining that one of the purposes of the religion clauses is to preserve the rights of religious believers and communities "to participate fully and equally with their fellow citizens in public life without being forced to shed their religious convictions and character"). But cf. Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 11–13 (2004) (suggesting that equality is only one in a broad set of intertwined values that inform both of the religion clauses). See also Bernadette Meyler, 47 B.C. L. REV. 275 (2006) (positing that free exercise rights were central to the early understanding of the equal protection principle, and arguing for a revival of the connection between the two concepts to clarify and correct both jurisprudential strands).

11. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 2, 5–10 (2000); see also Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) (maintaining that the Supreme Court has transformed the rationale of the Establishment Clause over the last fifty years from protecting the liberty of religious dissenters to guaranteeing the equality of religious minorities); Hall, *supra* note 10, at 3–5; William P. Marshall, *What Is the Matter With Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 196–200 (2000) (noting that the Court requires equal treatment of all religions and of religion and nonreligion).

12. 494 U.S. 872 (1990).

13. Conkle, *supra* note 11, at 7 (explaining that the *Smith* Court believed that granting Free Exercise exemptions would "create[] an undue risk of discrimination between or among religions, a risk that cannot be reconciled with the paramount requirement of denominational equality"); *id.* at 11–14 (explaining how formal neutrality "currently dominates the law of free exercise," both constitutionally, where it is actually the rule, and legislatively, where it is effectively the rule owing to Court-imposed limitations); see also Hall, *supra* note 10, at 5 ("[I]n free exercise cases, the concept of

Establishment Clause rulings as well employ a rule of “neutrality” that, although perhaps not exactly equivalent to equality,<sup>14</sup> significantly echoes equality concerns.<sup>15</sup> Even older Establishment Clause doctrines—including the infamous *Lemon* test<sup>16</sup> and Justice O’Connor’s no-endorsement rule<sup>17</sup>—compare the treatment of different religions, or of religious versus non-religious interests, in a manner that implicates equality ideals.<sup>18</sup>

Yet, despite the centrality of equality in the jurisprudence of religion, we do not have a common understanding of what it means to treat religion equally. This essay will not explore what constitutes religious equality, however, either as a general matter or in any of the particular contexts mentioned. Many have already traveled that road.<sup>19</sup> Rather, it will examine why we have so much trouble arriving at a consensus about what religious equality means. After all, even if we disagree about whether and when

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equality also occupies a significant place in the Court’s contemporary rhetoric.”).

14. See discussion *infra* notes 46–47.

15. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 670 (2002) (O’Connor, J., concurring) (describing as neutral a program in which government aid is available to both religious and secular beneficiaries on a nondiscriminatory basis); *id.* at 696 (Souter, J., dissenting) (referring to the sense of neutrality as evenhandedness between potential religious and secular recipients of government money); *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (describing, as an example of the principle of neutrality, a program in which government aid is available on equal terms to “the religious, irreligious, and areligious”). *But cf. id.* at 878 (Souter, J., dissenting) (indicating that neutrality has been used to describe at least three things: equipoise between government encouragement and discouragement of religion, a secular benefit, and evenhandedness in distribution of a benefit). See also Hall, *supra* note 10, at 4 (discussing 1980s–1990s Supreme Court Establishment Clause cases: “[T]he Court has veered away from ‘separation’ as an interpretive aid and has looked increasingly to Justice O’Connor’s no-endorsement test, which is rooted in the idea of equal respect for citizens.”); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 493 (2004) (“[T]he Supreme Court appears to be on a course towards making neutrality the centerpiece of Establishment Clause jurisprudence.”).

16. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

17. See *Lynch v. Donnelly*, 465 U.S. 668, 690–92 (1984) (O’Connor, J., concurring) (proposing a test that examines whether a challenged government practice has the purpose or effect of endorsing religion).

18. See Conkle, *supra* note 11, at 9–10, 16 (maintaining that the second prong of the *Lemon* test, which looks at the effect of the government’s action, evinces the Supreme Court’s concern for substantive neutrality, described by Douglas Laycock as requiring the government to “minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance”); Hall, *supra* note 10, at 4 (describing O’Connor’s no-endorsement rule as an equality-based notion that “is rooted in the idea of equal respect for citizens” based on their religious affiliations).

19. See, for example, Hall, *supra* note 10; Marshall, *supra* note 11; Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Ravitch, *supra* note 15; and Jay A. Sekulow, et al., *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351 (1995), for views of the matter from differing perspectives.

religious equality is required, perhaps we ought to be able to agree on what it is.<sup>20</sup>

The reasons for this difficulty may be divided into two groups: those that center around analytical jurisprudence, discussed in Part I, and those that stem from constitutional doctrine, discussed in Part II. Among the jurisprudential issues, Part I.A observes that equality in general and religious equality in particular are multidimensional concepts, each facet of which invites dispute. Part I.B argues that religion is difficult to classify definitively as either a status, a belief system, or a set of acts, so that it is not comparable to items that fall more neatly into one or another of these categories. Part I.C discusses the problem of defining religion.

Considering doctrinally-based difficulties, Part II.A deals with the issue of identifying the baseline for assessing religious neutrality, a construct that is often viewed as largely overlapping equality. Part II.B more directly discusses the baseline or comparative point of departure for equality in general and religious equality in particular. I maintain that setting a baseline for determining religious equality is especially problematic because the appropriate baseline is dependent on one's interpretation of the religion clauses.

In Part III historical material and commentary is used to posit that the American polity, collectively as a nation, may have suffered from a long-standing ambivalence about the meaning of the religion clauses and the role for religion in the public sphere. This ambiguity contributes significantly to our difficulty with defining religious equality. In the Conclusion I examine whether it is possible to escape from this historical dilemma and end the elusive quest for the meaning of religious equality. One might do so by settling on either an extremely narrow or an extremely broad understanding of the religion clauses. In either event, I argue, we are not likely to leave problems of religious equality behind us. Alternatively, we could try to focus on whatever historic commonalities emerge from any general uncertainty or ambivalence and translate them into modern formulations. This last approach does not settle issues of legitimacy nor obviate interpretive challenges, but might take the spotlight off equality.

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20. Some do not agree that equality should be the sole concern in implementing the Constitution's religion guarantees. See, e.g., Shiffrin, *supra* note 10, at 17 (2004) ("[E]quality is best seen as one important value in a rich and evolving tradition."); *id.* at 39-40 ("[D]eviating from equality might sometimes best accommodate the interests at stake in particular contexts.").

## I. JURISPRUDENTIAL DIFFICULTIES

### A. *The Multidimensional Nature of Equality*

In the analytical realm, some of the reasons that we encounter difficulty in identifying religious equality are fairly obvious. First, equality is itself a rather complex, multifaceted animal. It is an expansive concept that encompasses several dimensions, each of which can act as a jumping off point for controversy. Equality entails “subjects” as to which, “domains” within which, and “vantage points” from which it can be measured.<sup>21</sup>

When addressing who are the proper subjects of equality in the area of religion, if the subjects are the various existing religions, equality would require some sort of equivalence (presumably, equivalent government treatment) among them.<sup>22</sup> However, if the subjects of religious equality are viewed more broadly, equality may require equivalence between religious people, views, and interests, on the one hand, and secular people, views, and interests, on the other.<sup>23</sup>

Similarly, equality for any given set of subjects may extend only to very limited, or alternatively to unlimited, domains.<sup>24</sup> For example, equality could mean that the subjects being compared must be treated equally by the government within the limited sphere of financial aid, or, that they must be treated equally for all purposes, across the entire spectrum of governmental interaction with religion and religious individuals.

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21. Hall, *supra* note 10, at 11–28 (discussing the subjects and domains of religious equality); *id.* at 40–46 (discussing the vantage points of religious equality). Hall maintains that identifying the subjects of religious equality occurs at two levels, the level of definition, in which a “subject class of individuals” is defined by certain particular traits, and the level of identification, in which one identifies individuals who possess the relevant traits. *Id.* at 11. This is the “who” of religious equality, while domains involve the “what” of religious equality, that is, “[w]hat goods or burdens are to be distributed equally?” *Id.* Consideration of vantage points recognizes that, not only must those who are similar be treated alike, but those who are different must be treated differently. *Id.* at 40.

22. See *id.* at 11 (noting that subjects determine “[w]ho will be treated equally,” and that “proponents of nonpreferential aid to religion argue that the Establishment Clause was intended to preclude preferences among religious groups, but not between religious and nonreligious activities”); Conkle, *supra* note 11, at 8 (explaining that “denominational equality is designed to enhance the freedom and dignity of all religious believers,” and that its central premise is that “[a]ny one religion, whatever its substance, is [legally] equal to any other.”). For a discussion of what counts as a religion, see *infra* notes 40–43 and accompanying text.

23. Conkle, *supra* note 11, at 8 (“The broader notion of religious neutrality includes the requirement of denominational equality, but it also goes one step further, demanding that the government neither favor nor disfavor religion in general, as compared to nonreligion.”); Hall, *supra* note 10, at 12 (arguing that underlying claims of opponents of free exercise exemptions is the view that the Free Exercise Clause “treats religious believers and nonbelievers as equal subjects”).

24. See Hall, *supra* note 10, at 24.

There are also different possible types or manifestations of equality.<sup>25</sup> In the law of religion, as in equal protection law generally, equality may be determined formally or functionally.<sup>26</sup> Formal equality, sometimes referred to as equal treatment, would essentially require that the government treat all the subjects of equality in exactly the same way. It could not use religion as a means of classification, and effectively could not take religion into account in fashioning law or implementing policy.<sup>27</sup> Functional or substantive equality, sometimes also referred to as equal results or equal outcomes, would require the government to insure that religious people or interests of one religion achieve a kind of lived-out parity with those of other religions and/or the nonreligious, even if that means treating some or all religious interests differently in order to attain the equal result.<sup>28</sup> Thus, substantive equality would sometimes impose an affirmative duty on government to take religion into account and even to classify on a religious basis.<sup>29</sup> These two very different vantage points from which to measure equality often lead to quite dissimilar ultimate determinations.

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25. See *id.* at 40 (calling these manifestations—treatment versus effect—the “vantage points” from which to measure whether equality has been achieved).

“Lot-regarding” equality . . . consists of distributing the same lot of a benefit or burden to each individual. “Person-regarding” equality consists of distributing lots in such a fashion that the distribution has the same impact on each individual, measured from the standpoint of the individuals themselves. Equal treatment and equal opportunity may be said to be examples of treatments that secure lot-regarding equality. Equal impact and equal outcomes suggest standards for treatment consistent with person-regarding equality.

*Id.* at 41.

26. See generally Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1989); see also Conkle, *supra* note 11, at 9–10 (discussing Professor Laycock’s thesis); Rutherford, *supra* note 2, at 1072 (“Formal equality calls for identical treatment, and does not allow for existing differences, while substantive equality requires individualized treatment to yield equal opportunity.”).

27. See Laycock, *supra* note 26, at 999–1001 (citing Kurland’s 1961 definition of religious neutrality); see also Conkle, *supra* note 11, at 9 (discussing Laycock’s definition).

28. See Laycock, *supra* note 26, at 1001–06 (defining substantive religious neutrality as “the religion clauses requir[ing] government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance”); see also Conkle, *supra* note 11, at 9–10 (discussing Laycock’s notion). Michael McConnell analogizes religious discrimination to disability discrimination because both religion and disability make individuals different in ways “that cannot be changed but can only be accommodated.” Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1140 (1990). He argues: “If the paradigmatic instance of race discrimination is treating people who are fundamentally the same as if they were different, the paradigmatic instance of free exercise violations or handicap discrimination is treating people who are fundamentally different as if they were the same.” *Id.* (footnote omitted).

29. See Laycock, *supra* note 26, at 1003–04.

Issues of subjects, domains, and vantage points must be resolved before one can talk meaningfully about religious equality. Given all the options, it is not surprising that we cannot seem to settle on a common understanding. This difficulty would appear to arise in every conversation about equality, yet it sometimes seems that we have more of a problem when speaking of religious equality than when applying the concept elsewhere. Why should that be the case? The next section explains.

### *B. The Uniqueness of Religion*

A second analytical problem with identifying religious equality is that religion is unique. Equality is a comparative notion.<sup>30</sup> When we investigate whether two things are equal, we compare them. But often religion is not quite like other things to which it might meaningfully be compared.

To the extent that religion is a status, it is different from other kinds of constitutionally protected statuses, such as race or gender.<sup>31</sup> For one thing, religion may be chosen, but race, gender, and other constitutionally protected statuses, for the most part, are not.<sup>32</sup> In addition, most types of

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30. See Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 333 (1986) (“‘Neutrality,’ like ‘equality,’ is a principle of relationship, not of content.”). Equal Protection, for example, might be described as a guarantee of comparative fairness, rather than a guarantee of universally identical treatment. The latter would be virtually impossible to achieve in a regulatory state.

31. See Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243, 260–67 (1999) (discussing similarities and differences between religion and other constitutionally-protected aspects of identity, such as race and gender). *But see* Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119 (1997) (arguing that race and religion play similar roles in self-identity and should therefore be treated alike for constitutional purposes).

32. See Theresa M. Beiner & John M. A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 590 (1997) (noting that “some commentators have distinguished [Title VII] religion claims because they are based on ‘chosen’ beliefs as opposed to innate characteristics such as race or sex”); Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 727–28 (1996) (maintaining that religious discrimination is different from other status-based discrimination covered by Title VII because it “is often based upon a difference of belief, unlike [other discriminations] which are based . . . on attributes dependent upon one’s birthright”; these differ because, unlike birthright, “beliefs and concepts are a matter of choice”); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8 (2000) (stating that American antidiscrimination laws apply to religion as well as race and gender, even though the former is not “immutable” and is “within the control of a person”). *But cf.* Brownstein, *supra* note 2, at 109–12 (arguing that, although “in many circumstances a person can change their [sic] religion” so that “religious groups would not be covered by the equal protection clause because of their mutable status,” nevertheless “it is [often] unrealistic to view this characteristic as mutable,” and “for constitutional purposes, religious affiliation is an immutable characteristic vis-à-vis state action”); Hall, *supra* note

constitutionally protected statuses do not require or involve either belief or practice,<sup>33</sup> while religion involves both.<sup>34</sup> As a result, considering what it means to treat other forms of protected status equally may not translate directly to considering what it means to treat religious status equally.

Indeed, religion is not just a status. It could also be described as a philosophy, belief system, or world view. Yet religion is also not quite like other philosophies, beliefs, and world views. All are similar in that they are matters of conscience.<sup>35</sup> However, unlike religion, philosophies, beliefs, and world views do not usually mandate conforming action on the part of the adherent.<sup>36</sup> Religious rites, rituals, prayers, and other activities are often integral to what it means to say that one belongs to or is of a particular religion.<sup>37</sup>

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10, at 62 (arguing that religion works as a suspect classification in part because “[r]eligious convictions frequently appear to their possessors as immutable: something they did not choose, but which chose them.”).

33. See Brownstein, *supra* note 31, at 260 (regarding belief and practice); Jamar, *supra* note 32, at 727 (regarding belief). The status of being homosexual might be said to involve acts, though it has been argued that one can be homosexual without engaging in homosexual acts. In any event, homosexuality has not been recognized, at least not formally so, by the Supreme Court as a suspect classification warranting special constitutional protection, though *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003), could be understood otherwise.

34. Brownstein, *supra* note 31, at 260 (“Religion is not like other suspect classifications such as race, national origin, or gender in [that] . . . [i]t has a belief and behavioral dimension that is lacking in other suspect classifications.”).

35. Daniel Conkle argues that the Supreme Court has adopted a rule of formal neutrality, which “rejects the notion of *special* protection for *religious* claims of conscience” over any or all other claims of conscience. Conkle, *supra* note 11, at 12–15.

36. It is possible that there are secular causes that call for particular action as well as common conscience on the part of their followers. Animal rights lovers may ask their supporters to boycott furs or meats. However, boycotting fur and meat would not usually be required for one to claim the identity of an animal rights lover. Nevertheless, some organizations that are not religious may similarly prescribe rituals and codes of conduct. See Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 768 (1984) (“Professional and fraternal organizations have rituals and ethical codes that are not religious.”). And on the opposite side, one could certainly claim a religious identity without ever acting upon it, even though most religions make a set of actions obligatory for adherents. See, e.g., Conkle, *supra* note 11, at 15 (explaining that under formal neutrality, which “rejects . . . *special* protection for *religious* claims of conscience, . . . we define our own consciences and determine what they require. Our consciences might include religious obligations, but then again they might not.”). I mean to make a general point, not to cover every possible example. See *infra* notes 38–39 and accompanying text.

37. See *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (“[T]he ‘exercise of religion’ often involves not only belief and profession but the performance of . . . physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing . . . .”); Eisgruber & Sager, *supra* note 2, at 1248–49 (“[R]eligion often involves the extensive, communal enactment of behavior and relationships . . . .”); see also *Wisconsin v. Yoder*, 406 U.S. 205, 209–10 (1972) (describing the Amish religion as requiring its adherents to live “in a church community separate and apart from the world and worldly influence,” in which “[t]heir conduct is regulated in great detail by the . . . rules[] of the church community”). Kent Greenawalt identifies characteristics commonly found among institutions considered “indisputably religious.” In addition to certain beliefs

What has just been said about religion as not quite like other forms of status or of belief is meant as a generalization. That is, at its core, religion is different in the ways described. Of course, there are more nuanced understandings in which religion may sometimes be considered an involuntary and immutable status like race or sex, or that, given modern science, sex and maybe even race may be argued to be mutable.<sup>38</sup> Similarly, nonreligious philosophies or beliefs may be coupled with customary or obligatory action, as is religion, or, on the opposite side, one may belong to some religion without a component of required action.<sup>39</sup> Yet, despite these marginal instances in which religion and other beliefs and statuses may seem to merge, it remains the case that, as a general matter, religion is usually different.

This multifaceted quality of religion as status, coupled with belief, and accompanied by acts, exacerbates the problem of identifying the essence of religious equality, because it means that there is nothing really like religion to use as a point for comparison. Thus, agreement on what it means to achieve equality between religious people, entities, or views and

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and organizations, these common characteristics include practices such as “communication with God through ritual acts of worship and through corporate and individual prayer,” and “practices involving repentance and forgiveness of sins . . . .” Greenawalt, *supra* note 36, at 767. Of course, one may sincerely identify with a particular religion without adhering to any of its obligations, but this is not the usual case.

38. See Beiner & DiPippa, *supra* note 32, at 590 (describing sex and race as “innate characteristics”); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 294 (1999) (“Doctors can now alter or remove all the biological sex indicators, other than chromosomes, by the administration of hormones and surgery. Current psychiatric work with transsexuals, however, indicates that sexual self-identity may be biologically based and probably not mutable.”); *id.* at 301 (noting opposing state court determinations of the “legal” sex of “post-operative transsexuals”); Deborah Hellman, *What Makes Genetic Discrimination Exceptional?*, 29 AM. J. L. & MED. 77, 87 (2003) (describing race and sex as traits that are “mutable only at great effort,” while religion is “highly mutable”); Jamar, *supra* note 32, at 727 (contrasting discrimination based on “race, sex, color, national origin, age, and disability,” which are “attributes dependent upon one’s birthright,” with religious discrimination, which is “based on belief”); *id.* at 728 (asserting that a person cannot convert to a different race, origin, or sex, but can choose to convert to a different religion “merely by a genuine declaration of intent”); Post, *supra* note 32, at 8 (calling race and sex immutable, but religion not).

39. See A. Stephen Boyan, Jr., *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479, 487–88 (1968) (using an “institutional” as opposed to an “operational” definition of religion to recognize as members of a religious faith persons who hold themselves out as such but who do not personally participate in the rituals and ceremonies associated with the faith); Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 76–78 (1999) (describing a kind of “postmodern” religion in which each individual creates his or her own religion by selecting “a customized cart full of preferred religious options,” using “a particular religion or parts of religious and other practices, and forg[ing] them into a personalized package of concepts and daily or yearly rituals”) (italics omitted); *supra* note 36 (regarding nonreligious beliefs coupled with required action).

other people, entities, or views may be especially elusive, more so than in other areas of equality law.

### C. *Defining Religion*

The question of the similarity or dissimilarity of religion to other forms of status or belief raises another issue, the third analytical difficulty with identifying religious equality. In order to discuss points of similarity or dissimilarity among religions or between religion and other things—and thus in order to discuss religious equality—we need to determine what counts as religion.

Defining religion, at least for constitutional or other legal purposes, is a notoriously complex and controversial endeavor. There are a number of different ways to define religion suggested in the literature.<sup>40</sup> For instance, one possibility is to use a dictionary-style definition that specifies a set of required elements.<sup>41</sup> Another might be to employ a philosophical formulation that attempts to identify what makes religion unique in one's personal, inner experience. An example of such a definition would be Paul Tillich's well-known ultimate concern formulation, defining as one's religion whatever constitutes one's "ultimate concern," that is, "the fundamental wellspring of a person's motivations and emotions."<sup>42</sup> Finally, there are practical constructions of various sorts, such as Kent Greenawalt's famous definition by analogy. Greenawalt proposes identifying what is a religion by comparing what are disputably religions to what are indisputably religions, but, unlike in the case of dictionary definitions, not requiring any particular common feature.<sup>43</sup>

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40. See, e.g., Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (describing and analyzing several varied formulations); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309 (1994) (cataloguing numerous attempted definitions).

41. See, e.g., *United States v. MacIntosh*, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."); *Davis v. Beason*, 133 U.S. 333, 342 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.").

42. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 248–49 (1998) (discussing the Supreme Court's reference to Protestant theologian Paul Tillich's functional "ultimate concern" definition of religion and evaluating Tillich's approach); see also Feofanov, *supra* note 40, at 385 ("Religion is a manifestly non-rational (i.e., faith-based) belief concerning the alleged nature of the universe, sincerely held.").

43. See Greenawalt, *supra* note 36, at 762–69 (proposing an analogical approach to defining religion); see also Boyan, *supra* note 39 (proposing an "operational" and "institutional" definition of religion).

As even this brief list suggests, defining religion is quite an undertaking in its own right. Since defining religious equality may be dependent on first defining religion, the former enterprise becomes as mired in controversy as the latter.

## II. DOCTRINAL DIFFICULTIES

### A. *Neutrality's Baseline*

A fourth difficulty with defining religious equality results from the application of constitutional doctrine and concerns the problem of baselines. It has been said about the related notion of “neutrality” that one must first establish a baseline from which to determine whether the government has acted neutrally toward religion.<sup>44</sup> Since there is no “neutral” (that is, not value-dependent) perspective from which to measure whether the government has acted in a religiously neutral manner, it is argued, the notion of neutrality toward religion is inherently meaningless, ambiguous, or at least indeterminate.<sup>45</sup> If neutrality and equality cover the

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44. See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 3 (1986) (“[N]eutrality in the sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice . . . requires identification of a base line from which to measure encouragement and discouragement.”); Laycock, *supra* note 26, at 1005 (“[S]ubstantive neutrality requires a baseline from which to measure [the government’s] encouragement and discouragement [of religion.]”); cf. Ravitch, *supra* note 15, at 506 (recognizing the claim that neutrality requires establishing a baseline from which it can be determined, but arguing that, “unless one can demonstrate the neutrality of the baseline itself, the baseline cannot support claims of neutrality”). But see Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 319–24 (1990) (arguing that determining a baseline “tacitly concedes that government cannot avoid choosing among deeply held and competing views about the meaning and role of religion,” and that such a determination does nothing to resolve the problem of neutrality).

45. E.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 96–97 (1995). Smith concludes that “the quest for neutrality . . . is an attempt to grasp an illusion.” *Id.* at 96. Because “there is no neutral vantage point that can permit the theorist or judge to transcend [the competing positions on religious freedom,] . . . a theory of religious freedom is as illusory as the ideal of neutrality it seeks to embody.” *Id.* at 97; see also Laycock, *supra* note 26, at 994 (“Those who think neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all.”); *id.* at 1005 (suggesting that the necessary baseline from which to measure government encouragement or discouragement of religion, Laycock’s construct for identifying substantive neutrality, cannot be determined without applying judgment. “[T]here is no simple test that can be mechanically applied to yield sensible answers.”); Ravitch, *supra* note 15, at 492 (“neutrality . . . does not exist”); *id.* at 493 (“Claims of neutrality cannot be proven. There is no independent neutral truth or baseline to which they can be tethered. Thus, any baseline to which we attach neutrality is not neutral; claims of neutrality built on these baselines are by their nature not neutral.”) (footnote omitted); *id.* at 517 (“Since there is no neutral foundation or baseline that can be used to prove that something is ‘truly’ neutral, neutrality is nothing more than a buzzword and a dangerous one at that, because it implies that the supposedly neutral approach should be taken more seriously because it is actually neutral.”).

very same ground, as some seem to assume,<sup>46</sup> then this analysis would explain why we cannot agree about equality, just as we cannot agree about neutrality. Different people view the matter from different baselines.

### B. Equality's Baseline

Even if equality and neutrality are not quite the same thing,<sup>47</sup> equality nevertheless gives rise to a similar problem, perhaps a fifth reason we have trouble defining religious equality. Assuming they indeed are not the same, the baseline for determining religious equality might seem clearer at first than the baseline for establishing religious neutrality. Since equality is a comparative notion, the baseline is likewise a comparative one. The religious equality baseline would be the government's treatment of the entity to which the government's treatment of religion (or of a particular religion) is being compared.

But the baseline is not really any clearer, because one must first ascertain what is the proper entity to which to compare religion for purposes of measuring equality—that is, what are the proper subjects of religious equality.<sup>48</sup> Borrowing from Equal Protection law, one usually compares the government's treatment of the individual making a claim of inequality to that of some other individual similarly situated with respect to the purpose of the government's action.<sup>49</sup> No matter what the government alleges is its purpose for any given action, however, it may be

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46. See *Mitchell v. Helms*, 530 U.S. 793, 878–83 (1999) (Souter, J., dissenting) (explaining that “neutrality” has been used in at least three different senses in Supreme Court cases, including “equipose,” “secular,” and, in its latest evolution, “evenhandedness”); Laycock, *supra* note 26, at 995 (“Neutrality and equality are near cousins; they have most of the same attractions and most of the same inadequacies.”); Ravitch, *supra* note 15, at 508 (asserting that the Court in *Zelman v. Simmons-Harris* applied “formal-equality-as-formal-neutrality”); Smith, *supra* note 44, at 311–24 (explaining how neutrality and equality relate to liberalism, and concluding that “liberal equality is the alter ego of liberal neutrality” in a value-neutral version of liberalism).

47. Neutrality, like equality, could mean different things. See *Mitchell*, 530 U.S. at 878–83 (Souter, J., dissenting) (referring to at least three different senses of the term “neutrality” evidenced in Supreme Court opinions, only one of which—evenhandedness—corresponds to something like equality). If it means government must act with “no preference” among the subjects of neutrality, it might correspond with equality. If, on the other hand, it means government must stay out of the matter altogether, it would not really correspond with equality; equality is not concerned with whether or not the state involves itself, but rather with how the state treats the subjects of equality when it does or does not act.

48. Regarding the “subjects” of religious equality, see *supra* notes 22–23 and accompanying text.

49. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW*, § 1.2, at 683–84 (7th ed. 2004).

that there is never anyone similarly situated to the religious claimant when it comes to government treatment.<sup>50</sup>

To illustrate, let us say the state pays for public elementary school textbooks. The question arises whether the state may or even must pay for similar texts for parochial schools. If the state claims its purpose is to support education, and an equality standard inheres, should the parochial schools be compared with the public schools, other private schools, both, or neither? One would need to determine whether any of these potentially comparable subjects are similarly situated to parochial schools with respect to the government's aim of aiding education.

But however one chooses to answer that question, given constitutional doctrine, the religious nature of the schools may in itself act as a factor that makes them different from all other potential recipients of state aid, no matter what the state is trying to achieve. That is to say, given the existence of the religion clauses and whatever they command in terms of permissible or required treatment of religious groups and individuals, it may be that what seem in other contexts like similarly situated subjects of some government purpose are not really similarly situated after all, because one or both of the religion clauses operates to restrain the government from treating religious subjects the same as others. Or, to put it differently, religion is unique not only owing to its inherent qualities, discussed earlier, but also because the Constitution uniquely refers to it in the religion clauses and therein specifies how government and religion—and only government and religion—may interact.<sup>51</sup>

Thus, the determination of the proper comparative subjects in a religious equality situation appears to require an understanding not only of the purpose for any given government action, as in every equal protection context, but also of the purpose or intended operation of the Constitution's religion guarantees as well. If so, then identifying what it means to treat

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50. In this particular respect, it would seem that at least other religious claimants may be similarly situated to any given religious claimant, even if nonreligious claimants differ. However, depending on exactly what is required by the religion clauses, even all religious claimants may not be similarly situated.

51. *Cf. Locke v. Davey*, 540 U.S. 712, 721 (2004) (“[T]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions.”).

I don't mean here to conclude that, in interpreting the religion clauses, one must treat religion as unique. Rather, I mean only to say that the clauses themselves apply uniquely to religion in its relationship to government, and not to any other thing and its relationship to the state. One could argue that other constitutional provisions are intended to effectuate some of the same or similar protections for constructs other than religion, but that is beyond the scope of this essay.

religion equally requires, in the first instance, a theory of our constitutional religious freedoms.

### III. HISTORICAL AMBIVALENCE ABOUT THE RELIGION CLAUSES

Finding a theory of American religious freedom is exactly the rub, or the sixth obstacle to defining religious equality. We do not agree about the meaning of the religion clauses. It is not surprising that we cannot come to some accord regarding the meaning of religious equality when we do not agree about the constitutional parameters of church-state relations on which religious equality determinations are ultimately dependent. Until we reach a common understanding about the basic aims of the Constitution's religion clause provisions and how the clauses were to accomplish these aims, we cannot hope to find a generally acceptable definition of religious equality.

Here we are on more familiar ground. It is often the case that scholars and others do not agree among themselves about the meaning of constitutional provisions. In the case of these particular provisions, however, there may be more than the usual kinds of uncertainty. Uncertainty in interpreting many constitutional provisions stems from disputes about which mode of interpretation to utilize and to what outcome each leads us.<sup>52</sup> In addition to these usual kinds of difficulties, it could be argued that, with regard to religion, the American people as a collective entity have never actually had a common understanding about what the clauses would or should mean, and consequently about the meaning of religious equality. It could even be maintained that, from the start, individuals themselves were uncertain of just what they had created when they drafted and adopted the First Amendment's religion guarantees. Depending on one's theory of constitutional interpretation, a perpetual haziness at multiple levels of society and possibly continuing throughout our history about the basic nature of the Constitution's religious guarantees could be a significant obstacle to identifying the meaning of the religion clauses, and thus of religious equality.

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52. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (identifying six modalities of constitutional interpretation, namely, historical, textual, doctrinal, prudential, structural, and ethical).

### A. *At the Founding*

Originally, members of the founding generation, even some of those prominent in the formulation of the First Amendment, did not clearly agree with one another on what exactly was the ideal relationship between church and state, and thus may not have had a common idea about the extent of the operation of the religion clauses either.<sup>53</sup> For example, there are differences even between well-known separationists James Madison and Thomas Jefferson. Madison maintained that the government should foster religious pluralism as a method of curtailing religious hegemony and strife.<sup>54</sup> He was positively disposed toward religion<sup>55</sup> and believed, along Enlightenment lines, that men could reach God through reason.<sup>56</sup>

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53. See, e.g., *McCreary County v. ACLU*, 125 S. Ct. 2722, 2744 (2005) (“The fair inference is that there was no common understanding about the limits of the establishment prohibition . . .”); DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* 18–21 (2003) (arguing that the Religion Clauses were originally intended to address issues of federalism, and “simply were not designed to be used—as they are today—as a statement of general principles concerning religious liberty and the relationship between religion and government,” a subject on which, given the deep and widespread division on the issue of disestablishment, “Congress and the ratifying state legislatures plainly could not have agreed”); JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 24 (2004) (explaining that four major and numerous other minor theological and political views influenced the framing generation: “[T]he founders often moved freely between two or more perspectives, shifted their allegiances or alliances over time, or changed their tones and tunes as they moved from formal writing to the pulpit or to the political platform.”); Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn’t Provide*, 2004 *BYU L. REV.* 1617, 1619 (alluding to the “rich diversity evident in early American religious and political culture,” leading to the conclusion that “the history of religion in this country is a complicated and even contradictory affair” that does not provide “any definitive answers to the various issues raised by the Establishment Clause”); Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 *N.Y.U. L. REV.* 1693, 1701 (2005) (suggesting that individual state understandings of the church-state relationship are particularly important because “there was not a singular understanding of the proper relationship between the government and religion” at the time the Constitution was formulated); Shiffrin, *supra* note 10, at 14 (“[T]he Framers themselves did not agree upon the appropriate relationship between religion and government.”); cf. Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 *BYU L. REV.* 1593, 1595 (maintaining that, despite widespread historical consensus on the antebellum principle of voluntarism regarding religion, there were issues that remained “ambiguous or contained internal tensions”).

54. See James Madison, *Memorial and Remonstrance Against Religious Assessments*, (June 20, 1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, app. at 63–72 (1947). When many religions were permitted to flourish, Madison believed, no single sect would predominate and impose itself on all. See *THE FEDERALIST* NO. 10, at 84 (James Madison) (Clinton Rossiter ed. 1961) (“A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.”).

55. See Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Division on the Court Regarding Religious Expression by the State*, 75 *NOTRE DAME L. REV.* 433, 456 (1999).

56. *Id.* at 456–60.

While a healthy dose of separation was part of his ideal,<sup>57</sup> it is at least theoretically possible that his vision, which valued organized religion and supported government fostering multiple religious sects, could also permit some degree of nonpreferential state support for religion.<sup>58</sup>

Thomas Jefferson, though often cited as a relevant figure in this regard, was not on hand for the drafting of the First Amendment.<sup>59</sup> Nevertheless, he was a prominent individual at the time and his views on religion seem to have been fairly well-known. While his vision was probably more extreme than most, it would seem as relevant as anyone else's to ascertaining what at least some portion of the people understood about religion and government at the time. Jefferson, too, took an Enlightenment-inspired view of church and state,<sup>60</sup> but he understood man's relationship to God as one arrived at individually and solely through reason, with established churches playing no or even a negative role in the creation of that relationship.<sup>61</sup> While also a believer (he referred to himself as a Unitarian and thought that reason would eventually lead all men to accept God on such terms),<sup>62</sup> he was not as inclined as Madison to see the virtue of most organized religions of the day.<sup>63</sup> His vision entailed a strong measure of separation and would seem to curtail most or all government support for religion, as well as preference.

Thus, although they clearly shared points of commonality and are both often cited as separationists, it is not clear that even Madison and Jefferson entirely agreed about the ideal relationship of church and state.<sup>64</sup>

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57. See *id.* at 456–58; *McCreary County*, 125 S. Ct. at 2744 (quoting Madison to illustrate his separationist ideal); The Nation, not helping the argument for separating Church and State, <http://althouse.blogspot.com/2005/02/nation-not-helping-argument-for.html> (Feb. 8, 2005) (explaining that, when properly read in context, James Madison's quotes show him to be supportive of religion and Christian principles, but nevertheless believing that Christianity had its "greatest lustre" when separated from the state).

58. As Michael McConnell has documented, Madison was more sympathetic to organized religion than Jefferson, and might have viewed separation as valuable more for protecting religion from society than, as Jefferson viewed it, for protecting society from religion. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1452–53 (1990); see also *McCreary County*, 125 S. Ct. at 2749 (Scalia, J., dissenting) (noting Madison's reverential reference to the "Almighty Being" in his first inaugural address); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 854–58 (1994) (Thomas, J., concurring) (summarizing arguments that Madison either opposed all state support for religion (over irreligion) or just preferential aid to certain faiths, and siding with the latter position).

59. *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting); accord *Brady*, *supra* note 55, at 442.

60. Rutherford, *supra* note 2, at 1063.

61. *Brady*, *supra* note 55, at 451–55.

62. *Id.* at 453–55.

63. See *id.* 451–55.

64. See Eisgruber & Sager, *supra* note 2, at 1272 (describing Michael McConnell's historical

Moreover, despite their essentially coherent convictions about separation, and despite the possibility that early notions of separation might differ from modern notions, each occasionally engaged in activities that could give rise to claims of personal inconsistency or ambiguity on this point. For example, at the very same time that Madison, in connection with advocating for religious liberty in his home state of Virginia, maintained that “religion is ‘wholly exempt’ from the ‘cognizance’ of civil government,” he supported and even introduced laws in the state that would establish days of public fasting and thanksgiving and punish those who broke the Sabbath.<sup>65</sup> He later changed his mind and decided that government proclamations recommending days of thanksgiving and fasts were antithetical to separationist principles.<sup>66</sup> Similarly, there is evidence that Madison initially supported funding for legislative chaplains and then later reversed his position on this issue as well.<sup>67</sup>

Jefferson expressed a fairly consistent strict separationist vision,<sup>68</sup> but then similarly seemed to belie that conviction by praying and invoking divine assistance in both his inaugural addresses.<sup>69</sup> While famously skeptical of organized religion, Jefferson nevertheless encouraged and at

research showing “the serious divergence between the views of [Madison and Jefferson on religious freedom]”).

65. Brady, *supra* note 55, at 435 n.6 (citing this evidence to conclude that Madison “was not always sure where the line [between church and state] should be placed”).

66. *Id.* (recognizing that Madison’s views on the separation between church and state changed over time, particularly with regard to government proclamations of days of fasting and thanksgiving).

67. *Id.* at 445 n.51; CHESTER J. ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* 178–81 (1964); see also *Van Orden v. Perry*, 125 S. Ct. 2854, 2884 (2005) (Stevens, J., dissenting) (quoting Madison as opposing Congress’ appointment of chaplains paid with federal funds).

68. See Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), *quoted in Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting from Jefferson’s letter in which he interpreted the Establishment Clause as “building a wall of separation between church and State”); *McCreary County v. ACLU*, 125 S. Ct. 2722, 2744 (2005) (“Jefferson . . . refused to issue Thanksgiving Proclamations because he believed that they violated the Constitution.”); Derek H. Davis, Editorial, *Thomas Jefferson and the “Wall of Separation” Metaphor*, 45 J. CHURCH & ST. 5, 10 (2003) (noting that Jefferson was “well known for his unorthodox religious opinions as well as for his liberal views on religious liberty and the separation of church and state”). Although Jefferson was not in the country during the time that the First Amendment was formulated, he is nevertheless frequently cited, especially by the Court, as a Founder whose views on religion and the state are significant in understanding the religion clauses. Brady, *supra* note 55, at 439.

69. *Lee v. Weisman*, 505 U.S. 577, 633–34 (1992) (Scalia, J., dissenting) (quoting the INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. 101-10, at 22–23 (1989)). Akhil Amar observes that Jefferson had a consistent but different view of federal (which were prohibited) versus state (which were permitted) religious establishments, so that he proclaimed a religious Thanksgiving day as Governor but refused to do the same as President. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1159 & n.136 (1991). This possibly consistent understanding of the Establishment Clause as only a restriction on federal power would not alter the weight of the remaining points raised in the text about Jefferson’s ambiguous stance.

least symbolically supported it even in relation to government by attending public church services on government property, including those held in the Capitol, even traveling through a rainstorm on one occasion to get to the House of Representatives in order to attend.<sup>70</sup> In this regard, he is reported to have approved the use of the Capitol and other public buildings for church services, to have enlisted the military band to play religious music, and to have traveled an hour from the White House to get to the services.<sup>71</sup> On an official level, he also approved treaties with Indian tribes that provided government funds for spreading Christianity among them.<sup>72</sup> And on a personal level, he called himself a Christian, signed letters “God bless you,” was a generous financial backer of the Virginia Bible Society, and prepared three important religious works during his lifetime that examined the philosophy of Jesus, one directed toward the Indians.<sup>73</sup>

George Washington, clearly another influential figure, likewise displayed an ambiguous personal attitude toward religion, and possibly to the relationship between government and religion. On July 4, 1775, the day after he took command of the army, Washington issued an order stating: “The General . . . requires and expects of all officers and soldiers . . . a punctual attendance on Divine service, to implore the blessing of Heaven upon the means used for our safety and defense.”<sup>74</sup> When he resigned from his post as general, he issued a letter in which he prayed that God would “incline the hearts of the citizens to cultivate a spirit of subordination and obedience to government,” and dispose the citizens to

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70. See DANIEL L. DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 21–23 (2002).

71. David. D. Kirkpatrick, *Putting God Back Into American History*, N.Y. TIMES, Feb. 27, 2005, § 4 (Week in Review), at 1.

72. Davis, *supra* note 68, at 13 (noting that Jefferson approved treaties with the Indians in which the government “underwrote the ‘propagation of the Gospel among the Heathen’”); Kirkpatrick, *supra* note 71, at 4.

73. David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 399, 446–49 (2003); Letter from Thomas Jefferson to Dr. Benjamin Rush (Aug. 17, 1811) in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, at 614 (Adrienne Koch & William Peden, eds., 1944) (signed “God bless you and preserve you”); Letter from Thomas Jefferson to John Adams (Nov. 13, 1818) in *id.* at 690 (signed “God bless you and support you”); Letter from Thomas Jefferson to John Dickinson (Jan. 13, 1807) in *LETTERS OF THOMAS JEFFERSON* 139 (Frank Irwin, ed., 1975) (signed “God bless you, my excellent friend”); Letter from Thomas Jefferson to The Marquis de Lafayette (Feb. 14, 1815) in *id.* at 187 (signed “God bless you”); Kirkpatrick, *supra* note 71, at 4. Also, on an arguably personal though perhaps quasi-public level, Jefferson invited the audience to pray at the conclusion of his second inaugural address. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2749 (2005) (Scalia, J., dissenting); *cf.* *Van Orden v. Perry*, 125 S. Ct. 2854, 2883 (2005) (Stevens, J., dissenting) (arguing that public speeches by public officials are not recognized as exclusively government speech because they contain the personal views of the speaker).

74. WILLIAM J. JOHNSON, *GEORGE WASHINGTON THE CHRISTIAN* 69 (1919) (quoting from JARED SPARKS, 3 *THE WRITINGS OF GEORGE WASHINGTON* 491 (1834–37) [hereinafter SPARKS]).

act with “the characteristics of the Divine Author of our blessed religion,” whose example it was necessary to imitate in order “to be a happy nation.”<sup>75</sup> And, in 1796, in what is commonly known as his Farewell Address to the people of the United States, he was quoted as saying “reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”<sup>76</sup>

Nevertheless, despite these very public pronouncements of an important relationship between religion and government, Washington seemed to have something of an ambiguous personal relationship toward at least the organized religion of his day. He would more often use terms like “Providence” and standard deist references to a supreme being than refer to “God”;<sup>77</sup> he rarely, if ever, spoke of Jesus Christ;<sup>78</sup> and he belonged to the Free Masons, a group that supported Enlightenment-inspired ideas about reason and natural law.<sup>79</sup> One biographer characterized Washington as “[a] lukewarm Episcopalian” and even something of a deist, in that “he never took Communion, tended to talk about ‘Providence’ or ‘Destiny’ rather than God, and . . . preferred to stand rather than kneel when praying.”<sup>80</sup> Perhaps these less than religiously orthodox personal views are consistent with the fact that, on one occasion to a Jewish audience, Washington publicly expressed what sounded like opposition to government preference for any particular religion.<sup>81</sup> But on the other hand, this ecumenical position might be seen as standing in a somewhat uncomfortable relationship to his earlier invocation of the

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75. *Id.* at 141 (quoting from 8 SPARKS at 440–41, 452).

76. *Id.* at 217–18 (quoting from 12 SPARKS at 227–28).

77. See PAUL F. BOLLER, JR., GEORGE WASHINGTON AND RELIGION 92–115 (1963). However, as Justice Scalia recently noted, Washington added the words, “so help me God” to the Presidential oath. *McCreary County*, 125 S. Ct. at 2748 (Scalia, J., dissenting).

78. See BOLLER, *supra* note 77 at 68–69 (explaining that one such reference was probably written by one of his aides into a document signed without editing by a busy Washington); *id.* at 74–75 (arguing that one famous Washington document containing a probable reference to Christ was highly uncharacteristic, and that “the name of Christ . . . does not appear anywhere in [Washington’s] many letters to friends and associates throughout his life”); Kirkpatrick, *supra* note 71, at 4.

79. See Kirkpatrick, *supra* note 71, at 4; see also JOHN C. FITZPATRICK, GEORGE WASHINGTON HIMSELF 47 (1st ed. 1933) (mentioning Washington’s induction into the grand lodge of Free Masons in Fredericksburg, Virginia on November 4th, 1752).

80. JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 45 (2004); Kirkpatrick, *supra* note 71, at 4; accord *McCreary County v. ACLU*, 125 S. Ct. 2722, 2745 n.26 (2005) (citing JAMES THOMAS FLEXNER, GEORGE WASHINGTON: ANGUISH AND FAREWELL (1793–1799) 490 (1972), which describes Washington’s religious belief as “that of the enlightenment: deism”).

81. In a letter to the Hebrew Congregation in Newport, Rhode Island, Washington wrote: “All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights.” Letter from George Washington to the Touro Synagogue (1790).

indispensable example for citizenship supplied by the “Divine Author of our blessed religion,” a reference at least to Christianity and apparently to Christ.<sup>82</sup> Did Washington mean all Americans have a natural right to their own personal form of religious freedom, but imitating Christ is necessary to be a good American citizen?

A number of other prominent individuals could be argued similarly to have displayed somewhat ambiguous or inconsistent attitudes on the matter of religion, and some on church-state relations as well. Founding father Benjamin Rush strongly advocated that substantial instruction in the Christian religion be part of a system of public education.<sup>83</sup> Though he remained committed to the idea that Christian values were important to a civic republican ideal, he apparently moved from one Protestant denomination to another during his lifetime until he abandoned all organized churches and ended his life as a Unitarian-Universalist.<sup>84</sup> Benjamin Franklin, though a noted religious skeptic, is reported to have proposed that the Constitutional Convention begin each day with a prayer because “the longer I live, the more convincing proofs I see of this truth—that God governs in the Affairs of Men.”<sup>85</sup> Thomas Paine was infamous in the United States for his publication of *The Age of Reason*, in which he derided organized religion and attacked its belief in what he considered biblical superstitions.<sup>86</sup> Yet Paine also criticized schools for teaching the

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82. See *supra* note 75 and accompanying text.

83. BENJAMIN RUSH, *Plan for the Establishment of Public Schools* (1786), reprinted in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 3 (Frederick Rudolph ed., Harvard Univ. Press 1965) (calling for a plan for public schools in Pennsylvania that “is friendly to religion”); BENJAMIN RUSH, *Thoughts upon the Mode of Education Proper in a Republic* (1786), reprinted in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 10 (Frederick Rudolph, ed., Harvard Univ. Press 1965) (“[T]he only foundation for a useful education in a republic is to be laid in RELIGION.”). See generally *id.* at 10–13. See also BENJAMIN RUSH, *A DEFENCE OF THE USE OF THE BIBLE AS A SCHOOL BOOK* (1791), reprinted in BENJAMIN RUSH, *ESSAYS: LITERARY, MORAL AND PHILOSOPHICAL* 55 (Michael Meranze ed., Union College Press 1988) (presenting “arguments in favor of the use of the bible as a schoolbook”).

84. See ROBERT H. ABZUG, *COSMOS CRUMBLING: AMERICAN REFORM AND THE RELIGIOUS IMAGINATION* 11–29 (1994) (tracing Rush’s movement from conventional Protestant Christianity to a Universalist spirituality); Charles A. Howe, *Benjamin Rush*, *DICTIONARY OF UNITARIAN AND UNIVERSALIST BIOGRAPHY*, <http://www.uua.org/uuhs/duub/articles/benjaminrush.html>.

85. NEWT GINGRICH, *WINNING THE FUTURE: A 21ST CENTURY CONTRACT WITH AMERICA* 47 (2005). See also Kirkpatrick, *supra* note 71, at 4 (reporting that the Convention declined Franklin’s suggestion to hire a chaplain because it might leave the negative impression that the body’s deliberations were not going well).

86. See generally MARY A. BEST, *THOMAS PAINE: PROPHET AND MARTYR OF DEMOCRACY* 312–13 (1927) (opining that the first part of *The Age of Reason* “set the Christian world on fire”); GREGORY CLAEYS, *THOMAS PAINE: SOCIAL AND POLITICAL THOUGHT* 177 (1989) (characterizing *The Age of Reason* as Paine’s “most . . . ill-fated work” because of its “primarily negative” impact in the 1790s); SAMUEL EDWARDS, *REBEL!: A BIOGRAPHY OF THOMAS PAINE* 186 (1974) (detailing Paine’s vilification upon the publication of *The Age of Reason* by noting that “[s]ome of his contemporaries even said that he was fortunate to have been in prison when it was published, because he might have

sciences as the accomplishments of man when instead they should have been taught “theologically,” by which he meant with reference to God, “for all the principles of science are of divine origin.”<sup>87</sup>

Other influential figures of the time on religious issues exhibited similar ambiguity or inconsistencies when it came to either religion or religion and the state. For example, from the Baptist camp (Baptists were generally proponents of separationism<sup>88</sup>), Isaac Backus, an evangelist active in the struggle for disestablishment and religious liberty in New England, adopted the separationist mantle, yet he seemed to have no problem with requiring Protestant-based religious oaths for state officeholders; official days of fasting, thanksgiving, and prayer; and legislative chaplains (except for his objection to a denominational preference for Episcopalians).<sup>89</sup> One historian has argued that most Baptists at this time, though they similarly shared separationist ideals and were opposed to compulsory religious taxation, did not object to the state maintaining a Christian character.<sup>90</sup> To that end, many were unopposed to compulsory Protestant church attendance, the inculcation of the Westminster Confession of Faith in the public schools, and Puritan laws against profanity, blasphemy, gambling, card playing, theater-going, and desecration of the Sabbath.<sup>91</sup> If these views were intended to describe separationism, it was a very different animal than that of which we speak today.

been lynched by outraged mobs had he been free”); HAROLD NICOLSON, *THE AGE OF REASON: THE EIGHTEENTH CENTURY 377* (1961) (noting that in *The Age of Reason*, Paine “made fun of the Bible” and “denied the miraculous birth of Christ”); R.B. Bernstein, *Rediscovering Thomas Paine*, 39 N.Y.L. SCH. L. REV. 873, 925–26 (1994) (describing *The Age of Reason* as Paine’s “great attack on ‘revealed religion’” and noting his opposition to “the tyranny of organized religion,” despite the fact that he was “[a] deeply religious man”).

87. Thomas Paine, *The Existence of God, Address Delivered as a Discourse at the Society of Theophilanthropists in Paris* (Jan. 16, 1797), available at [http://www.scaevola.com/deism/existence\\_of\\_god.htm](http://www.scaevola.com/deism/existence_of_god.htm). See also Kirkpatrick, *supra* note 71, at 4 (noting that Paine criticized schools in France “for teaching science without emphasizing the role of a divine ‘Creator’”).

88. Brady, *supra* note 55, at 444–45.

89. See ISAAC BACKUS, *THE TESTIMONY OF TWO WITNESSES* 46–47 (Boston, Samuel Hall 2d ed. 1793) (voicing Backus’s complaint that Episcopalians served as legislative chaplains); WILLIAM G. MCLOUGHLIN, *SOUL LIBERTY: THE BAPTISTS’ STRUGGLE IN NEW ENGLAND, 1630–1833*, at 267 (1991) (“Backus was . . . far from having a clear-cut position on the precise line to be drawn between church and state.”); *id.* at 267–68 (regarding religious oaths and days of fasting, thanksgiving and prayer); Brady, *supra* note 55, at 444–45 & nn.44–45, 47–50, 52–54, 56.

90. See MCLOUGHLIN, *supra* note 89, at 267–69 (regarding the Westminster Confession; “Puritan blue laws” punishing blasphemy, profanity, and profaning the Sabbath; and laws against gambling, card playing, dancing, and theatergoing); WILLIAM G. MCLOUGHLIN, *ISAAC BACKUS AND THE AMERICAN PIETISTIC TRADITION* 148–49 (1967).

91. MCLOUGHLIN, *supra* note 89, at 268–69; MCLOUGHLIN, *supra* note 90, at 149.

To sum up the matter of the Founders' views, they apparently expressed widely varying opinions and engaged in varying practices with respect to the mixing of religion and government, several occasionally acting in ways that seem at least arguably inconsistent with positions they espoused. Sometimes their views about religion or their actions with regard to the intersection of religion and government appeared at least mildly confused or somewhat inconsistent, or changed over time. For these and other reasons, some historians and others—recently including Supreme Court justices—conclude that these leaders' public expressions of faith do not necessarily tell us very much about their notion of the ideal relationship between church and state.<sup>92</sup> Indeed, their notions of the ideal might not have been clearly delineated even to themselves, and even if their ideals were consistent and well-defined, given the diversity of viewpoints in general, no particular individual view was necessarily embedded in the religion clauses.<sup>93</sup>

It is not entirely clear where Congress, as the nation's representative, stood on the matter of religion and government either. Several scholars point to practices of the early Congresses that are similarly at odds with strict separationist principles.<sup>94</sup> Congress allocated funds for legislative chaplains,<sup>95</sup> and re-enacted the Northwest Ordinance despite that

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92. Davis, *supra* note 68, at 8 (“[T]he Founding Fathers’ intent on [the meaning of the Establishment Clause] is fraught with ambiguities,” reflected in the eleven drafts of the religion clauses that “are roughly equally divided between language that adopts nonpreferentialism on the one hand and separationism on the other”); *Van Orden v. Perry*, 125 S. Ct. 2854, 2888 (2005) (Stevens, J., dissenting) (“As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star.”); Kirkpatrick, *supra* note 71, at 4. *See also Van Orden*, 125 S. Ct. at 2888 n.33 (citing Justice Souter’s concurrence in *Lee v. Weisman*, 505 U.S. 577, 626 (1992) for the proposition that “‘at best, . . . the Framers simply did not share a common understanding of the Establishment Clause,’ and at worst, their overtly religious proclamations show ‘that they . . . could raise constitutional ideals one day and turn their backs on them the next’”).

93. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2744 (2005) (“The fair inference is that there was no common understanding about the limits of the establishment prohibition . . . . What the evidence does show is a group of statesmen . . . who proposed a guarantee with contours not wholly worked out . . . .”); *cf. McLoughlin*, *supra* note 89, at 269 (arguing that “Jefferson and Madison spoke for a rationalist-humanist element in American thought that . . . throughout most of our history has been the view of a small minority,” while Backus’s “evangelical view of Separationism . . . has predominated”).

94. *See, e.g., Antieau*, *supra* note 67, at 181–82 (describing the practice of early Congresses of employing and paying chaplains for both houses of Congress and for army and navy troops); *id.* at 182 (noting that Congress adopted a resolution asking the President to declare a day of public thanksgiving and prayer on the same day it adopted a resolution recommending the First Amendment to the states); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 217 (1986) (making the same point about the First Congress); Brady, *supra* note 55, at 441–42 & n.31.

95. *Antieau*, *supra* note 67, at 181; *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984); *Marsh v.*

provision's express support for encouraging religion, on the ground that religion was necessary for good government.<sup>96</sup> Also, the first proclamation of thanksgiving and prayer, issued by President Washington in 1789, arose in response to a congressional resolution.<sup>97</sup> But do we really know just what the nation's representatives considered to be the reach of the religion clauses? There does not seem to be sufficient evidence to determine what, if anything, were most of their individual views, let alone a consistent and collective vision to guide us.<sup>98</sup>

Similarly, at the state level during the period of ratification, no clear picture of the meaning of religious freedom emerges.<sup>99</sup> Leonard Levy's treatise on the history of the Establishment Clause maintains that debates about the rights to be considered for inclusion in a bill of rights "occurred on a level of abstraction so vague as to convey the impression that Americans . . . had only the most nebulous conception of the meanings of the . . . rights they sought to insure," and that the principal advocates for "rights of conscience" (among other rights) did not supply any reasoned analysis of the meaning, reach, or limits of such rights.<sup>100</sup> He concludes that, despite the wide variation during this period in state practices, constitutions, and laws with regard to religious establishments, the subject

Chambers, 463 U.S. 783, 786–92 (1983).

96. An Act to Provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50, 52 & n.(a) (1789) ("Northwest Ordinance") (reenacting The Northwest Ordinance of July 13, 1787, which provided: "Religion, morality, and knowledge, being necessary to good government . . . , schools and the means of education shall forever be encouraged."); *see also* Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (stating that Congress's reenactment of the Northwest Ordinance confirms that Congress did not intend that Government "should be neutral between religion and irreligion"); Brady, *supra* note 55, at 477 & n.260.

97. Wallace, 472 U.S. at 100–03 (Rehnquist, J., dissenting); *see also* ANTIEAU, *supra* note 67, at 182; CURRY, *supra* note 94, at 217.

98. *But cf.* CURRY, *supra* note 94, at 208–17 (arguing that, viewing the events surrounding passage of the Bill of Rights in light of the broader context of colonial and revolutionary America, Congress' intent regarding the religion clauses is not so ambiguous as the work of many previous historians would seem to imply).

The passage of the First Amendment constituted a symbolic act, a declaration for the future, an assurance to those nervous about the federal government that it was not going to reverse any of the guarantees for religious liberty won by the revolutionary states. Because it was making explicit the non-existence of a power, not regulating or curbing one that existed, Congress approached the subject in a somewhat hasty and absentminded manner. To examine the two clauses of the amendment as carefully worded analysis of Church-State relations would be to overburden them. Similarly, to see the two clauses as separate, balanced, competing, or carefully worked out prohibitions designed to meet different eventualities would be to read into the minds of the actors far more than was there.

*Id.* at 216.

99. *See generally* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 66–74 (1986) (discussing ratification debates in various states).

100. *Id.* at 66–67.

“was rarely mentioned at all and then only very briefly” in the state ratifying convention debates.<sup>101</sup> Philip Kurland surmises that state ratifying conventions that drafted bills of rights did so “more from habit than from reason,” and that, other than generally moving toward more religious toleration from the founding to statehood, “no pattern can be discerned among the fundamental documents governing religion within the colonies and the states.”<sup>102</sup> Levy’s explication of the available records concerning drafting and ratification of the Establishment Clause similarly does not produce any clear or cohesive vision of the intended scope of that provision.<sup>103</sup>

As for the actual policies and practices within the states at the time, some states never had, or had recently abolished, their state establishments, while others, including Connecticut, Massachusetts, New Hampshire, and South Carolina, still maintained—and some say wholeheartedly endorsed—their established churches,<sup>104</sup> some into the mid-nineteenth century.<sup>105</sup> And some of the staunch supporters of these state establishments were defenders of the need for the Federal Constitution’s religion clauses, probably understanding them not as guarantees of church-state separation generally, but rather as embodying the federalist principle of leaving the matter of religion wholly to the states in order to protect their states’ locally established preferences.<sup>106</sup> This wide variety of opinion in the states about the ideal relationship between church and state does not suggest any particular consensus about the religion clauses generally, beyond the rejection of an official federal church.

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101. *Id.* at 66–74. Levy argues that this is because the federal government was universally understood to have no power at all to act with respect to religion under the proposed Constitution. *Id.* at 74; accord CURRY, *supra* note 94, at 215–16.

102. Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 851–52 (1986). See generally *id.* at 851–53 (describing widely varying and inconsistent state practices and policies with regard to religious freedom and establishments).

103. LEVY, *supra* note 99, at 84–89. Here, again, Levy argues that the relevant history nevertheless teaches that the federal government “had no power to legislate on the subject of religion.” *Id.* at 89.

104. *Id.* at 66–74 (explaining that Pennsylvania never experienced an establishment of religion; Connecticut, Massachusetts, New Hampshire, and South Carolina maintained establishments at the time of ratification; Maryland’s constitution permitted one though none existed; New York did not have an establishment; Virginia had recently abandoned its established religion; and North Carolina ended its establishment before the ratification debates).

105. Kirkpatrick, *supra* note 71, at 4 (citing historian Gordon Wood); see also Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1132–33 & n.98 (1988) (noting that seven of the fourteen states presented with the issue of ratifying the First Amendment embraced anti-establishment policies at that time, while the remaining seven maintained or authorized established religions).

106. See Brady, *supra* note 55, at 441 n.30 (discussing Patrick Henry and Richard Henry Lee).

In addition, many provisions for and advocates of religious freedom at the state level did not understand the notion to include everyone. Equality was fine for most Christian sects, but not for all,<sup>107</sup> and often not for some or all non-Christians.<sup>108</sup>

For what it may be worth, there even seems to be reason to wonder about the religiosity of the average citizen of the time. Many maintain that the country was deeply devout, but others point to evidence that might question that reality.<sup>109</sup> One commentator concludes that:

Most Americans in the founding era probably held a “centrist” position that favored limited government support for religion. The type of “mild” establishment that they envisioned typically included laws protecting Sabbath observance; the proclamation of days of thanksgiving, prayer and fasting, and other public acknowledgments of the country’s dependence on God; legislative and military chaplains; laws punishing blasphemy; and support for religious education. . . . [T]he strict disestablishment position implemented in Virginia was an anomaly in the late eighteenth century, and . . .

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107. Catholics, for example, were often treated as a legally unequal, disfavored Christian sect. *See, e.g.*, S.C. CONST. of 1778, art. XXXVIII, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS 3255–56 (Francis Newton Thorpe ed., 1909) (providing for equality for “all denominations of Christian Protestants”); N.J. CONST. of 1776, art. XIX, *reprinted in id.* at 2597 (applying civil rights only to Protestants).

108. *See, e.g.*, Hall, *supra* note 10, at 12–13 (explaining that “[m]ost states originally limited the scope of equality to Christian denominations and sects”); Kurland, *supra* note 102, at 851–52 (“[M]ost opinion voiced in New England was animated by desire to exclude non-Protestants from public office—not by toleration but by intolerance.”). *See generally* MORTON BORDEN, JEWS, TURKS, AND INFIDELS (1984) (discussing the hurdles that non-Christians had to overcome in their struggle to repeal state laws that were religiously discriminatory). *See also* *McCreary County v. ACLU*, 125 S. Ct. 2722, 2745 (2005) (“[H]istory shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular”); *Van Orden v. Perry*, 125 S. Ct. 2854, 2885–87 (2005) (Stevens, J., dissenting) (citing various sources to establish that the originally intended coverage of religious freedom was limited to Christians).

109. Compare Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2109 (2003) (“[M]ost members of the founding generation believed deeply that some type of religious conviction was necessary for public virtue.”), with ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776–1990*, at 22–23 (1992) (marshalling evidence that “in 1776 only about one out of five New Englanders had a religious affiliation,” “Boston’s taverns were probably fuller on Saturday night than were its churches on Sunday morning,” and “single women in New England during the colonial period were more likely to be sexually active than to belong to a church,” to establish that, although these facts didn’t prove the colonists “were irreligious[,] . . . their faith lacked public expression and organized influence”). *Cf.* Kirkpatrick, *supra* note 71, at 4 (quoting professor emeritus Forrest McDonald as saying that “Christians probably outnumbered deists among the founders”).

most state practices, in fact, included numerous forms of cooperation between church and state.<sup>110</sup>

But another, assessing the same history, resolves:

The vast majority of Americans assumed that theirs was a Christian, i.e. Protestant, country, and they automatically expected that government would uphold the commonly agreed on Protestant ethos and morality. In many instances, they had not come to grips with the implications their belief in the powerlessness of government in religious matters held for a society in which the values, customs, and forms of Protestant Christianity thoroughly permeated civil and political life. The contradiction between their theory and their practice became evident to Americans only later, with the advent of a more religiously pluralistic society, when it became the subject of a disputation that continues to the present.<sup>111</sup>

What these differing, uncertain, or ambiguous views about religion and church-state relations translate into in terms of the meaning of the Constitution's religion guarantees, and then in turn religious equality, is less than lucid.<sup>112</sup> It is possible to conclude that, from the very inception, there was no single, general understanding of the religious freedom represented by the First Amendment. The collective "we" could not have had one in common, as individuals did not even have one within themselves. Some people, maybe even many, held sometimes inconsistent or changing views of the relationship between government and religion, or professed a view and then acted at odds with it. Some appear even to have had uncertain or inconsistent views toward religion itself, or at least toward organized churches and theologies, leaving us to wonder how this might affect what they thought of church and state. Some prominent

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110. Brady, *supra* note 55, at 470–71 (footnotes omitted). *See generally id.* at 470–77.

111. CURRY, *supra* note 94, at 219.

112. *See, e.g.*, Conkle, *supra* note 105, at 1132 (footnotes omitted):

Needless to say, it can be exceedingly difficult, if not impossible, to determine the original understanding of a provision in the Bill of Rights. The evidentiary materials are woefully incomplete, and it is difficult to determine the relevance and relative weight of the various types of evidence that do exist. The historical question addressed in the *Everson-Rehnquist* debate is one that falls prey to these evidentiary and analytical problems; as a result, it is difficult to say whether the framers and ratifiers of the establishment clause intended to adopt a broad or a more narrow prohibition on congressional action.

*See also*, Veronica C. Abreu, *Muddled Original Understanding of the Establishment Clause: A Comparative Critique of Philip Hamburger's and Noah Feldman's Historical Arguments*, 23 QUINNIPIAC L. REV. 615 (evaluating the implications of divergent views of early Americans on religious liberty).

figures were committed in theory to separation of church and state at all levels of government, but did not seem to see the need to practice it completely at any. Perhaps people expected the religion clauses to embody whatever state of affairs they lived with at the time—for example, nonestablishment meant no tithing to an official federal denomination—or perhaps they thought these new guarantees were supposed to usher in a new, more inclusive or more separationist ideal. Or more likely, perhaps people had not resolved this question, in either a general sense or certainly in its particular applications, not each in his or her own mind and certainly not collectively.

### *B. At Incorporation*

The picture does not become clearer if we fast forward to the period of adoption of the Fourteenth Amendment, which is supposed to be the source of incorporation of the religion guarantees. One commentator, for example, argues that the religious equality notion of Free Exercise embraced by the founding generation had evolved into a religious liberty notion advanced by the post-Civil War generation, and that the Establishment Clause, originally intended as an establishment-neutral reservation of power to state majorities, was then transformed into a tool to express the rights of citizens against state majorities, thus altering altogether the meaning of the Constitution's religious guarantees.<sup>113</sup> Others

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113. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1109–10, 1149 (1994) (“[T]he Free Exercise Clause was adopted a second time through its incorporation into the Privileges or Immunities Clause of the Fourteenth Amendment and . . . the scope of the new Free Exercise Clause was intended to include protections unanticipated at the Founding.”). Lash argues that the common understanding of Free Exercise changed from an equality concern with anti-targeting to a liberty concern with affirmatively requiring state accommodations. *See id.* at 1109 (“[T]he Privileges or Immunities Clause incorporated a conception of religious liberty vastly different from that intended in 1791 and constitutes a constitutional modification of the original ‘rights of conscience.’”); *id.* at 1149 (arguing that the framers of the Fourteenth Amendment’s Privileges or Immunities Clause indicated their intent that it was to protect religious exercise—in both its mandatory and discretionary aspects—as a substantive right against not only majoritarian hostility but also majoritarian indifference, so that generally applicable laws might thereafter violate constitutionally protected religious liberty). *But see* Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998) (arguing that Free Exercise was always understood as a liberty guarantee, and that incorporation of Free Exercise by the Fourteenth Amendment did not change that understanding).

Akhil Amar makes a related, though not identical argument. He describes how the Establishment Clause effectively mutated from a structural provision enforcing federalism, and agnostic regarding establishments at the founding, into at least a weak substantive right grounded in either liberty or equality that was then incorporated by the Fourteenth Amendment. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 246–54 (1998). He similarly expounds on the

argue that incorporation insured or cemented religious equality rather than or as superior to religious liberty.<sup>114</sup> Another, along with his own supporters, maintains simply that “[t]he evidence seems inescapable: the fourteenth amendment, as originally understood, did not incorporate the establishment clause for application to the states.”<sup>115</sup> If these and other differing interpretations are any indication, adding incorporation into the mix surely does not obviate the difficulty of determining the meaning of the religion guarantees.<sup>116</sup>

There is evidence that prominent leaders at the time of the adoption of the Fourteenth Amendment were likewise somewhat ambiguous on the matter of religion or religion and state, as at the founding. For example, evincing his personal attitude toward religion, Abraham Lincoln was not baptized and never joined a church,<sup>117</sup> though apparently church

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reconstruction of the Free Exercise Clause, from its original admonition only against Congress enacting laws targeting religious acts for persecution, into the Fourteenth Amendment’s version, which creates a substantive privilege in the individual to be free even from unintentional encroachment on religious activity, that is, a kind of “libertarian autonomy from governmental intrusion.” *Id.* at 254–56.

114. See Rutherford, *supra* note 2, at 1060, 1065 (noting that “[e]quality was central to our founding as a nation” and also “provided the unifying theme of the Fourteenth Amendment”); *id.* at 1067 (because older parts of the Constitution should be reconciled with later-adopted parts, “the First Amendment Religion Clauses should be interpreted in ways that are consistent with the Fourteenth Amendment paradigm of equality,” so that “when the Religion Clauses clash with the egalitarian goals of the Fourteenth Amendment, the egalitarian principles must prevail”); *cf.* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT (1988) (tracing the historical evolution of the Fourteenth Amendment generally, including agreement over its equality concern and disagreement over its liberty aspects).

115. Conkle, *supra* note 105, at 1138–39; *accord* Amar, *supra* note 69, at 1157–58 (arguing that it is particularly awkward to view the Fourteenth Amendment as incorporating the Establishment Clause so as to prevent state establishments, because the very purpose of the Establishment Clause was to protect the states’ right to choose whether to establish a religion free from federal government interference; for this and other reasons, incorporation of the Establishment Clause is inappropriate); *see also* Van Orden v. Perry, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring) (presenting the view that the Establishment Clause’s text and history do not support incorporation).

116. See Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1577–89 (1995) (describing very conflicting views of the Fourteenth Amendment at the time of its adoption on the issue of whether it incorporated an equality-based or liberty-based view of the First Amendment, including the religion clauses).

117. Kirkpatrick, *supra* note 71, at 4; ELTON TRUEBLOOD, ABRAHAM LINCOLN: THEOLOGIAN OF AMERICAN ANGUISH 5 (1973) (noting that Lincoln was never a church member). Lincoln explained this in a letter to Colonel A. J. Warner, December 30, 1864:

I have never united myself to any church, because I have found difficulty in giving my assent, without mental reservations, to the long, complicated statement of Christian doctrine which characterize their Articles of Belief and Confessions of Faith. When any church will inscribe over its altar, as its sole qualification for membership, the Saviour’s condensed statement of both Law and Gospel, “Thou shalt love the Lord thy God with all thy heart and with all thy soul and with all thy mind, and thy neighbor as thyself,” that church will I join with all my heart and all my soul.

AN AUTOBIOGRAPHY OF ABRAHAM LINCOLN, CONSISTING OF THE PERSONAL PORTIONS OF HIS

membership was generally not the norm during this period.<sup>118</sup> He is reported to have rarely mentioned Jesus,<sup>119</sup> and is often famously considered irreligious.<sup>120</sup> But his wife described him as “a man of faith,” even if not technically a Christian, and her assessment is backed by evidence of his occasional resorts to faith and his well-known uses of Biblical rhetoric in public addresses.<sup>121</sup> Shortly before his death, when asked by a clergyman whether he loved Jesus, he reportedly replied:

When I left Springfield I asked the people to pray for me. I was not a Christian. When I buried my son, the severest trial of my life, I was not a Christian. But when I went to Gettysburg and saw the graves of thousands of our soldiers, I then and there consecrated myself to Christ. Yes, I *do* love Jesus.<sup>122</sup>

One commentator sums up Lincoln’s religiosity by describing him as “wrestl[ing] with faith, longing to be more religious, but never getting there.”<sup>123</sup>

What exactly does this personal spiritual journey, coupled with mixed public religious references, tell us about Lincoln’s views on government and religion generally, or the Constitution’s religious guarantees in particular? As with leaders of the revolutionary period, not all that much, let alone anything precise or consistent. Perhaps it makes one skeptical

LETTERS SPEECHES AND CONVERSATIONS 442 (Nathaniel Wright Stephenson ed., 1926).

118. See TRUEBLOOD, *supra* note 117, at 95–97 (explaining that “only 23 percent of the population were church members in 1860,” but that church membership was not then synonymous with being a “serious Christian”).

119. Kirkpatrick, *supra* note 71, at 4. However, Lincoln is reported to have used “no less than forty-nine designations” to refer to “the Deity,” among them “Jesus,” “Christ,” “Crucified One,” and “God.” WILLIAM J. JOHNSON, ABRAHAM LINCOLN, THE CHRISTIAN 215–17 (1913).

120. Kirkpatrick, *supra* note 71, at 4.

121. *Id.* (referring to Mary Lincoln’s assessment and citing particular instances of possible religiosity on Lincoln’s part). Mary Lincoln was quoted as having stated that Lincoln “never joined any Church. He was a religious man always, I think, but not a technical Christian.” WILLIAM HERNDON, RELIGION OF LINCOLN (quoted from FRANKLIN STEINER, THE RELIGIOUS BELIEFS OF OUR PRESIDENTS 118 (1995)). See generally TRUEBLOOD, *supra* note 117; JOHNSON, *supra* note 119. In a handbill printed on July 31, 1846, addressed to “The Voters of the Seventh Congressional District Fellow Citizens,” Lincoln writes: “That I am not a member of any Christian Church, is true; but I have never denied the truth of the Scripture; and I have never spoken with intentional disrespect of religion in general, or of any denomination of Christians in particular.” TRUEBLOOD, *supra* note 117, at 15. Trueblood calls “unjustified” the popular conclusion, drawn from Lincoln’s failure to join a church, that he “had no strong or vital faith.” *Id.* at 95. He argues: “To question . . . whether Lincoln believed in God is a clear waste of time and effort. The answer is obvious. The only valuable inquiry is that of *how* he believed.” *Id.* at 121.

122. JOHNSON, *supra* note 119, at 172 (quoting O. H. OLDROYD, LINCOLN MEMORIAL ALBUM 366 (1883)).

123. David Brooks, *Stuck in Lincoln’s Land*, N.Y. TIMES, May 5, 2005, at A35 (“[Lincoln] was mesmerized by religion, but could never shake his skepticism.”).

that he could have maintained a definitive and coherent position on the legal issue of religion if he held such a troubled position on the personal issue of religion, though in theory they are separate matters. Whatever we think of Lincoln's view, more importantly, we do not have any clearer picture of the generally prevalent view of religious freedom during his day than of his own personal view. If the wildly varying conclusions of the scholarly debate is any indication, it is not any more likely that a consistent, common notion of the ideal or the commonly understood vision of government and religion will emerge by looking at evidence from the post-Civil War, Fourteenth Amendment period than by looking at the more frequently discussed founding period, when at least the drafting and application of the religion clauses was on the front burner, so to speak.

### C. Today

There seems even less hope of finding agreement today. Issues of religion are among those one strives to avoid at social gatherings for fear of upsetting civility. From people on the street, to those in the media, to political actors, to academics, the debate over the proper resolution of church-state issues rages at every turn.<sup>124</sup> We are a country divided, at least with regard to religion and government.<sup>125</sup> With increased religious heterogeneity over time, in addition to the seemingly increasing prominence and political power of some religious minorities (particularly non-Christians), it is unlikely we will ever agree. If we have never and will never agree about the meaning of constitutionally required religious freedom, it seems pretty well assured that we will not agree about religious equality either.

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124. Brady, *supra* note 55, at 435; *see, e.g.*, Patrick M. Garry, *The Myth of Separation: America's Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475 (2004) (discussing religious divisions in the 2004 United States Presidential election); Scott C. Idelman, *Liberty in the Balance: Religion, Politics, and American Constitutionalism*, 71 NOTRE DAME L. REV. 991 (1996) (book review) (illustrating current divisions among scholars about historic understandings regarding church and state and their significance).

125. *See supra* note 124; Kirkpatrick, *supra* note 71, at 4 (titling one insert "The Partisan Divide, Then and Now"). *See generally* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT 6 (2005) (hereinafter FELDMAN, DIVIDED BY GOD) ("The deep divide in American life . . . is not primarily over religious belief or affiliation—it is over the role that belief should play in the business of politics and government."); Noah Feldman, *A Church-State Solution*, N.Y. TIMES, July 3, 2005, § 6 (Magazine), at 28 [hereinafter Feldman, *A Church-State Solution*] (arguing that the church-state debate in America today is dominated by two opposing camps, "values evangelicals" and "legal secularists," and proposing a new compromise between these two views).

#### D. In the Court

To compound the problem, the Supreme Court's religion jurisprudence, when viewed as it emerged over this same historical period, reflects a marked and particular ambivalence about church-state doctrine. The Court's doctrinal evolution under both clauses wanders about, not following a consistent trajectory—even one with fits and starts—in a single, general direction.<sup>126</sup> Under Supreme Court tutelage in the twentieth century, the Establishment Clause first seemed to require separation of church and state,<sup>127</sup> then, at times, no-endorsement of religion<sup>128</sup> or no-coercion toward religion,<sup>129</sup> followed today largely by religious neutrality in some areas, but then not in others.<sup>130</sup>

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126. This pattern might be contrasted with, for example, Equal Protection Clause jurisprudence. It could be argued that the Supreme Court's interpretation of rights under the Equal Protection Clause has consistently, though perhaps with occasional fits and starts, moved toward greater expansion of rights for specially protected individuals and the inclusion of more protected classifications.

127. The *Lemon* test, articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612–15 (1971), is usually understood to have adopted a rule of separation. See Conkle, *supra* note 105, at 1125 (discussing how the *Lemon* test embodied the separationist doctrine adopted in *Everson v. Board of Education*, 330 U.S. 1 (1947)).

128. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (“In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion, a concern that has long had a place in our Establishment Clause jurisprudence.”); *Lynch v. Donnelly*, 465 U.S. 668, 688, 690–92 (1984) (O’Connor, J., concurring); Shiffrin, *supra* note 10, at 36; see also Feldman, *supra* note 11, at 694–700 (tracing developments in the evolution of Establishment Clause jurisprudence to demonstrate a transformation in the rationale of the Clause from protecting the liberty of conscience of religious dissenters to guaranteeing the political equality of religious minorities).

129. See *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Santa Fe Indep. Sch. Dist. v. Does*, 530 U.S. 290, 310–13 (2000) (applying Lee’s non-coercion test to a school district’s policy regarding student-led prayers before high school football games); McConnell, *supra* note 3, at 157–59 (citing the concurring and dissenting opinion of Justice Kennedy in *County of Allegheny* as the origin of the “coercion” test used in *Lee*, and concluding that, in 1992, it was too soon to determine whether coercion would be the Court’s establishment standard); see also Lupu & Tuttle, *supra* note 1, at 558 (noting “the rise of both the endorsement and coercion tests” in the years before 2002).

130. Compare *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–55 (2002) (“[Prior cases] make clear that where a government aid program is neutral with respect to religion . . . the program is not readily subject to challenge under the Establishment Clause.”), *Mitchell v. Helms*, 530 U.S. 793, 809–14 (2000) (explaining how government neutrality emerges from prior Establishment Clause cases as the central concern), and *Ira C. Lupu & Robert W. Tuttle, Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 924 (2003) (describing *Zelman’s* and *Mitchell’s* neutrality rule), with *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (conspicuously avoiding use of neutrality as the rule of decision in upholding a public display of the Ten Commandments). Cf. Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1087–1101 (2002) (positing that Establishment Clause doctrine has followed two competing doctrines of separation and neutrality, and suggesting a method of reconciling the two). It may be that different Establishment Clause disputes call upon different doctrines, so that, for example, religious symbols cases employ a historical practice (*Van Orden*) or a no endorsement (*Lynch/Allegheny*) rule, while school funding cases employ the neutrality (*Mitchell/Zelman*) test.

Doctrinal ambivalence seems even more pronounced in the Free Exercise arena. At first, there were no constitutionally required exemptions for religious acts or actors.<sup>131</sup> Then exemptions were said sometimes to be required.<sup>132</sup> This was followed by a period in which constitutionally required exemptions were formally the rule,<sup>133</sup> but in fact balancing usually occurred and exemptions were only rarely actually required.<sup>134</sup> Today, we once again have a general default rule of no constitutionally required exemptions.<sup>135</sup> Rather than moving in a straight, or even a wavy, line, the Court seems literally to have been rounding a circle.<sup>136</sup> Perhaps we ought not fault the Court for failing to reach a general consensus about a matter that may have begun and continued for 200 years without one.

### CONCLUSION

There are many reasons why we cannot identify what it means to treat religion equally. Equality is itself too broad-ranging a concept. It operates along several different axes, each of which must be determined before we can establish what equality means in a given context. It is not clear who are the proper subjects or what is the proper domain of religious equality. Equality takes different forms, including formal and substantive varieties; one must decide which to apply. Equality requires comparisons of like entities, but religion is different in significant respects from most of the things to which one would assume it ought normally to be compared for

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131. See *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (finding no constitutional exemption for the religious exercise of polygamy).

132. See *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (distinguishing between direct and indirect burdens on religious exercise, the former triggering a standard of review much more likely to result in invalidating the state's action than the latter).

133. See *Wisconsin v. Yoder*, 406 U.S. 205, 213–15, 221–29 (1972) (holding that only a state interest “of the highest order” may justify denying the free exercise of religion, and the State’s interest in universal education did not qualify where an Amish education alternatively satisfied the State’s concerns); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (imposing a compelling state interest standard on government actions that incidentally burden a claimant’s religious exercise).

134. See *Eisgruber and Sager*, *supra* note 2, at 1246 (noting that the Court applied strict scrutiny to burdens on religious practices only in *Sherbert v. Verner* and its progeny and in *Wisconsin v. Yoder*, but not in other pre-*Smith* cases).

135. See *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (stating that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”).

136. *Hall*, *supra* note 10, at 47 (tracing the irregular path of Free Exercise interpretation and concluding, “The Court can now assert with pride that free exercise jurisprudence has managed to end the twentieth century without significant change from its position at the end of the nineteenth century.”).

this purpose. Indeed, religion is itself especially unamenable to definition. Defining or measuring equality may require establishing a baseline, which would involve making value-laden moral or political judgments. And, most important, one cannot apply an equality norm without attacking the underlying and particularly pernicious problem of identifying a theory of the religion clauses. This is an area in which there is, and probably always has been, substantial disagreement and uncertainty.

At this point it might seem best to avoid equality if possible. Is such a thing possible, especially given the central focus of so many on this particular construct? One could argue, and some have, that equality is not the be all and end all of religion jurisprudence anyway.<sup>137</sup> There are competing understandings of the religion clauses that would enable us to interpret and apply them without fully coming to grips with equality.

For example, an originalist could glean a minimal common denominator of agreement and hold that up as the original understanding. The minimalist originalist could argue that all understood the Establishment Clause to forbid formally declaring a particular federal church and requiring contribution for its maintenance. He could also argue that all understood the Free Exercise Clause to prohibit government's deliberate attempts explicitly to suppress religious belief, though not necessarily to interfere with religious practice or even all manner of religious expression. Thus, originalists might conclude that the original understanding of neither clause requires application of equality norms: the Establishment Clause only forbids a federal church,<sup>138</sup> the Free Exercise Clause only forbids targeted religious persecution,<sup>139</sup> and incorporation either never occurred or did not alter these least common denominators at all, or at most simply brought them down from the federal to the state

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137. Shriffrin, *supra* note 10, at 15 (“[T]he religion clauses cannot be explained by reference to equality.”); *see also* Hall, *supra* note 10, at 77 (“[R]eligious equality, though not the only value embedded in the First Amendment Religion Clauses, is an important value . . .”).

138. *See, e.g.*, SMITH, *supra* note 45, at 21 (indicating that the religion clauses struck a compromise between the traditionalists, who favored government support for religion, and the voluntarists, who opposed it, by assigning the matter to the jurisdiction of the states); *see also* AMAR, *supra* note 113, at 248 (recounting such a federalist understanding of the Establishment Clause); CURRY, *supra* note 94, at 207–08 (describing arguments of critics of the *Everson* decision who contended that the Establishment Clause “was intended only to ban a state religion”); *cf.* GERARD A. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987) (suggesting a sect-equality understanding of the Establishment Clause as opposed to a no-aid-to-religion understanding).

139. *See* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (holding that Free Exercise Clause protections “pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons,” since historically it was religious persecution that concerned its drafters). Targeting, however, is a concept that might encompass equality concerns.

level.<sup>140</sup> Though perhaps neither says exactly this, recent opinions from the pens of Justices Thomas and Scalia at least hint at and sometimes assert much of it.<sup>141</sup>

From what appears to be the other end of the political spectrum, Steven Shiffrin has recently argued that there are seven values underlying each of the religion clauses, and that the courts should consider all of them, as they suggest their relevance, in every Establishment and Free Exercise case.<sup>142</sup> While not abandoning equality or eliminating entirely the need to ascertain what it is, this theory would certainly downplay its significance.<sup>143</sup>

Finally, we might try to focus on something other than equality per se. Taking a more middle-of-the-road approach, one could envision the essential command of both religion clauses not as requiring either formal or substantive equality, but rather as forbidding the government from skewing private choice in matters of religion. Private choice could be skewed either through significant selective aid (Establishment Clause) or through significant selective burden on religious action when such is not necessary (Free Exercise Clause).<sup>144</sup> This interpretation of First Amendment purpose would not obviate the difficult determinations needed to decide individual cases, but it might take them out of the confusing and elusive world of equality-speak.<sup>145</sup>

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140. See, e.g., Conkle, *supra* note 105, at 1139 (“There is substantial historical evidence . . . that . . . the framers and ratifiers of the fourteenth amendment did not intend to incorporate the establishment clause for application against the states.”); see also *supra* notes 113–16 and accompanying text.

141. See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854, 2864–68 (2005) (Thomas, J., concurring); *McCreary County v. ACLU*, 125 S. Ct. 2722, 2748–64 (2005) (Scalia, J., dissenting).

142. Shiffrin, *supra* note 10 at 13–15. Shiffrin maintains that he is not calling for ad hoc balancing in all cases, *id.* at 15, but it is difficult to distinguish his analysis from just that.

143. *Id.* at 15 (“I argue that the religion clauses cannot be explained by reference to equality.”); *id.* at 16 (“Deviations from religious equality are not always fatal. . . . Similarly, compliance with religious equality should not always pass muster under the religion clauses.”); *id.* at 17 (“[R]eligious equality cannot possibly be achieved in a diverse society.”).

144. See, e.g., Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 693 (1968) (suggesting that the Establishment Clause “should be read to prohibit only aid which has as its motive or substantial effect the imposition of religious belief or practice,” which is “the core value” of the clause); *id.* at 723 (explaining why the no-aid principle is preferable to an equal-aid principle); *id.* at 728 (arguing that perfect neutrality is neither possible nor the fundamental establishment value). Although the text uses the term “selective” to modify “aid” and “burden,” and thereby might suggest some comparative measurement, the proposal need not require the full realm of equality determinations discussed earlier.

145. One suspects that equality discussions would seep into the application of this principle as well. For example, in determining what is “selective” aid to religion (under Establishment) or a “selective” burden on religious action (under Free Exercise), comparisons, and thus notions of equality, could easily play a role.

Or maybe it would not. Even if it were possible to interpret the religion clauses in a non-equality-based way, there is still the Equal Protection Clause to contend with. Reading equality out of the First Amendment would probably only lead to its resurrection under the Fourteenth Amendment (and through reverse incorporation, the Fifth).<sup>146</sup> We seem drawn inexorably to the ideal of equality in all areas of public life, religion being just one among many. If only we could agree on what it means. Whichever side one finds affinity with in the matter of religion and government, equality and its concomitant confusions are likely to be part of the common vocabulary and unlikely to shed much light on the debate.

Even if this journey does not bring us to a satisfactory point in ascertaining or avoiding the meaning of religious equality, perhaps the historical account compiled above might instead lead to a useful understanding of American religious freedom, as it is embodied in the religion clauses. Three historically consistent points seem to emerge: First, most Americans have always and continue generally to express a belief in a god or supernatural spirit of some sort. Second, we generally respect the idea or value of religion, whether or not we ourselves embrace religion and whether or not we find fault with particular or all organized religions. Third, we have always subscribed at least to an ideal of religious tolerance and non-denominationalism.

Even those public figures who displayed ambiguous attitudes toward, or engaged in ambiguous practices with regard to, religion in general, or to their own personal religion in particular, seemed to count themselves as believers. In the early years, this pro-belief attitude took the form of adherence to and public expressions of Protestant Christianity. While there was more than a bit of actual religious intolerance, at least formally Americans espoused the ideals of tolerance and non-denominationalism within their Protestant Christianity.

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146. Equal Protection is largely omitted, at least formally, from religion and government analyses because the religion clauses seem to have been read to cover whatever equality component might be afforded constitutionally to religion. *See, e.g.*, Rutherford, *supra* note 2, at 1084 (footnote omitted):

Although a few cases implicitly apply an equal protection analysis to religious discrimination, courts rarely deal directly with the issue of discrimination on the basis of religion. Instead, claims of discrimination on the basis of religion typically are recast as free exercise claims. As a result, the appropriate level of scrutiny for religious discrimination is unclear.

*Id.* If this reading were to change, the door would be open to applying the Equal Protection Clause in its own right. At least some of the problems of analyzing religion in equality terms that are mentioned herein, if not all, would reappear, now under the guise of Equal Protection Clause analysis. *See generally* Meyler, *supra* note 10 (discussing the historical and proper relationships between free exercise and equal protection).

Today we are more pluralistic, but the basic dynamic of our attitudes about religion and the church-state relationship seems similar. That is, as a general matter, most still seem to accept that it is a good thing to have a religion, whatever it may be, or at least to believe in a god or overarching spirit of some sort. Likewise, most also generally appear willing to tolerate some level of public expression of religiosity, at the very least “minor” instances of ceremonial deism, such as “In God We Trust” on our coins, or a solemn prayer at a public ceremony to honor those killed on September 11, 2001. Moreover, we also generally seem to agree that denominational preference is unacceptable, and we have broadened our non-preferentialism to encompass not only *all* Christians but also, at a minimum, mainstream religious faiths.

Using these principles of common agreement as a guide, one could imagine the translation of earlier apparently acceptable acts of religious affirmance to modern equivalents. Just as an example—and these are only meant to illustrate the point, not to argue for or against adopting these, or any, translations—reciting Protestant prayers at government sponsored events might now take the religiously milder, less denominational form of singing “God Bless America.” Teaching of Christian texts and precepts in public schools might now mean that non-denominationally available school vouchers are sometimes acceptable instead. Or, public days of fasting, thanksgiving, and prayer might now translate into allowing religious symbols in public parks on relevant occasions, as long as all religions are permitted to display theirs in due course.

Whether this particular or some other translated version of our historical commonality is desirable, supportable, or possible is a different matter entirely, and a subject for another treatise.<sup>147</sup> Not only is the idea of updating historical practices open to debate, but on a practical level, certainly translation raises its own set of attendant difficulties of interpretation and application. The suggestion here is only that accepting the view that we never quite knew just what we wrought when we fashioned the religion clauses does not necessarily doom us to live in a perpetual state of confusion. Perhaps something useful may be salvaged from the possible historical ambiguity in the understanding of American religious freedom, and from the fundamental disagreement about the meaning of religious equality that ensues from that uncertain understanding.

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147. Though he discusses it in different terms, one could argue that an example of a different sort of translation is contained in recent writings of Noah Feldman. *See, e.g.*, FELDMAN, *DIVIDED BY GOD*, *supra* note 125; Feldman, *A Church-State Solution*, *supra* note 125.