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# RELIGIOUS FREEDOM AND THE FIRST SELF-EVIDENT TRUTH: EQUALITY AS A GUIDING PRINCIPLE IN INTERPRETING THE RELIGION CLAUSES

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*[T]hey came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me, and by that time no one was left to speak up.*

— Martin Niemöller<sup>1</sup>

## I. INTRODUCTION

### A. *The First Self-Evident Truth*

The sad legacy of Nazi Germany is unquestionably the clearest testament of the dangers of discriminatory government classifications. With the United States' constitutional commitment to equality, one is tempted to feel confident that the slightest discrimination is subject to strong public scrutiny and criticism, if not judicial redress, even if the discrimination is far less horrific than the atrocities of the Second World War. That aspiration, however, underestimates the subtlety of inequality and overestimates the visibility of its consequences. Indeed, it is not blind, ignorant hatred alone that fuels discrimination; nor does unquestioning acceptance of just legal form snuff out its flame. Ideas and convictions are the first defenses against tyranny. Without the protections of the First Amendment, all other liberties are

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<sup>1</sup> BARTLETT'S FAMILIAR QUOTATIONS 684 (Justin Kaplan ed., 16th ed. 1992).

hollow, including the equality embodied in the Fourteenth Amendment.

John Adams, Charles Carroll, Thomas Jefferson, and John Penn were among the many signers of the Declaration of Independence who knew it to be self-evident "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, [and] that among these are life, liberty, and the pursuit of happiness."<sup>2</sup> Roger Williams and Martin Luther King, Jr. knew the importance of equality.<sup>3</sup> Despite their best efforts and our nation's continual discovery and acceptance of the breadth of the first "self-evident" truth, one last, great vestige of government-directed discrimination still persists and is sanctioned under law: discrimination on the basis of religion or religious belief. The equal right of religious people to think differently, entertain unique beliefs, and speak up against immoral and evil action, even if directed by the government, has always been the first defense against tyranny. This is the first truth, which Hitler understood and which, unfortunately, became evident to Martin Niemoller only through experience.

### B. *Religious Classifications*

The Supreme Court has sought repeatedly to guard against religious classifications that place religious individuals at an advantage because of their religion, and thus violate the Establishment Clause.<sup>4</sup> At the same time, the Court has warned against the use of religious classifications to shackle religious citizens with unique disabilities or to exclude them from the equal enjoyment of certain general government benefits.<sup>5</sup> Such government action violates the Free Exercise Clause. The Court, however, has discarded the original meaning of the Religion Clauses,<sup>6</sup> and has ignored too frequently

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<sup>2</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>3</sup> Williams observed:

It is the will and command of *God*, that (since the coming of his Son the *Lord Jesus*) a *permission* of the most *Paganish, Jewish, Turkish, or Antichristian consciences* and *worships*, be granted to *all men* in all *Nations* and *Countries*: and they are only to be *fought* against with that *Sword* which is only (in *Soul matters*) *able to conquer*, to wit, the *Sword of God's Spirit*, the *Word of God*.

ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION* (1644), *reprinted in* 3 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 3 (Russell & Russell 1963).

Similarly, Dr. Martin Luther King, Jr. noted:

An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is *difference* made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is *sameness* made legal.

MARTIN L. KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 83 (1964).

<sup>4</sup> See, e.g., *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994).

<sup>5</sup> See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993).

<sup>6</sup> The Religion Clauses of the First Amendment state that "Congress shall make no

the Clauses' relationship to the rest of the Constitution. Consequently, the Court's religious freedom cases are often logically incomprehensible, its First Amendment jurisprudence irreconcilable from one case to the next. The reasoning suffers from a lack of intelligible consistency and constitutional congruency. Despite the Court's window-dressing, its treatment of the Religion Clauses hardly provides a completely integrated jurisprudence.

The parallel state of confusion in which the Court's establishment and free exercise cases languish is the result of a departure from the original intent of the framers and ratifiers of the First Amendment. First, the Supreme Court trespassed unwisely in the people's sphere of authority, judicially amending the Constitution to apply the First Amendment to the states.<sup>7</sup> While this was, and is, a black-eye upon the institutional integrity and constitutional authority of the Court, it has become arguably less controversial, from a practical standpoint, considering the religious diversity of the United States. The Court's second departure from the historical understanding of the Constitution is not ignored so easily. In tossing away the First Amendment's federal flavor, the Court unwittingly ignored the key ingredient in the Framers' concept of religious liberty—the overriding principle of equality of religious choices. Finally, with this omission, the Court began to depart from the concept of the First Amendment Religion Clauses as two prohibitions working together to ensure the equal protection of what has been called the "First Liberty":<sup>8</sup> the freedom to make voluntary choices regarding religious exercise. As early champions of freedom in the New World understood, without religious liberty, no other freedoms could thrive. Thus, while the Court's unfaithfulness to the text and history of the Constitution by departing from the federalism limit on the First Amendment has led only to a jurisprudential disaster, its latter two indiscretions, left unrepentant, have led to a jurisprudential and practical nightmare, breeding legal confusion and government-enforced religious discrimination.

This Article addresses the confusion created by the Court's departure from the original meaning of the Religion Clauses. That confusion is analyzed by examining the Court's establishment and free exercise cases. Most of the scrutiny is focused on the establishment test expounded in *Lemon v. Kurtzman*,<sup>9</sup> and its application to government treatment of religion and reli-

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law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

<sup>7</sup> See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the First Amendment so as to apply equally to the states).

<sup>8</sup> See WILLIAM L. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* (1986).

<sup>9</sup> 403 U.S. 602 (1971). In accordance with the *Lemon* test, in order to survive Establishment Clause scrutiny, government action must: (1) reflect a clearly secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. *Id.* at 612-13.

gious citizens in government-controlled education. Part II scrutinizes *Lemon's* logic as applied by lower courts, and as avoided by the Supreme Court in numerous cases where side-stepping *Lemon's* requirements seemed prudential and efficient to the justices. The Court's free exercise jurisprudence is then examined, revealing much of the same logical and historical unfaithfulness prevalent in *Lemon*. In Part III, an alternative test is proposed, one emphasizing equality as the overriding principle to guide adjudication of Religion Clauses cases. This principle is faithful to the Religion Clauses' original purpose of protecting equality of religious choice, a familiar goal of the Court's Establishment Clause jurisprudence prior to *Lemon*, and a useful principle in subsequent cases where the Court has wished to free itself from the burden of *Lemon's* illogic. Similarly, the equality principle is equally cognizable in cases traditionally categorized as raising issues of religious free exercise. The equal protection of all citizens, religious or nonreligious, in voluntarily choosing whether to exercise religion, is only possible with an adequate understanding of the equality principle as it applies to issues of religious voluntarism. When the unique aspect of religious exercise is considered, religious classifications that protect religious liberty are shown to be consistent with, and in furtherance of, the equality principle.

The Religion Clauses contain two prohibitions that exist to preserve the liberty to make voluntary choices regarding religion. These prohibitions are designed to protect against two distinct types of government actions which interfere with religious liberty. In order to attain its purpose of protecting the religious rights of all Americans, the prohibitions of the Religion Clauses must be read together. This Article will give the Religion Clauses a comprehensive and intelligible interpretation that is consistent with its original purpose and in harmony with the other clauses of the First Amendment.

## II. A JURISPRUDENCE OF CHANCE

### A. *The Need to Define Religion's Role in the Marketplace*

Since *Everson v. Board of Education*,<sup>10</sup> the Court has grappled frequently with governmental activity within the religious sphere. In recent years, the *Lemon* test has been used most consistently to judge alleged violations of the Establishment Clause. Set forth in *Lemon v. Kurtzman*,<sup>11</sup> the test requires that to survive constitutional scrutiny, government action must:

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<sup>10</sup> 330 U.S. 1 (1947). In *Everson*, the Supreme Court upheld a New Jersey statute that permitted government reimbursement of public transportation costs of students in parochial schools. *Id.* at 18.

<sup>11</sup> 403 U.S. 602 (1971) (holding unconstitutional Pennsylvania and Rhode Island statutes that permitted direct government support of parochial schools in the form of teachers' salary supplements, textbooks, and secular instructional materials).

(1) have a secular legislative purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion.<sup>12</sup> The Court applies the *Lemon* test only haphazardly; in a growing number of cases, the Court has resolved Establishment Clause claims without any substantive discussion of the *Lemon* test or any apparent application of the test to the decision.<sup>13</sup> Yet, *Lemon* lives on, leaving the Court's Establishment Clause jurisprudence in disarray, resulting in a torturous interpretation of the limits within which government and religion may interact.

Members of the Supreme Court have warned of the inherent dangers of a jurisprudence that lacks sound historical and traditional grounding, resting instead on catchy phrases and neat tests. In *McCollum v. Board of Education*,<sup>14</sup> Justice Reed noted that a "rule of law should not be drawn from a figure of speech."<sup>15</sup> Justice Jackson agreed that without guarded caution, the Court would "make the legal 'wall of separation between church and state' as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded."<sup>16</sup> A year prior to penning the *Lemon* test, Chief Justice Burger explained that "[t]he considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."<sup>17</sup> Even while introducing the *Lemon* test, the Chief Justice warned that the Court should not "engage in a legalistic minuet in which precise rules and forms must govern."<sup>18</sup>

With equal consistency, the Court has warned against government hostility towards its citizens because of their religion. In *Zorach v. Clauson*,<sup>19</sup> the Court discussed the impermissibility of governmental hostility toward religion. Dismissing the idea that government may not accommodate the "spiritual needs" of the citizenry, the Court declared:

To hold that [government] may not [accommodate religion]

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<sup>12</sup> *Id.* at 612-13.

<sup>13</sup> See, e.g., *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994); see also *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228, 252 (1982) (holding that the *Lemon* test is not necessary for analysis of patent discrimination against a church).

<sup>14</sup> 333 U.S. 203 (1948).

<sup>15</sup> *Id.* at 247 (Reed, J., dissenting).

<sup>16</sup> *Id.* at 237-38 (Jackson, J., concurring).

<sup>17</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

<sup>18</sup> *Lemon*, 403 U.S. at 614.

<sup>19</sup> 343 U.S. 306 (1952) (upholding a released-time program for religious instruction away from public school property).

would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups, nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.<sup>20</sup>

This view was reiterated in *Lynch v. Donnelly*,<sup>21</sup> in which the Court declared that the Constitution "forbids hostility" toward any religion.<sup>22</sup> Finally, in *McDaniel v. Paty*,<sup>23</sup> Justice Brennan agreed to strike down a provision that barred clergy from serving as state legislators, noting that it violated the Establishment Clause because it manifested "patent hostility toward, not neutrality respecting, religion," and had the "primary effect" of inhibiting religion.<sup>24</sup>

The religious heritage of the American people also dictates that government not be hostile to religion. In *Zorach*, the Court noted:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.<sup>25</sup>

The Court reiterated this view eleven years later, when it observed:

The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This back-

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<sup>20</sup> *Id.* at 314.

<sup>21</sup> 465 U.S. 668 (1984).

<sup>22</sup> *Id.* at 673.

<sup>23</sup> 435 U.S. 618 (1978).

<sup>24</sup> *Id.* at 636 (Brennan, J., concurring in judgment).

<sup>25</sup> *Zorach*, 343 U.S. at 313.

ground is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God."<sup>26</sup>

When the government shows hostility toward religion it is "at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."<sup>27</sup>

Hostility towards religion robs American democratic institutions of a major source of the values that justify their existence. The American political tradition presupposes a government that does not seek to shape its people's values, but rather is itself shaped by them.<sup>28</sup> Accordingly, religion traditionally has played a central role in the development of public virtue:

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.<sup>29</sup>

Governmental hostility towards religion is antithetical to the American experience; without a respect for and understanding of religion, the very fabric of western society, its history, and the moral authority of many of its laws are cut adrift.<sup>30</sup>

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<sup>26</sup> *School Dist. v. Schempp*, 374 U.S. 203, 213 (1963).

<sup>27</sup> *McDaniel*, 435 U.S. at 639 (Brennan, J., concurring in judgment) (quoting *McColum*, 333 U.S. at 211-12). Similarly, in *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court declared:

Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

*Id.* at 676-77 (validating tax exemptions for religious property).

<sup>28</sup> This tradition is expressed in our nation's law, which "knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871).

<sup>29</sup> *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

<sup>30</sup> As one commentator noted:

True political liberty is the child of religious liberty. It must look to freedom of the soul as a child does to its mother for birth, protection, and provision. Political anarchy is the usual result of a people seeking full liberty by ignoring or neglecting the support which religion brings to man's moral nature. It is a long road to political liberty, but it is a road which has run parallel with religious liberty.



### B. *Driving Religion Out of the Marketplace*

Despite opinions eschewing even the appearance of hostility to religion, the Supreme Court's First Amendment jurisprudence readily lends itself to the fomenting of such hostility. *Lemon's* shallow roots in our history of religious freedom, and the ease with which its prongs may be used to bump religious expression and liberty into a second-class status in the marketplace of ideas, have brought about the very confusion and hostility that it sought to avoid. The justices have refused to listen to their own devout counsel. Five justices of the current Court have expressed their discomfort with one aspect or another of the *Lemon* test,<sup>31</sup> yet it continues to plague the Court's Religion Clauses jurisprudence. *Lemon's* longevity, despite its indefensibility, is probably due to its usefulness. As Justice Scalia explained:

When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.<sup>32</sup>

Those instances in which the Court has ignored *Lemon* suggest that some Justices have been tempted to apply an equality principle at various times since *Lemon's* creation.<sup>33</sup> The cases in which the Court has invoked *Lemon*, or paid it homage by deferring to its "helpful" guidance, demonstrate the inequality the sometimes untamed test tolerates at the expense of religious citizens.

Even though the Supreme Court has never enshrined the analysis presented in *Lemon* as a rigid test for resolving Establishment Clause claims, lower courts have made the *Lemon* test the sole means for winnowing out

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ARTHUR B. STRICKLAND, ROGER WILLIAMS: PROPHET AND PIONEER OF SOUL-LIBERTY 140 (1919).

<sup>31</sup> See *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2498-500 (1994) (O'Connor, J., concurring in judgment); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2414, 2149-50 (1993) (Scalia, J., joined by Thomas, J., concurring in judgment); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in part); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting).

<sup>32</sup> *Lamb's Chapel*, 113 S. Ct. at 2150 (Scalia, J., concurring in judgment) (citations omitted).

<sup>33</sup> See *infra* part III.B.

instances in which government has become excessively entangled with religion. Unfortunately, rigid and mechanical application of the vaguely understandable yet easily manipulable *Lemon* test often leads to absurd results. These results reflect the breadth of confusion that plagues courts that reflexively apply the *Lemon* test to every sort of Establishment Clause case. Although some of these decisions seem amusing, they all bear the scent of that "relentless extirpation of all contact between government and religion," which inaccurately or inadequately reflects "the history or the purpose of the Establishment Clause."<sup>34</sup> Such absurdity is not required by the text of the First Amendment, nor was it intended by its Framers.

Currently the Court has before it a case that demonstrates the problems with singling out religion and religious adherents for special disabilities in the provision of government services. *Rosenberger v. Rector of the University of Virginia*<sup>35</sup> demonstrates that, in light of the logical inconsistencies of *Lemon*, a new test for interpreting the Religion Clauses is needed. Perhaps the Court will view *Rosenberger* as "the proper case . . . to bring [its] Establishment Clause jurisprudence back to . . . the proper track—government impartiality, not animosity, towards religion."<sup>36</sup> *Lemon* and its progeny, "cases . . . so hostile to our national tradition of accommodation,"<sup>37</sup> should be clarified or overruled where appropriate so as to recognize the principle of neutrality through equality embodied in the thinking of the Founders, the traditions of this nation, and the text of the First and Fourteenth Amendments.

### 1. *The Secular Purpose Prong*

The Supreme Court treats *Lemon*'s secular purpose prerequisite as tolerating legislation if it has *any* secular purpose.<sup>38</sup> Although the Court has used the purpose prong to defeat government action only three times since *Lemon*,<sup>39</sup> it poses a significant threat of confusing lower courts and abusing religious liberty.

Justice O'Connor noted recently that "[w]hat makes accommodation permissible, even praiseworthy, is . . . that the government is accommodat-

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<sup>34</sup> *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part).

<sup>35</sup> 18 F.3d 269 (4th Cir.), cert. granted 115 S. Ct. 417 (1994). For a brief description of *Rosenberger*, see *infra* notes 61-69 and accompanying text.

<sup>36</sup> *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., concurring in judgment); see also *id.* at 2505 (Kennedy, J., concurring in judgment).

<sup>37</sup> *Id.* at 2515 (Scalia, J., dissenting).

<sup>38</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (noting that "a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion") (emphasis added).

<sup>39</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 585-89 (1987); *Wallace*, 472 U.S. at 56; *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

ing a deeply held belief.”<sup>40</sup> When, however, exemptions are provided on a nondiscriminatory basis, the purpose of the legislation is to remove burdens on religious freedom; thus, the government’s action “advances” the cause of religion. The secular purpose prong, however, must take account of the fact that “intentional governmental advancement of religion is sometimes required by the Free Exercise Clause.”<sup>41</sup> As Justice O’Connor explained, “[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden.”<sup>42</sup> Accordingly, *Lemon’s* purpose prong, in addition to confusing First Amendment jurisprudence, actually induces tension between the Establishment Clause and the Free Exercise Clause. Legislators are given a multitude of blind choices without guidance, leaving efforts at accommodation futile because of the uncertain status of legislative countenance of minority beliefs under the Establishment Clause.<sup>43</sup>

Not only has the purpose prong “made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional,”<sup>44</sup> but courts have found that “discerning the subjective motivation of those enacting the statute is . . . almost always an impossible task.”<sup>45</sup> This is adequately demonstrated by an examination of the facts in *Edwards v. Aguillard*<sup>46</sup> and *Stone v. Graham*.<sup>47</sup> In *Edwards*, Louisiana State Senator Bill Keith sponsored a bill that required the teaching of evolution and creation science whenever one or the other was taught.<sup>48</sup> After the bill was adopted into law, it was challenged as “establishing” religion.<sup>49</sup> Even though Justice Scalia thoroughly perused the legislative and trial records to cite numerous examples of secular legislative purposes,<sup>50</sup> the majority found these purposes unwise at best, and at worst a sham,<sup>51</sup> if the goal was to achieve “academic freedom.”<sup>52</sup> The majority dismissed Senator Keith’s statements on the legislative floor and at

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<sup>40</sup> *Grumet*, 114 S. Ct. at 2497 (O’Connor, J., concurring in judgment).

<sup>41</sup> *Edwards*, 482 U.S. at 617 (Scalia, J., dissenting).

<sup>42</sup> *Wallace*, 472 U.S. at 83 (O’Connor, J., concurring).

<sup>43</sup> See, e.g., *Grumet*, 114 S. Ct. at 2498 (O’Connor, J., concurring in judgment) (attributing the State’s unconstitutional attempt at accommodation to prior Supreme Court rulings); *id.* at 2505 (Kennedy, J., concurring in judgment) (same).

<sup>44</sup> *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting).

<sup>45</sup> *Id.* (Scalia, J., dissenting).

<sup>46</sup> 482 U.S. 578 (1987).

<sup>47</sup> 449 U.S. 39 (1980).

<sup>48</sup> *Edwards*, 482 U.S. at 581, 587.

<sup>49</sup> *Id.* at 581-82.

<sup>50</sup> *Id.* at 619-26 (Scalia, J., dissenting).

<sup>51</sup> *Wallace*, 472 U.S. at 586-87.

<sup>52</sup> *Id.* at 587-89.

trial that attributed a sincere secular purpose to the legislation.<sup>53</sup> Interestingly, the justices in the majority were the same justices who two years earlier had been willing to rest their decision in *Wallace v. Jaffree*<sup>54</sup> on the word of Alabama State Senator Donald Holmes.<sup>55</sup> Like Senator Keith, Senator Holmes was the sponsor of a bill involving religion and the public schools.<sup>56</sup> Unlike Keith, however, Senator Holmes stated that his bill, providing for a period of silence for meditation or voluntary prayer in public schools, had "no other purpose" than to aid religion by returning voluntary prayer to public school.<sup>57</sup> In *Edwards*, the justices ignored clear legislative evidence, resting its decision on the conclusion that the stated secular purpose, "academic freedom," was improvidently sought after, and thus not a secular purpose at all.<sup>58</sup> In *Wallace*, however, the Court deferred to the "unrebutted evidence of legislative intent."<sup>59</sup> In light of the Court's application of the purpose prong in these two cases, legislators from Louisiana and Alabama, along with everyone else having to reconcile the Court's reasoning, must be left in silent awe of *Lemon*'s versatility.<sup>60</sup>

In the hands of the zealous lower courts, *Lemon* has justified outlandish, and sometimes hypocritical, results. In *Rosenberger v. Rector of the University of Virginia*,<sup>61</sup> the Fourth Circuit demonstrated the extent to which the

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<sup>53</sup> *Id.* at 620-25 (Scalia, J., dissenting).

<sup>54</sup> 472 U.S. 38 (1985).

<sup>55</sup> See *id.* at 39 (majority opinion by Stevens, J., joined by Brennan, Marshall, Blackmun, and Powell, JJ.); *Edwards*, 482 U.S. at 579 (majority opinion by Brennan, J., joined by Marshall, Blackmun, Powell, and Stevens, JJ.).

<sup>56</sup> *Wallace*, 472 U.S. at 56-57.

<sup>57</sup> *Id.* at 57.

<sup>58</sup> *Edwards*, 482 U.S. at 586-87.

<sup>59</sup> *Wallace*, 472 U.S. at 58. As Justice Powell observed, in the context of Establishment Clause issues, "interference with the decisions of [government] authorities is warranted only when the purpose for their decisions is *clearly religious*." *Edwards*, 482 U.S. at 605 (Powell, J., concurring) (emphasis added). Apparently, in both *Edwards* and *Wallace*, the "clear" and "unrebutted" evidence of purpose allowed the Court to skirt *Lemon*'s permitted justification of "any" secular purpose.

<sup>60</sup> The legislators from Louisiana must have been particularly confused. The Court in *Wallace* noted that "[t]he legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday," *Wallace*, 472 U.S. at 59, suggesting that it is the thought behind legislation that counts. Nevertheless, the Court in *Edwards* revealed that it is not how you play the legislative game, but whether the Court desires your legislation to win or lose. The Court's pole vault from *Wallace* to *Edwards* brings to mind the counsel of Spinoza: "He who seeks to regulate everything by law, is more likely to arouse vices than reform them." BENEDICT DE SPINOZA, *TRACTATUS THEOLOGICO-POLITICUS*, reprinted in 1 *THE CHIEF WORKS OF BENEDICT DE SPINOZA* 261 (R.E. Elwes trans., Dover 1955).

<sup>61</sup> 18 F.3d 269 (4th Cir.), cert. granted, 115 S. Ct. 417 (1994).

purpose prong may be manipulated. Ronald Rosenberger challenged the University of Virginia's policy of excluding religious groups from eligibility for reimbursement of certain operating expenses that were provided to other groups and organizations from a fund supported by mandatory full-time student contributions.<sup>62</sup> After concluding that the university's discrimination was a presumptive burden on the enjoyment of a government benefit in violation of the Free Speech and Press Clauses, the Fourth Circuit determined nonetheless that a fear of violating the Establishment Clause was sufficiently compelling to justify the unconstitutional condition.<sup>63</sup>

Analyzing *Lemon* to demonstrate the possible Establishment Clause problems of equal funding for religious organizations, the court in *Rosenberger* deferred to the university's conclusion that the funding of religious activities would not further its "educational mission."<sup>64</sup> The conclusion was made even though religious discussion and education was a part of the university's academic curriculum.<sup>65</sup> Under this application of *Lemon*'s purpose prong, the university was allowed to define religion out of the marketplace of ideas. After approving this discriminatory subterfuge, the court then suggested that the university's "secular purpose" was to avoid "an establishment of religion at the institution."<sup>66</sup> As long as the discrimination was carried out "in a manner consistent with the educational purpose of the University [which was conveniently defined to allow such discrimination] as well as with state and federal law,"<sup>67</sup> which the court interpreted to require the discrimination because of the Establishment Clause, there was no First Amendment problem.<sup>68</sup> Accordingly, the discrimination did not offend the Establishment Clause because the "secular purpose" was to discriminate against religion in order to avoid offending the Establishment Clause.<sup>69</sup>

The Supreme Court's failure to recognize "that determining the subjec-

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<sup>62</sup> *Id.* at 270-71. The amount of funding given to groups depended on the group's size, the benefits conferred on the university community by the group, and the group's financial self-sufficiency. *Id.* at 271. The guiding principle in administering the fund was to promote the educational mission of the university. *Id.* The policy excluded religious organizations, fraternities and sororities, political organizations, and groups with exclusionary membership policies from funding. *Id.* In addition to the aforementioned organizations, "[t]he following expenditures and activities also [were] excluded by the guidelines: (1) honoraria or similar fees; (2) religious activities; (3) social entertainment and related expenses; (4) philanthropic contributions and activities; and (5) political activities." *Id.* (footnote omitted).

<sup>63</sup> *Id.* at 287.

<sup>64</sup> *Id.* at 284.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 283 (quoting the university's "Student Activity Fee Statement of Purpose").

<sup>68</sup> *Id.* at 284.

<sup>69</sup> *Id.*

tive intent of legislators is a perilous enterprise”<sup>70</sup> was compounded in *McDaniel v. Paty*.<sup>71</sup> In *McDaniel*, the plurality held that a Tennessee statute unconstitutionally abridged the free exercise of religion by disqualifying members of the clergy from service as legislators.<sup>72</sup> Yet, if *Lemon*’s purpose prong is read broadly to forbid religious motivation, not only clergy-legislators but all legislators must shed their religious faith before voting. While a pharmacist, engineer, or lawyer may bring the expertise garnished from their professions to tasks such as drafting and voting on legislation, a person of deep religious faith may not. If *Lemon* is taken to its logical conclusion, the pharmacist must also dispense with religious motivations. This is simply an example of the most basic problem with *Lemon*’s purpose prong; its results depend on a fictional formula for deciding the ratio of religious motives to other motives for government action.<sup>73</sup>

## 2. *The Effect Prong*

The second prong of the *Lemon* test requires that the “principal or primary effect [of government action] must be one that neither advances nor inhibits religion.”<sup>74</sup> Since *Lemon*, the Supreme Court has only once struck down government action as “inhibiting” religion.<sup>75</sup> This is not surprising, as a true and faithful application of the effects prong is almost impossible without striking down all government action containing religious classifications. As Justice Frankfurter explained:

By its nature, religion—in the comprehensive sense in which the Constitution uses that word—is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives. Religious beliefs pervade, and

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<sup>70</sup> *Edwards v. Aguillard*, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting).

<sup>71</sup> 435 U.S. 618 (1978) (plurality op.).

<sup>72</sup> *Id.* at 629. Justice Brennan agreed that “because the challenged provision requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion.” *Id.* at 634 (Brennan, J., concurring in judgment).

<sup>73</sup> *See Edwards*, 482 U.S. at 636-37 (Scalia, J., dissenting) (noting that it is impossible to determine purpose of a statute because each individual legislator may have several motives for supporting legislation).

<sup>74</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>75</sup> *See Larson v. Valente*, 456 U.S. 228 (1982). Even in *Larson*, the Court observed that its application of the *Lemon* test was superfluous to the outcome of the case. *Id.* at 252. Indeed, the conclusion that the government’s action inhibited religion was based on an overriding principle of equality among religious denominations gleaned from the writings of James Madison and the Court’s prior missives regarding “neutrality.” *Id.* at 245-46.

religious institutions have traditionally regulated, virtually all human activity. . . . State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.<sup>76</sup>

Similarly, as an eight member Court noted in *School District v. Schempp*:<sup>77</sup>

It can be truly said . . . that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are "earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing.]"<sup>78</sup>

Clearly, every government action will, in some respect, either advance or inhibit those institutions which pervade virtually all human activity and those beliefs which guide its citizens into every measure which may be worthy. Like the purpose prong, *Lemon's* effect prong is unworkable as a model for distinguishing between those government actions that only act to advance religion by its establishment, and those actions that advance religious freedom through its accommodation.

In *Larson v. Valente*,<sup>79</sup> the Supreme Court reviewed a state program that exempted certain religious organizations, based upon the source of contributions, from the registration and reporting requirements of a charitable solicitation act.<sup>80</sup> In finding that the exemption violated the Establishment Clause by discriminating against religious organizations that did not qualify for the exemption, the Court denounced denominational preferences

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<sup>76</sup> *McGowan v. Maryland*, 366 U.S. 420, 461-62 (1961) (Frankfurter, J., concurring in judgment); see also *School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (noting that "[n]either government nor this Court can or should ignore the significance of the fact that . . . many of our legal, political and personal values derive historically from religious teachings"); cf. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (stating that "[s]hort of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference").

<sup>77</sup> 374 U.S. 203 (1963).

<sup>78</sup> *Id.* at 213 (alteration in original) (citation omitted).

<sup>79</sup> 456 U.S. 228 (1982).

<sup>80</sup> *Id.* at 230-32. The exemption was only given to those religious organizations that received greater than one half of their contributions from members or affiliated organizations. *Id.* at 231-32.

as inconsistent with the free exercise of religion.<sup>81</sup> Noting that government must treat all religions equally,<sup>82</sup> the Court suggested that the act violated the *Lemon* test, but only after hedging *Lemon* as applicable to actions touching upon religion generally, rather than actions discriminating among religions.<sup>83</sup> This suggestion revealed the Court's strategy; selective application of the test permits the Court to avoid the restraints of *Lemon*. The Court was willing to recognize that public aid of religion *A* inhibits religion *B* and all other religions not subsidized, but was not willing to admit that public aid of idea or philosophy *A* inhibits religion *A* and *B* and all other religious ideas not subsidized. The Court's supreme tinkering with logic and language is evident from what is not said in *Larson*. While citing several cases for precedential proclamations of equality among religions, the Court omitted conspicuously the language from those cases warning that nonreligion should not be preferred over religion in general.<sup>84</sup> After the Court's ellipses are removed, it becomes clear that government funding of every idea, organization, or citizen to the exclusion of religion and religious citizens who otherwise qualify for government funding inhibits religion in the same way that funding religion *A* inhibits religion *B*. This indefensible

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<sup>81</sup> *Id.* at 255.

<sup>82</sup> *Id.* at 246 (citing *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) ("[N]o state can 'pass laws which aid one religion' or that 'prefer one religion over another.'"); see also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion . . ."); *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("[G]overnment must be neutral when it comes to competition between sects.").

<sup>83</sup> *Larson*, 456 U.S. at 252.

<sup>84</sup> See, e.g., *Epperson*, 393 U.S. at 104 ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Schempp*, 374 U.S. at 218 (quoting *Everson*, 330 U.S. at 18); *id.* at 220 (quoting *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961)) ("[N]either a State nor the Federal Government . . . can constitutionally . . . pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."); *id.* at 225 (quoting *Zorach*, 343 U.S. at 314) ("We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'"); *Zorach*, 343 U.S. at 314 (To hold that the state may not "encourage[] religious instruction or cooperate[] with religious authorities . . . would be to find in the Constitution a requirement that the government show a callous indifference to religion groups[,] . . . preferring those who believe in no religion over those who do believe."); *Everson*, 330 U.S. at 16 (stating that government cannot "exclude individual[s] . . . because of their faith, or lack of it, from receiving the benefits of public welfare legislation"); *id.* at 18 (holding that the First Amendment "requires the state to be a [sic] neutral in its relations with groups of religious believers and non-believers").



twist of *Lemon* is one more reason the test has produced logical inconsistencies within the Court's jurisprudence.

The more fundamental concern is that when lower courts zealously and reflexively apply the Supreme Court's discriminatory, yet authoritative logic found in *Lemon*'s effect prong, religious citizens are singled out for discrimination in the provision of government benefits. Government action often benefits a wide range of activities and institutions that include religious bodies and individuals. In *Rosenberger*, the Fourth Circuit approved the University of Virginia's policy of taking fourteen dollars per semester from every full-time student to support a "wide variety of student organizations, activities, and publications,"<sup>85</sup> so long as those activities were not, *inter alia*, political or religious.<sup>86</sup> Amazingly, the Fourth Circuit held that this discrimination does not "inhibit" religion.<sup>87</sup>

The university subsidizes those groups that check their political and religious beliefs at the door. Those refusing to do so are allowed on the playing field, but they are forced to shoulder personally the cost of their own participation, while helping to subsidize all other groups. In the economic marketplace, the notion that unequal subsidization would not inhibit a taxed but unsubsidized competitor is not only unpersuasive, it is poor economic theory. In the marketplace of ideas, the theory is no more persuasive or legitimate. As Justice Brennan has explained: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' [rather] than through any kind of authoritative selection."<sup>88</sup> In *Rosenberger*, the selective provision of general funds was at the heart of the university's "authoritative selection" process. Religious and political ideas had to compete with philosophical and cultural ideas, among others, after giving them an assisted head start.<sup>89</sup> It is astoundingly illogical to conclude that the university's policy did not inhibit religion.<sup>90</sup>

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<sup>85</sup> *Rosenberger v. Rector of the Univ. of Va.*, 18 F.3d 269, 270 (4th Cir.), *cert. granted*, 115 S. Ct. 417 (1994).

<sup>86</sup> *Id.* at 271.

<sup>87</sup> *Id.* at 285.

<sup>88</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (alteration in original)).

<sup>89</sup> One wonders if the University of Virginia would feel slighted in the least if it were compelled to contribute money to the student recruitment efforts of Duke, North Carolina, and Georgetown, and then join the race to prove itself the more worthy institution of higher learning to the top high school students in America. Thomas Jefferson, the university's founder, certainly would have felt slighted, believing that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." An Act for Establishing Religious Freedom (1785), *reprinted in* VA. CODE ANN. § 57-1 (Michie 1986).

<sup>90</sup> The Fourth Circuit's astonishing conclusion that the university would be advanc-

This conclusion is even more surprising when the consistency of the Fourth Circuit's logic is put to the test. The analysis in *Rosenberger* provides the most compelling evidence of the utter hypocrisy produced by *Lemon*'s application. After painstakingly explaining how the university's provision of support and "sustenance of religion in [several] incidental respects [did] not . . . inhibit religion,"<sup>91</sup> the court suggested that the use of "public funds to support a publication so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation."<sup>92</sup> The court failed to explain how the university's extensive support of the other students' clear propagating was not also a "patent" violation of the same clause.<sup>93</sup>

While *Lemon*'s internal inconsistency is unsurprising, if not entirely expected, the Fourth Circuit took *Lemon* where few enterprising courts have gone before. The court held that the university had "penalize[d]" the religious students freedom of speech by "withholding . . . an otherwise discretionary benefit."<sup>94</sup> This "create[d] an *uneven playing field* on which the advantage [was] tilted towards [organizations] engaged in wholly secular modes of expression."<sup>95</sup> However, after finding such discrimination unconstitutional under the Free Speech Clause, the Fourth Circuit then used *Lemon*'s mutated interpretation of the Establishment Clause to uphold the university's actions, essentially repealing the Free Speech Clause.<sup>96</sup> Miracu-

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ing religion by treating religious groups equally, *Rosenberger*, 18 F.3d at 285, is further evidence of *Lemon*'s invitation to the bizarre. It is as if the university and the lower courts believe religious adherents do not need to be treated equally to compete on par with other philosophical and scientific views in the quest to prove that their religious tenets and ideas are the "truth" of which Justice Brennan wrote. See *supra* note 88 and accompanying text. Religious citizens must have some hidden fountain of wealth that never runs dry, but from the public fountain all nonreligious citizens and groups may drink, and the government even draws the water. Perhaps the Commonwealth of Virginia believes in a miraculous Divinity after all.

<sup>91</sup> *Rosenberger*, 18 F.3d at 285.

<sup>92</sup> *Id.*

<sup>93</sup> In its entanglement analysis, the court simply brushed aside any dispute, emphatically concluding that unlike general in-kind support, the equal provision of cash support is "a beast of an entirely different color." *Id.* at 286. The more apt metaphor is that the latter is simply the third head on a beast the Supreme Court has encountered before. In *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981), and *Zobrest v. School District*, 113 S. Ct. 2462, 2466-69 (1993), two cases recognized by the Fourth Circuit in its *Rosenberger* analysis, the Supreme Court simply tamed two heads of the beast. The Fourth Circuit continued to let the third head tug in an opposite direction of the other two, providing the internal inconsistency in its analysis of both *Lemon*'s effect and entanglement prongs.

<sup>94</sup> *Rosenberger*, 18 F.3d at 281.

<sup>95</sup> *Id.* (emphasis added).

<sup>96</sup> *Id.* at 287.

lously, the "uneven playing field" the court decried was transformed into "neutrality" under *Lemon*.<sup>97</sup> Thus, under the Fourth Circuit's analysis, *Lemon* consumes not only the Establishment Clause, but the also the Free Speech Clause.<sup>98</sup>

The Supreme Court clearly has held that "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."<sup>99</sup> *Lemon's* effect prong, however, gives lower courts license to deny religion or religious people equality in the provision of general government benefits. The Supreme Court then attempts to revoke this license in piecemeal fashion, as it purports to correct the confusion with each new clarification of *Lemon*.<sup>100</sup> The language of *Lemon* lives on, and its inherent confusion reigns in lower courts that tortuously misapply it to the detriment of religion and religious adherents.

### 3. *The Entanglement Prong*

The third and most tangled web of the *Lemon* test prohibits the excessive entanglement of government and religion.<sup>101</sup> As noted above, preventing all entanglement of religion and government is impossible; it is equally unwise. As Justice Brewer explained in *Church of the Holy Trinity v. United*

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<sup>97</sup> *Id.* at 284-85.

<sup>98</sup> The Fourth Circuit completed the demolition with its dicta that the Free Exercise Clause would also support the conclusions reached in the discussion of freedom of speech. *Id.* at 283 n.31. Sadly, the Equal Protection Clause appears to be *Lemon's* next victim. See *id.* at 287-88 (dismissing equal protection claim upon finding that discrimination was not product of a discriminatory intent); cf. *id.* at 281-82 (justifying the differential treatment of religious organizations by recognizing the Commonwealth's compelling purpose of avoiding an Establishment Clause violation). While the Fourth Circuit allows the Commonwealth to eat the cake inconsistent logic has given it, religious citizens are left to shiver outside the government's castle as others enjoy the liberties *Lemon*, in the hands of lower courts, has reserved for the nonreligious aristocracy.

<sup>99</sup> *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).

<sup>100</sup> See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993); *Mergens*, 496 U.S. at 249-50; *Bowen v. Kendrick*, 487 U.S. 589, 607-09 (1988); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986); *Widmar*, 454 U.S. at 273-74.

<sup>101</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). Justice O'Connor and Chief Justice Rehnquist have attributed "many of the inconsistencies in [the Court's] Establishment Clause decisions" to the entanglement web. *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (citing *Wallace v. Jaffree*, 472 U.S. 38, 109-110 (1985) (Rehnquist, J., dissenting)).

*States*.<sup>102</sup>

Every constitution of every one of the . . . States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community.

. . . .

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation.<sup>103</sup>

Justice Douglas reiterated these truths sixty years later, when he stated:

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.<sup>104</sup>

This historical understanding finds contemporary support from Justice Scalia, who recently observed that “those who adopted our Constitution . . . believed that the public virtues inculcated by religion are a public good. . . . Unsurprisingly, then, indifference to ‘religion in general’ is *not* what our cases, both old and recent, demand.”<sup>105</sup> Thus, as justices of the Court have long recognized, some entanglement of the civil and religious is not only inevitable, but quite welcome.

The qualifier “excessive” does not save *Lemon*’s third prong from absurd and confusing results. Indeed, even before *Lemon*, the Court had recognized the paradox inherent in asking government to maneuver one way or the other to avoid excessive entanglement with religion.<sup>106</sup> In *Widmar v.*

<sup>102</sup> 143 U.S. 457 (1892).

<sup>103</sup> *Id.* at 468, 470.

<sup>104</sup> *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

<sup>105</sup> *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2151 (1993) (Scalia, J., concurring in judgment).

<sup>106</sup> See *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970) (acknowledging that elimination of tax exemptions for religious organizations would tend to expand, not contract,

*Vincent*,<sup>107</sup> the Court noted that to exclude all religious groups from a privilege granted to others would risk greater entanglement because government "would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'"<sup>108</sup> Entanglement, then, can mean any number of things. To those adhering to the *Lemon* formula, it has meant most often either political divisiveness over sensitive issues of religious funding or other support of religion, or close administrative involvement of government and religion.<sup>109</sup>

In *Aguilar v. Felton*,<sup>110</sup> the Court reviewed a New York program that used federal education money earmarked for the remedial education of children of low-income families to pay the salaries of regular public educators who provided such instruction on parochial school premises.<sup>111</sup> Only 13.2% of the eligible students in 1981-1982 were private school students.<sup>112</sup> Of those, at least 92% attended religious schools.<sup>113</sup> Six taxpayers filed suit, challenging the inclusion of the private religious school students in the program as a violation of the Establishment Clause. Finding that the program violated the Establishment Clause by entangling government and religion, the Court noted that several supervisory precautions were taken to ensure that the effect of the program did not advance religion, thus violating the Establishment Clause under the *Lemon* entanglement prong.<sup>114</sup>

Writing for the majority, Justice Brennan explained that the entanglement present in the New York program raised two concerns. First, the publicly funded "aid [was] provided in a pervasively sectarian environment," requiring "a permanent and pervasive state presence" in the parochial schools.<sup>115</sup> Apparently, refusing to allow the private religious schools and their students to participate equally with others in a government program supported by federal and state taxes would save the schools from "endur[ing] the ongoing presence of state personnel . . . guard[ing] against

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government involvement with religion).

<sup>107</sup> 454 U.S. 263 (1981).

<sup>108</sup> *Id.* at 272 n.11 (quoting *O'Hair v. Andrus*, 613 F.2d 931, 936 (1979)).

<sup>109</sup> *See Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993).

<sup>110</sup> 473 U.S. 402 (1985).

<sup>111</sup> *Id.* at 404-06. The instruction included "remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services." *Id.* at 406.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 409. Paradoxically, in *School District v. Ball*, 473 U.S. 373 (1985), *Aguilar*'s companion case, the Court struck down a similar program in Michigan as violating the effect prong of *Lemon* because there were no precautions to prevent the advancement of religion. *Id.* at 386-92.

<sup>115</sup> *Aguilar*, 473 U.S. at 412-13.

the infiltration of religious thought" in the program.<sup>116</sup> Second, the daily decisions the government personnel would have to make might offend the religious schools; thus, "the dangers of political divisiveness along religious lines increase[d]."<sup>117</sup> It was, however, logical divisiveness with the Court's reasoning that initiated vehement attacks of the entanglement analysis from the dissenters.

While then Justice Rehnquist noted the obvious "'Catch-22' paradox . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement,"<sup>118</sup> Justice O'Connor wrote a more comprehensive assault on the majority's interpretation. Aside from the realization that the entanglement of religion and government was always a possibility, she exposed the Court's reliance on political divisiveness as illogical. Justice O'Connor found "[i]t . . . curious indeed to base . . . interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit."<sup>119</sup> The Court's entanglement analysis left the government in the same incurable position as the other two prongs of *Lemon*. As Justice White had predicted:

The Court . . . creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.<sup>120</sup>

In *Board of Education v. Grumet*,<sup>121</sup> the Court's most recent foray into interpretation of the Religion Clauses, Justices O'Connor and Kennedy recognized another unfortunate paradox for legislators, this one created by the Court's unpredictable jurisprudence in this area. *Grumet* involved the village of Kiryas Joel in New York, a community consisting entirely of adherents to the Satmar Hasidim form of Judaism.<sup>122</sup> Most of the children

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<sup>116</sup> *Id.* at 413.

<sup>117</sup> *Id.* at 414.

<sup>118</sup> *Id.* at 420-21 (Rehnquist, J., dissenting) (citation omitted).

<sup>119</sup> *Id.* at 429 (O'Connor, J., dissenting).

<sup>120</sup> *Lemon*, 403 U.S. at 668 (White, J. concurring in part); *see also Aguilar*, 473 U.S. at 420-21 (Rehnquist, J., dissenting); *id.* at 429 (O'Connor, J., dissenting); *Wallace*, 472 U.S. at 109 (Rehnquist, J., dissenting) (recognizing that the entanglement prong can, in certain circumstances, create an "insoluble [sic] paradox").

<sup>121</sup> 114 S. Ct. 2481 (1994).

<sup>122</sup> *Id.* at 2485.

were educated in private schools that did not offer services for handicapped children.<sup>123</sup> Beginning in 1984, the local public school district provided services for the Satmar Hasidists' disabled children in an annex to one of the private schools.<sup>124</sup> Unfortunately, these services were provided pursuant to the same type of state program that the Supreme Court struck down in *Aguilar*.<sup>125</sup> The Satmar Hasidists' disabled children were then sent to another school district, where they were frightened and traumatized by being in a strange environment with radically different students.<sup>126</sup> To accommodate this unique situation and resolve a protracted political problem, the New York legislature created a school district drawn up along the Kiryas Joel village lines.<sup>127</sup> Although the statute did not turn over the school district to a Satmar Hasidist religious organization, the school board was made up exclusively of such adherents, because the village was made up entirely of those adhering to this faith.<sup>128</sup> The New York State School Boards Association and others brought suit, claiming that the accommodation was "an unconstitutional establishment of religion."<sup>129</sup>

Fearing that future religious groups requiring such an accommodation would not be guaranteed equal treatment, the Court held that the special school district was an unconstitutional establishment of religion.<sup>130</sup> Although the Court did not say what would suffice to guarantee future equal treatment, a neutral process of evaluating and granting appropriate, similar accommodations would appear to be enough.<sup>131</sup> The Court did suggest that a history of granting similar accommodations might be adequate.<sup>132</sup> Justice Scalia, however, noted in dissent that had the legislature granted such accommodations, "each of [the accommodations] would have been attacked (and invalidated) for the same reason"—there would have been no prior history.<sup>133</sup> While Justice Scalia's criticism simply highlighted one more inconsistency engendered by the majority's maternal instinct toward *Lemon*, Justice O'Connor remarked on the practical difficulties caused by the

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* The Satmar Hasidists "speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls." *Id.*

<sup>127</sup> *Id.* at 2486.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2491.

<sup>131</sup> *See id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2513 n.4 (Scalia, J., dissenting). Justice Scalia observed: "I am sure the Court has in mind some way around this chicken-and-egg problem. Perhaps the legislature could name the first four school districts *in pectore*." *Id.*

Court's unwillingness to revisit a comprehensive interpretation of the Religion Clause. It was, she observed, "the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here."<sup>134</sup>

The disfavor for religion in Supreme Court cases,<sup>135</sup> however, is mild compared to the astonishing government discrimination against religion and religious citizens that is justified by lower courts which zealously apply the Court's interpretation of *Lemon*. The annoying and recurring paradox created by the *Lemon* prongs is aptly demonstrated in the Fourth Circuit's entanglement analysis in *Rosenberger*. While the Fourth Circuit held that the university's refusal to grant a general benefit to student religious organizations was justified by the entanglement prong of *Lemon*,<sup>136</sup> it found no problem in granting those benefits to such "cultural organizations" as the Muslim Students Association and the Jewish Law Students Association.<sup>137</sup> Curiously, the Fourth Circuit's entanglement analysis rested largely on the "potential for political divisiveness related to religious belief and practice."<sup>138</sup> The court's conclusion that religious divisiveness is somehow more dangerous than philosophical or cultural divisiveness is surely novel. The university must have feared that "facilitating discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints"<sup>139</sup> was somehow a call to arms. The Fourth Circuit failed to explain how the Jewish and Muslim student groups could be trusted to live in peace and harmony, while equal treatment of *religious* students was believed to be the first step toward Holy War.<sup>140</sup> To employ Justice O'Connor's example, the

<sup>134</sup> *Id.* at 2498 (O'Connor, J., concurring in judgment).

<sup>135</sup> See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Ball*, 473 U.S. at 373; *Aguilar*, 473 U.S. at 402; *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

<sup>136</sup> *Rosenberger v. Rector of the Univ. of Va.*, 18 F.3d 269, 287 (4th Cir.), *cert. granted*, 115 S. Ct. 417 (1994).

<sup>137</sup> *Id.* at 288.

<sup>138</sup> *Id.* at 286.

<sup>139</sup> *Id.* at 272 (quoting the constitution of Wide Awake Productions).

<sup>140</sup> Perhaps the court believed that Jews and Muslims have a milder history of "divisiveness." Of course, such a distinction between the "political divisiveness" of religion and the "cultural divisiveness" between Jews and Muslims is not only practical fantasy, but historical nonsense.

After more than 200 years, the Commonwealth of Virginia has successfully come full circle in *Rosenberger*. As the Supreme Court has noted, James Madison's views "accurately reflect[] the spirit and purpose of the Religion Clauses of the First Amendment." *McDaniel v. Paty*, 435 U.S. 618, 624 (1978). To condemn the discrimination in which the university was engaged, one need only quote paragraph four of Madison's



fact that Ronald Rosenberger has been in litigation with the university for over four years because of the university's discrimination against religion and religious students, not because of its funding, provides the final and most emphatic example of *Lemon's* "insoluble paradox."<sup>141</sup>

### C. *Free Exercise of Religion*

Although this Article is mainly critical of the illogical interpretation of the Establishment Clause, the Constitution's commitment to religious free exercise has enjoyed no better treatment. This Article will not give an exhaustive treatment of the Court's free exercise cases, partly because of the greater consistency among the cases, at least until recently, and partly because the Court's indiscretions in this area have been fewer and less disastrous. Perhaps this is because a majoritarian democracy in a religious, if not Christian, nation, although prone to take actions that are inevitably suspect under *Lemon*, is less likely to take actions that will directly infringe upon religious freedom. Nevertheless, the Court's treatment of religious free exercise must be addressed if a comprehensive interpretation of the Religion Clauses is to be understood. After all, the Framers believed the goal of religious liberty would not be complete without prohibiting Congress from infringing upon the exercise of religion.<sup>142</sup> Thus, religious free exercise is

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#### *Memorial and Remonstrance:*

[T]he bill violates that equality which ought to be the basis of every law, and which is more indispensable [sic], in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. . . . As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.

JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), reprinted in 8 THE PAPERS OF JAMES MADISON 1784-1786, at 295, 300 (Robert A. Rutland et al. eds., 1973). As Justice Brennan has explained:

The Framers were not concerned with the effects of certain incidental aids to individual worshippers which come about as by-products of general and nondiscriminatory welfare programs. If such benefits serve to make easier or less expensive the practice of a particular creed, or of all religions, it can hardly be said that the purpose of the program is in any way religious, or that the consequence of its nondiscriminatory application is to create the forbidden degree of interdependence between secular and sectarian institutions.

*School Dist. v. Schempp*, 374 U.S. 203, 302-03 (1963) (Brennan, J., concurring).

<sup>141</sup> See *Lemon*, 403 U.S. at 668 (White, J., concurring in part).

<sup>142</sup> See U.S. CONST. amend I.

extremely important, whether protected by a political majority because the particular religions are important to it, or by the courts because they are entrusted to do so by the First Amendment.

Compared to its Establishment Clause jurisprudence, the Supreme Court's treatment of free exercise was, at one time, doctrinally simplistic. If a person could prove that a government action burdened a sincerely held religious belief, and the government could not in turn prove that it had a compelling interest, unrelated to religion, in not providing an exemption for the religious dissenter, the fundamental right to religious free exercise trumped the government's action.<sup>143</sup> When the religious citizen won, the courts would then force the government to provide the exemption requested. For example, in *Sherbert v. Verner*,<sup>144</sup> a Seventh-Day Adventist was discharged from her employment for refusing to work on Saturday, the day of her sabbath.<sup>145</sup> South Carolina denied her unemployment compensation because she refused to accept suitable work, all of which also required her to work on Saturday.<sup>146</sup> The Supreme Court articulated a two-part test to guide interpretation of the Free Exercise Clause. First, "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."<sup>147</sup> Only after finding that the South Carolina law impeded the Saturday sabbath observer's religion by compelling her to choose between unemployment benefits and her religion, did the Court turn to the second part of the test: "[W]hether some compelling state interest . . . in [enforcing the statute] justify[d] the substantial infringement of [the religious observer's] First Amendment right. . . . [I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"<sup>148</sup> Balancing the competing claims, the Court held

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<sup>143</sup> *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

<sup>144</sup> 374 U.S. 398 (1963).

<sup>145</sup> *Id.* at 399.

<sup>146</sup> *Id.* at 399-401.

<sup>147</sup> *Id.* at 404 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (rejecting claims of Orthodox Jews that Sunday closing laws restricted their religious freedom because they were civilly prohibited from working on Sundays, and thus economically compelled to violate their religious duty to not work on Saturdays, the Jewish sabbath)).

<sup>148</sup> *Id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). Note the illogical use of language by the Court. First, the Court says the law is constitutionally invalid if it violates free exercise rights. *See id.* at 404. Then, the Court suggests the gravest of dangers to compelling governmental interests can validate a constitutionally invalid law. *Id.* at 406. This unfaithfulness to language is what created the numerous problems with the *Lemon* test. To be consistent, the Court's two-part test should remain, but if one proves a sincerely held and actually burdened religious belief or practice, it should only be recognized as constitutionally protected if the government does not have a compelling interest which outweighs the interest in the religious exercise or belief. Thus, the

that the state could not apply its Saturday work requirement in this circumstance.<sup>149</sup>

Apart from the overemphasis on religious belief as opposed to conduct motivated by religious belief,<sup>150</sup> the *Sherbert* opinion provided a relatively sound approach to free exercise analysis. Unfortunately, since *Sherbert*, the Court has refused to require any free exercise exemptions in any context other than unemployment compensation.<sup>151</sup> In *Employment Division v. Smith*,<sup>152</sup> five members of the Supreme Court sharpened the teeth of this distinction, suggesting that true religious liberty existed only in so far as employment rights were concerned. In *Smith*, two members of the Native American Church were denied unemployment compensation after being fired from their jobs for ingesting peyote, a hallucinogenic drug.<sup>153</sup> Unemployment compensation was denied because the two were discharged for misconduct connected with work, even though the peyote was used as part of a religious sacramental ceremony.<sup>154</sup> The Court previously had remanded the case to the Oregon Supreme Court to determine whether the state's criminal controlled substance laws provided an exemption for the sacramental use of peyote, reasoning that if the state could criminally prohibit all use of peyote, it could certainly deny unemployment compensation in all cases of such use.<sup>155</sup> Once the Oregon Supreme Court concluded that the criminal law provided no religious exceptions,<sup>156</sup> the issue became whether a religiously neutral and generally applicable state criminal law burdening religious exercise violated the federal Constitution.<sup>157</sup> The Court held that it did not.<sup>158</sup>

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more precise holding would be that a constitutionally protected free exercise right is either present or absent. If the Constitution is indeed the supreme law of the land, then recognizing a right it protects should end the inquiry, precluding government infringement regardless of the interests at stake. Otherwise, the Constitution is not what it says it is, and can be trumped by a democratic majority without amendment or by a court without apology. Such a result is no more justifiable than a holding that the First Amendment Speech Clause protects speech that the Establishment Clause allows the government to restrict. *See supra* notes 94-98 and accompanying text.

<sup>149</sup> *Sherbert*, 374 U.S. at 409.

<sup>150</sup> *Id.* at 402-03 (noting that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such . . . [while] overt acts prompted by religious beliefs or principles . . . '[are] not totally free from legislative restrictions'" (citations omitted)).

<sup>151</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990) (listing cases representative of this trend).

<sup>152</sup> 494 U.S. 872 (1990).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 874.

<sup>155</sup> *Employment Div. v. Smith*, 485 U.S. 660, 672-74 (1988).

<sup>156</sup> *Employment Div. v. Smith*, 763 P.2d 146, 148 (Or. 1988), *rev'd*, 494 U.S. 872 (1990).

<sup>157</sup> *Smith*, 494 U.S. at 878-79.

Justice Scalia, writing for the Court in *Smith*, began by engaging in the same historical revision and precedential exploits characteristic of the Court's Establishment Clause cases.<sup>159</sup> The Court, in a maneuver designed to avoid the logical roadblocks on the way to its result, distanced the situation in *Smith* from cases in which it had previously struck down religiously neutral and generally applicable statutes.<sup>160</sup> First, the Court characterized the issue as one involving a general criminal law rather than an unemployment compensation case.<sup>161</sup> This characterization supplied the diversion needed to later distinguish between the unemployment compensation cases and the other free exercise cases, thus limiting the embarrassing conflict between *Sherbert*'s logic and the Court's result.<sup>162</sup>

Having hidden *Sherbert* and its progeny in a closet, the Court could then attempt to support its new test in *Smith*. Interestingly, Justice Scalia cited *Minersville School District v. Gobitis*,<sup>163</sup> a case whose reasoning met an early death after three years. By resurrecting *Gobitis*, the Court sought to give authority to its wholehearted deferral to the legislature in matters of religious conscience, much as it did in other cases that have employed the *Lemon* test.<sup>164</sup> Turning to its new creation, the Court in *Smith* indicated

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<sup>158</sup> *Id.* at 882.

<sup>159</sup> *Id.* at 876-82. See generally Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

<sup>160</sup> *Smith*, 494 U.S. at 876.

<sup>161</sup> *Id.* at 875-76.

<sup>162</sup> *Id.* at 883. The Court attempted to paint *Sherbert* as a situation in which a neutral and generally applicable law was not present, reiterating that the *Sherbert* test "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884. There was no indication in *Sherbert*, however, that South Carolina did not impose its Saturday work requirement on every unemployment compensation applicant. The Court presented *Sherbert* as standing "for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* The Court never explained why the Oregon criminal law, which provided a system of individual exemptions for prescribed uses of substances from a medical practitioner, *id.* at 874, did not fall within even this narrow reading of *Sherbert*.

<sup>163</sup> *Id.* at 879 (citing *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940), overruled by *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>164</sup> Justice Scalia has characterized the *Lemon* test as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, . . . stalk[ing] Establishment Clause jurisprudence once again, frightening the little children." *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., dissenting). Apparently, rumors of the death of *Gobitis* have also been exaggerated. Little did constitutional scholars realize, until *Smith*, that *Gobitis*, which had been overruled by *Barnette*, had given life to a stealth body-snatcher that would slowly take over the very soul of the Court's free exercise jurisprudence, fully exposing itself fifty years later.

that it was a sort of "hybrid" beast.<sup>165</sup> Under the new test, with regards to laws of general applicability, the government action is required to pass the strict scrutiny test reserved for unemployment compensation cases only where free exercise is linked with other constitutional protections, such as free speech.<sup>166</sup> In a fascinating show of paradoxical nerve, the Court cited *West Virginia Board of Education v. Barnette*,<sup>167</sup> the case overruling *Gobitis*, for the proposition that even some free speech cases have involved combined freedom of religion interests.<sup>168</sup> The Court's elaborate and intense attempt to construct a foundation for its new test, to the point of citing bad law, presumably must be credited to its own recognition of the novelty of the structure it created.

With *Smith*, the free exercise of religion was hobbled to the point of needing the crutch of free speech or some other right before it could obtain the status and protection of other fundamental constitutional rights.<sup>169</sup> In *Church of the Lukumi Babalu Aye v. City of Hialeah*,<sup>170</sup> the Court's latest free exercise case, Justice Kennedy continued to rely on *Smith*, attempting to

<sup>165</sup> *Smith*, 494 U.S. at 882.

<sup>166</sup> *Id.* at 881.

<sup>167</sup> 319 U.S. 624 (1943).

<sup>168</sup> *Smith*, 494 U.S. at 882 (citing *Barnette*, 319 U.S. at 624). Although this is true of the factual context of *Barnette*, the Court in that case rested its decision on free speech grounds alone. *Barnette*, 319 U.S. at 633-34. Interestingly, the Court in *Smith* overlooked the true wisdom articulated in *Barnette*:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

*Id.* at 640-41. Thus, the only burial in *Barnette* was *Gobitis*'s support of uniformity and sameness, the very attitude that is curiously prevalent in the Court's decision to allow the legislature to decide what shall be generally applicable. The Court in *Barnette* recognized:

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State . . . , the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

*Id.* at 641-42. Under *Smith*'s revision of the free exercise test, individuals are seldom allowed to prove that their eccentricity is harmless to the state. As long as the state's means are reasonable in light of its ends, free exercise is a mere shadow of freedom.

<sup>169</sup> The decision shocked Congress into enacting the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (Supp. V 1993), to restore religious liberty to its revered status.

<sup>170</sup> 113 S. Ct. 2217 (1993).

give reasonable content to the new standard,<sup>171</sup> despite its unstable logic and the broad criticism it engendered.<sup>172</sup> Nevertheless, the *Smith-Hialeah* sudden about-face in free exercise interpretation, and the Court's unwillingness to recognize the logical matrimony of the two prohibitions of the Religion Clauses, leaves free exercise and establishment jurisprudence in a rare, yet ironic, congruence.

"Rather than taking the opportunity to derive narrower, more precise tests from the case law, [the Supreme Court] tend[s] to continually try to patch up the broad test[s], making [them] more and more amorphous and distorted."<sup>173</sup> If the Court's jurisprudence in this area has proven unworkable and unfaithful to the purposes of the Religion Clauses, the Court should forthrightly recognize this development and make use of the opportunity the *Rosenberger* case presents. In the past, the Court has employed a test that is more consistent with the original purposes of the Religion Clauses, and that provides a more workable framework for determining when government can legitimately employ religious classifications. Partial application of the test was found in the faithful and sensible application of the effect prong of *Lemon* as recognized by the Court in *Widmar v. Vincent*,<sup>174</sup> *Mueller v. Allen*,<sup>175</sup> and *Zobrest v. Catalina Foothills School District*.<sup>176</sup> Justice Brennan cogently explained this test in *McDaniel v. Paty*.<sup>177</sup> Other than *Lemon* and its misguided and confusing progeny, the Supreme Court's precedents have adhered consistently to a view that equality of voluntary religious choices, whether of nonreligion or a diversity of religious beliefs, is the better and intended understanding of the First Amendment's Religion Clauses.<sup>178</sup>

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<sup>171</sup> *Id.* at 2226.

<sup>172</sup> See, e.g., McConnell, *supra* note 159; Richard J. Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620 (1992); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

<sup>173</sup> *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2499 (1994) (O'Connor, J., concurring).

<sup>174</sup> 454 U.S. 263 (1981).

<sup>175</sup> 463 U.S. 388 (1983).

<sup>176</sup> 113 S. Ct. 2462 (1993).

<sup>177</sup> 435 U.S. 618, 639 (1978) (Brennan, J., concurring in judgment); see *infra* note 183 and accompanying text. Unfortunately, throughout his tenure on the Court, Justice Brennan was uniquely representative of the trend of the majority—doing not as he stated, but as his desired results dictated. Often, in cases before and after *McDaniel*, his logic failed to live according to the standard required by his own language in *McDaniel*. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. v. Ball*, 473 U.S. 373 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (Brennan, J., dissenting); *Roemer v. Maryland*, 426 U.S. 736, 770 (1976) (Brennan, J., dissenting); *Meek v. Pittenger*, 421 U.S. 349, 373 (1975) (Brennan, J., concurring in part); *Lemon*, 403 U.S. at 642 (Brennan, J., concurring in part).

<sup>178</sup> For a general discussion of the Religion Clauses, see CHESTER J. ANITEAU ET AL.,

### III. THERE AND BACK AGAIN: EQUALITY AND ITS PLACE THROUGHOUT OUR HISTORY OF RELIGIOUS LIBERTY

In *McDaniel v. Paty*,<sup>179</sup> Justice Brennan presented an interpretation of the Religion Clauses, gleaned from Supreme Court precedents, that is faithful to the historical understanding and proper harmony of the First Amendment:

Beyond the[] limited situations in which government may take cognizance of religion for purposes of accommodating our traditions of religious liberty, government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits. "State power is no more to be used so as to handicap religions than it is to favor them."<sup>180</sup>

The principle of equality of religious exercise should replace *Lemon* as guiding "[t]he general nature of [the Court's] inquiry in this area."<sup>181</sup>

#### A. *The Founders Understood the Equality Principle of Religious Liberty*

"No one questions that the Framers of the First Amendment intended to restrict exclusively the powers of the Federal Government."<sup>182</sup> The real issue is whether the Fourteenth Amendment requires that the restrictions of the First Amendment Religion Clauses apply to the states. The historically accurate and honest view is that the Constitution was amended by the Court in 1940, and not by the people.<sup>183</sup> Yet, despite what has been described as

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FREEDOM FROM FEDERAL ESTABLISHMENT (1964); SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902); ROBERT H. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); MARK D. HOWE, THE GARDEN AND THE WILDERNESS (1965); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986); McConnell, *supra* note 151; Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992).

<sup>179</sup> 435 U.S. 618 (1978).

<sup>180</sup> *Id.* at 639 (Brennan, J., concurring in judgment) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947)) (footnote omitted).

<sup>181</sup> *Mueller v. Allen*, 463 U.S. 388, 394 (1983).

<sup>182</sup> *School Dist. v. Schempp*, 374 U.S. 203, 253 (1963) (Brennan, J., concurring).

<sup>183</sup> In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court stated that "[t]he

the Court's "superficial and purposive interpretations of the past . . . [which] ha[ve] dishonored the arts of the historian and degraded the talents of the lawyer,"<sup>184</sup> a principled interpretation of the Religion Clauses can be salvaged. Regardless of whether one believes that the First Amendment should have been incorporated to apply to the states, the Framers' views of the relationship between, and substance of, the Establishment and Free Exercise Clauses should inform the Supreme Court's interpretive jurisprudence.<sup>185</sup>

If George Washington is the father of our country and James Madison the father of the Constitution, Roger Williams can be called the father of the principle of religious equality. After banishment from Massachusetts for his radical ideas about the purity of the Church and its autonomy from government, Williams went to Rhode Island to begin a great experiment, the first of its kind.<sup>186</sup> On August 20, 1638, the men of Providence agreed upon a compact which would grant equal religious liberty to all by submitting themselves to the will of the government organized for the public good, but only in civil matters.<sup>187</sup> This experiment was unique.

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fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. . . . The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact [laws abridging First Amendment liberties]." *Id.* at 303 (footnote omitted). The Court failed to provide any historical support for this proposition. Indeed, it has never provided any persuasive evidence that the ratifiers of the Fourteenth Amendment meant for it to incorporate the protections and prohibitions of First Amendment, or any other amendment, to the states. *See generally* Note, *supra* note 178.

<sup>184</sup> HOWE, *supra* note 178, at 4.

<sup>185</sup> *See* Board of Educ. v. Grumet, 114 S. Ct. 2481, 2506 (1994) (Scalia, J., dissenting) ("Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion."); County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment) ("[T]he meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings."); *Schempp*, 374 U.S. at 294 (Brennan, J., concurring) ("[T]he line we must draw between the permissible and impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment."); *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947) ("Whether this . . . law is one respecting an 'establishment of religion' requires an understanding of the meaning of that language. . . . [T]herefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted."); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) ("If we pass . . . to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth . . . this is a Christian nation.").

<sup>186</sup> *See* Timothy L. Hall, *Roger Williams and the Foundation of Religious Liberty*, 71 B.U. L. REV. 455, 465-69 (1991).

<sup>187</sup> *Id.* at 475.



It was not toleration in the narrow sense of benevolent non-interference by an authority that refrained from exercising its reserved right, that Roger Williams was interested in; it was rather religious liberty as a fundamental right, that had never been surrendered to the civil power, that lay beyond its jurisdiction and was in no way answerable to it . . . .<sup>188</sup>

Williams's views were not important simply because they were at the foundation of religious liberty in the New World. They are specifically relevant in understanding the meaning of the Religion Clauses drafted a century after his death because his views were "picked up by Baptists and other pietists in late eighteenth-century America, groups without whose advocacy the First Amendment probably would not have been adopted."<sup>189</sup>

When examined, Roger Williams's ideas of the respective spheres of civil and ecclesiastical authority and their impact on religious liberty are surprisingly similar to ideas later espoused by James Madison. Moreover, while the Supreme Court's overworked and inexact metaphor of the "wall of separation between church and State," is generally credited to Thomas Jefferson,<sup>190</sup> it first appeared in Williams's writings.<sup>191</sup> It is not the metaphor which gave birth to *Lemon* and the other jurisprudential disasters already discussed; this language, like so much of the Court's other missives, only became destructive when it obtained an import greater than the substance and truth it embodied. If the "separation" is viewed from the theological and libertarian perspective of Roger Williams, rather than from the

<sup>188</sup> 1 VERNON L. PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT: THE COLONIAL MIND 1620-1880*, at 71-72 (1930).

<sup>189</sup> John H. Mansfield, *Comment on Holmes, "Jean Bodin: The Paradox of Sovereignty and the Privatization of Religion,"* in *RELIGION, MORALITY, AND THE LAW: NOMOS XXX* 71, 76 (J. Roland Pennock & John W. Chapman eds., 1988).

<sup>190</sup> See *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>191</sup> In a writing entitled *Mr. Cotton's Letter Lately Printed, Examined and Answered*, Roger Williams asserted:

[T]he Church of the Jews . . . and the Church of the Christians . . . were both separate from the world; and that when they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, etc., and made his Garden a Wilderness, as at this day. And that therefore if he will ever please to restore his Garden and Paradise again, it must of necessity be walled in peculiarly unto himself from the world; and that all that shall be saved out of the world are to be transplanted out of the Wilderness of the world, and added unto his Church or Garden.

ROGER WILLIAMS, *MR. COTTON'S LETTER LATELY PRINTED, EXAMINED AND ANSWERED* (1644), reprinted in 1 *THE COMPLETE WRITINGS OF ROGER WILLIAMS*, *supra* note 3, 313, 392 (second emphasis added).

political perspective of Jefferson, wrought with the anticlerical biases of the enlightenment, a more comprehensive philosophy of the Religion Clauses emerges.<sup>192</sup> This philosophy, understood by Williams, Madison, and the citizens who ratified the First Amendment, gives the Religion Clauses a coherence absent from current Supreme Court jurisprudence.<sup>193</sup>

Williams found his philosophy in his faith, believing it “impossible for any Man or Men to maintaine their *Christ* by their *Sword*, and to worship a true *Christ*!”<sup>194</sup> As one commentator explained:

Liberty of conscience meant for Williams that no man should be prevented from worshipping as his conscience directed him. It also meant that no man should be compelled to worship against his conscience or to contribute to the support of a worship his conscience disapproved.

. . . .  
 . . . There was one thing government could do, though few governments had ever done it: government could protect the free exercise of conscience in religion. . . . [I]t required a vigilance and impartiality that were rare among rulers to watch over the exercise of religion in such a way as to prevent one group within the state from usurping authority over the consciences of other groups.<sup>195</sup>

Despite his strong support of liberty, Williams did not support anarchy as the price of religious freedom. For example, fearing that Catholic allegiance to a foreign authority might pose security risks for the government because of contemporary theological and political turbulence in Europe, he supported certain restrictions upon the freedom of Catholics.<sup>196</sup> Illustrating his philosophy, Williams wrote a letter to the townsmen of Providence suggesting the following hypothetical:

There goes many a ship to sea, with . . . papists and protestants, Jews and Turks; . . . [none should] be forced to come to the ship's prayers or worship, nor compelled from

<sup>192</sup> See generally HOWE, *supra* note 178, at 1-10.

<sup>193</sup> For an in-depth analysis of the Court's need for some coherent “constitutional philosophy” regarding religion, see John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847 (1984).

<sup>194</sup> ROGER WILLIAMS, *THE BLOODY TENENT YET MORE BLOODY* (1652), reprinted in 4 THE COMPLETE WRITINGS OF ROGER WILLIAMS, *supra* note 3, at 515.

<sup>195</sup> EDMUND S. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* 137, 140 (1967).

<sup>196</sup> *Id.* at 136-37.

their own particular prayers or worship, if they practice any. [Nevertheless,] [i]f any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace or preservation[,] . . . the commander or commanders may judge, resist, compel, and punish such transgressors, according to their deserts and merits.<sup>197</sup>

Still, for Williams, the vaulted place for freedom of conscience was reserved exclusively for *religious* conscience and no other.<sup>198</sup> The only possible restriction on this equal liberty of conscience in religious matters was the interest in the common order and safety of society.<sup>199</sup>

Like Roger Williams, the ratifiers of our Constitution viewed equality of religious liberty as a single goal with limitations in only the most compelling circumstances. The First Amendment was a political compromise among several colonies worried about the power of a centralized government encroaching on local beliefs.<sup>200</sup> This fear of centralization forced a compromise among various founding colonial views, ensuring that the power each independent sovereign gave to the federal government would not be used to encroach upon the states' respective approaches to religion and religious freedom. The colonists believed that equal religious liberty was a singular goal, and that the unique prospect of three sovereigns, the Creator, the national government, and the state, necessitated a dual protection. When the differences among the different colonies' treatment of religion are understood, and the history of England's national establishment is considered, one can understand the fear each colony experienced in risking the creation of a nationwide civil authority that might encroach upon local religious autonomy on the one hand, and individual religious freedom on the other.

As the Supreme Court correctly noted in *Everson v. Board of Educa-*

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<sup>197</sup> ROGER WILLIAMS, LETTER TO THE TOWN OF PROVIDENCE (Jan. 1655), reprinted in 6 THE COMPLETE WRITINGS OF ROGER WILLIAMS, *supra* note 3, at 278-79.

<sup>198</sup> ROGER WILLIAMS, THE HIRELING MINISTRY NONE OF CHRISTS (1652), reprinted in 7 THE COMPLETE WRITINGS OF ROGER WILLIAMS, *supra* note 3, at 179. See generally HOWE, *supra* note 178, at 6-19. Williams "thought every government was entitled to impose a rigorous standard of behavior in matters that affected civility, humanity, morality, or the safety of the state and individuals in it, but no standard at all in religion." MORGAN, *supra* note 195, at 136.

<sup>199</sup> See WILLIAMS, *supra* note 197, at 278-79.

<sup>200</sup> See ANTIEAU ET AL., *supra* note 178, at 30-61; CORD, *supra* note 178, at 14-15; HOWE, *supra* note 178, at 20-23, 30-31, 70. See generally Fairman, *supra* note 178; Note, *supra* note 178.

tion,<sup>201</sup> “[n]o one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights’ provisions embracing religious liberty.”<sup>202</sup> Thus, the views of Virginia’s leaders should be relevant to a determination of their respect for the equality of each colony to be free from an establishment of religion at the hands of the others, and each citizen to be free from federal actions restricting religious freedom. Conveniently, Madison’s views of religious freedom epitomized these notions. He believed:

[E]quality . . . ought to be the basis of every law . . . . If “all men are by nature equally free and independent,” all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an “*equal* title to the free exercise of Religion according to the dictates of conscience.” Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.<sup>203</sup>

Madison’s ideal government was one “best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.”<sup>204</sup> He took these views of equality with him when he led the debate over the Bill of Rights.<sup>205</sup> Madison, however, simply led the debate; his vote counted no greater than others participating in the process. Nevertheless, history reveals that all colonists could agree on that which constituted a “religion,” and on that which was the consistent characteristic of an “establishment.” By understanding the significance of these two words, and their meaning to the ratifi-

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<sup>201</sup> 330 U.S. 1 (1947).

<sup>202</sup> *Id.* at 11.

<sup>203</sup> MADISON, *supra* note 140, at 300.

<sup>204</sup> *Id.* at 302.

<sup>205</sup> As then Justice Rehnquist noted in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Madison first proposed that the Religion Clauses state that “[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and *equal rights of conscience* be in any manner, or on any pretext, infringed.” *Id.* at 94 (Rehnquist, J., dissenting) (emphasis added). See generally *id.* at 92-100.

ers, a cogent explanation of the true principle behind the Religion Clauses is obtained.

The First Amendment was a contract among the colonies to maintain their equal rights to treat religion as their respective citizens wished. The newly created federal government could not choose any state's religious preferences and attempt to impose them upon the other states.<sup>206</sup> The Founders understood the Religion Clauses to be mutually supportive,<sup>207</sup> prohibiting certain government action which would infringe the overriding liberty and freedom to make one's own decision regarding religion.<sup>208</sup> Although the colonies had different experiences with the establishment of religion, and thus that term meant different things to each, there were general characteristics of an establishment that gave content to understanding.<sup>209</sup> Government coercion in matters of religion was the overriding characteristic of an establishment.<sup>210</sup> Indeed, Virginia's Declaration of Rights announced that "religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by *force or violence*."<sup>211</sup> The Supreme Court recognized this essential element of an establishment of religion in its Religion Clauses cases until 1962, when the Court laid the foundations for *Lemon*, and solidified the future trend towards avoiding and misinterpreting the history of the Religion Clauses.<sup>212</sup>

<sup>206</sup> As the Court observed in *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589 (1845), "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states." *Id.* at 609.

<sup>207</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>208</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-2, at 1156-57 (2d ed. 1988).

<sup>209</sup> Among the general characteristics of an establishment were:

1. A state church officially recognized and protected by the sovereign;
2. A state church whose members alone were eligible to vote, to hold public office, and to practice a profession;
3. A state church which compelled religious orthodoxy under penalty of fine and imprisonment;
4. A state church willing to expel dissenters from the commonwealth;
5. A state church financed by taxes upon all members of the community;
6. A state church which alone could freely hold public worship and evangelize;
7. A state church which alone could perform valid marriages, burials, etc.

ANTIEAU ET AL., *supra* note 178, at 1-2.

<sup>210</sup> 6 WILL DURANT, *THE STORY OF CIVILIZATION* 208-20, 501-06, 523-601, 631-41 (1957); LEO PFEFFER, *CHURCH, STATE AND FREEDOM* 20-30 (rev. 1st ed. 1967). See generally ANTIEAU ET AL., *supra* note 178; CORD, *supra* note 178; McConnell, *supra* note 151.

<sup>211</sup> VA. CONST. art I, § 16, reprinted in *SOURCES OF OUR LIBERTIES* 311, 312 (Richard L. Perry ed., rev. ed. 1978) (emphasis added).

<sup>212</sup> Compare *McGowan v. Maryland*, 366 U.S. 420 (1961) and *Zorach v. Clauson*,

Religious non-coercion, or equality, ensures that there is never an establishment of religion. This does not imply that there is an establishment if there is no equality, because equality under the Religion Clauses should be understood as equality of religious choices, rather than equality of treatment in every circumstance. Thus while equality of treatment, in and of itself, proves the absence of an establishment of religion, inequality of treatment is only an establishment if there is coercion of those not treated equally to accept a religious choice they would otherwise reject. When one comprehends the place that religious belief and exercise played in early America, and combines this with the notion of equality of religious choices, it becomes clear that the ratifiers' equality principle was not breached by the inclusion of a special exemption for the free exercise of religion.

Under the equality understanding, the Establishment Clause protects every citizen's right to make voluntary choices regarding religion by forbidding the government from using its power to join the marketplace of ideas on the side of any belief, regardless of whether it favors or disfavors religion. The Free Exercise Clause complements, rather than conflicts with, the Establishment Clause; it protects entirely different interests. Virginia, the only state that had both an establishment clause and a free exercise clause worded in the terms of "free exercise of religion," defined religion as a "*duty owed to our Creator*."<sup>213</sup> Similarly, in the other states, religious freedom was understood as the freedom to worship the Creator according to the dictates of one's conscience.<sup>214</sup> Madison explained that the status of this liberty was "precedent, both in order of time and degree of obligation, to the claims of Civil Society."<sup>215</sup> It was the very fact that such a duty was owed to a third sovereign, the Creator, that led the ratifiers to adopt a special place for religious conscience in the First Amendment.<sup>216</sup> As one scholar

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343 U.S. 306 (1952) and *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) and *Everson v. Board of Educ.*, 330 U.S. 1 (1947) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940) with *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>213</sup> VA. CONST. art. I, § 16, reprinted in *SOURCES OF OUR LIBERTIES*, *supra* note 211, at 217 (emphasis added).

<sup>214</sup> See generally McConnell, *supra* note 151.

<sup>215</sup> MADISON, *supra* note 140, at 299; see also Herbert W. Titus, *No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion*, 22 CUMB. L. REV. 505, 507 (1992) ("Both Madison and Jefferson endorsed a legal definition of religion, which distinguished the exclusive authority of God from the limited authority of man, and acknowledged the necessary separation of the two.").

<sup>216</sup> Justice O'Connor recently evidenced a similar understanding, noting that "[w]hat makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a *deeply held belief*." *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2497 (1994) (O'Connor, J., concurring in judgment) (emphasis added). That which Roger Williams made explicit and the Framers understood, Justice O'Connor overlooked, for the protection of voluntary religious choices requires a special place in

has noted, this view of the Religion Clauses

consider[s] as religious only those beliefs that affirm the existence of a spiritual reality. If this definition excludes some philosophies, that, it may be said, is exactly what the Constitution intended. A particular importance was attached to, and a particular problem for government seen in connection with, a certain belief about reality, and these matters were addressed in the opening clauses of the first amendment. . . . If reason and ordinary experience predominate, the result, it may be said, is not religion for constitutional purposes. Religion requires "faith," and faith moves beyond the paths of ordinary understanding.<sup>217</sup>

The ratifiers were familiar with persecution for religious conscience. They understood the stubbornness of faith and the opposition it produced in those dissenting against government encroachment in matters reserved to a spiritual sovereign. The particular problem of forming a government of citizens owing their allegiance to a separate sovereign provided the greatest justification for the Free Exercise Clause of the First Amendment.

Unlike the analysis under the Establishment Clause, the private choices involved in the free exercise of religion bring with them duties and obligations that one's conscience feels are owed to a higher authority than government. Justice Brennan recognized the distinctiveness of these duties by suggesting that government may use religion as a classification when seeking to accommodate "our traditions of religious liberty."<sup>218</sup> An equality principle of the Religion Clauses cannot mean that religion can never be treated differently, because to do so effectively would allow the Establishment Clause to repeal the Free Exercise Clause.<sup>219</sup> A proper understanding of the two requires that it not "be ignored that the First Amendment itself contains a religious classification."<sup>220</sup> This lone religious classification,

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civil government for "religion." That there may be equally deserving ethical and moral convictions, or comprehensive belief systems that are just as important to some, is irrelevant.

<sup>217</sup> Mansfield, *supra* note 193, at 851.

<sup>218</sup> *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in judgment).

<sup>219</sup> In the Delaware Declaration of Rights, this understanding of equality is illustrated. In § 2, the "right of conscience in the free exercise of religious worship" was specially protected, while in § 3, "all persons professing the Christian religion" were granted the protection "to enjoy equal rights and privileges" in the state. DEL. DECLARATION OF RIGHTS §§ 2-3 (Sept. 11, 1776), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 211, at 338.

<sup>220</sup> *Welsh v. United States*, 398 U.S. 333, 372 (1970) (White, J., dissenting).

however, does not serve to breach equality for religious or nonreligious citizens. When the government grants a religious accommodation, whether out of majoritarian sincerity or constitutional duty, the nonreligious citizen is not burdened in his religious choice to not exercise religion.<sup>221</sup>

As Roger Williams elaborated in his hypothetical involving a ship at sea, there must be some limit even with respect to one's religious duty to the Supreme sovereign.<sup>222</sup> The Framers understood this as well. The last clause in Virginia's Declaration of Rights alludes to this principle, acknowledging that "it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other."<sup>223</sup> Virginia's Act for Establishing Religious Freedom acknowledged:

[T]o suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty. . . . [I]t is time enough, for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.<sup>224</sup>

Delaware's Declaration of Rights also protected the free exercise of the Christian religion unless such exercise "disturb[ed] the peace, the happiness or safety of society."<sup>225</sup> Other states evidenced a similar view of religious freedom during the period before ratification of the First Amendment.<sup>226</sup>

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<sup>221</sup> It is, of course, true that government can take action to protect or further religious liberty even when not obligated to do so by the Free Exercise Clause. This concept is best summarized by Chief Justice Burger in *Walz v. Tax Commission*, 397 U.S. 664 (1970), where he noted:

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

*Id.* at 669.

<sup>222</sup> See *supra* note 197 and accompanying text.

<sup>223</sup> VA. CONST. art. I, § 16, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 211, at 312.

<sup>224</sup> An Act for Establishing Religious Freedom (1785), *reprinted in* VA. CODE ANN. § 57-1 (Michie 1986).

<sup>225</sup> DEL. DECLARATION OF RIGHTS § 3 (Sept. 11, 1776), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 211, at 338.

<sup>226</sup> For example, Maryland's Declaration of Rights stated:

[W]herefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice;



Thus, the ratifiers of the Religion Clauses understood them to protect the complete equality of all citizens in the choice of whether to engage in religious exercise, and the limits placed on that exercise. The free exercise of religion, however, could not threaten the peace, safety, or good order of society.

Even if incorporation is viewed as removing the specific federalism limitation on the First Amendment, it should not change the content of its limitations. Too often, courts have interpreted the Establishment Clause to tilt the balance in favor of nonreligious ideas and viewpoints, while reducing the Free Exercise Clause to meaninglessness. A faithful application of the Founders' understanding of the Religion Clauses would require the government to treat its citizens with a blind eye toward religious adherence, except in those circumstances where religious liberty is jeopardized. The Supreme Court should look to the Religion Clauses as understood by the Founders to clarify its jurisprudence. A study of opinions other than *Lemon* and its aberrant progeny, and the post-*Sherbert* free exercise cases, demonstrates that the Court has frequently done just that.

## B. *The Equality Principle in Supreme Court Jurisprudence*

### 1. *The Court's Equal Access Cases*

[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified

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unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil or religious rights

MD. DECLARATION OF RIGHTS XXXIII (Nov. 3, 1776), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 211, at 346, 349. Massachusetts also provided an exception to the right of free exercise declaring:

[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

MASS CONST. art II, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 211, at 373, 374. Finally New Hampshire granted "every denomination of christians demeaning themselves quietly, and as good subjects of the state," equal protection of the law. N.H. CONST., BILL OF RIGHTS art. VI (June 2, 1784), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 211, at 382, 383.

by reference to content alone.<sup>227</sup>

This equal protection analysis applies with equal force to religious speech. In *Widmar v. Vincent*,<sup>228</sup> the Court held that granting student religious groups equal access to university facilities would not violate the Establishment Clause; accordingly, the Clause provided no valid justification for the denial of equality to religious groups.<sup>229</sup> Writing for seven members of the Court, Justice Powell found it "novel" to suggest that religious worship, as opposed to speech about religion, is not subject to the same equal protection guaranteed by the First and Fourteenth Amendments.<sup>230</sup> Indeed, the Court has consistently upheld protection for religious speech in a wide variety of contexts, with no suggestion that the religious content of that speech in any way limits the full force of First Amendment guarantees.<sup>231</sup>

Although finding that equal protection must be afforded to religious speech, the Court has often hidden *Lemon's* paradoxical logic under a bushel of common sense. The focus has changed from looking for effects that "advance" religion, to looking instead at whether the challenged government action has the effect of fostering religious uniformity or otherwise interfer-

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<sup>227</sup> *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972).

<sup>228</sup> 454 U.S. 263 (1981).

<sup>229</sup> *Id.* at 270-76.

<sup>230</sup> *Id.* at 269 n.6.

<sup>231</sup> *See., e.g., Lee v. International Soc. for Krishna Consciousness, Inc.*, 112 S. Ct. 2709 (1992) (per curiam) (striking down ban on distribution of religious literature in airport terminals); *International Soc. for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (upholding ban on solicitation at airport terminals); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (same); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding limitation on solicitation at state fairgrounds); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (striking down restriction on religious speech in public park); *Kunz v. New York*, 340 U.S. 290 (1951) (striking down municipal ordinance restricting street preaching); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (striking down licensing practice for religious speech in public park); *Saia v. New York*, 334 U.S. 558 (1948) (striking down limitation on sound amplification of religious speech in public park); *Marsh v. Alabama*, 326 U.S. 501 (1946) (striking down ban on distribution of religious literature in company-owned town); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding application of child labor law to distribution of literature); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (striking down restriction on door-to-door religious canvassing); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down tax on door-to-door religious canvassing); *Largent v. Texas*, 318 U.S. 418 (1943) (striking down permit requirement for door-to-door religious canvassing); *Jamison v. Texas*, 318 U.S. 413 (1943) (striking down prohibition on distribution of religious literature in public places); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (striking down licensing scheme as applied to door-to-door solicitation for religious causes); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (same); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (striking down ban on distribution of religious literature in public places).

ing with voluntary choices in matters of religion. Thus, in *Widmar*, the issue under the effects test was not "whether the creation of a religious forum would violate the Establishment Clause," but rather whether the "University [that] ha[d] opened its facilities for use by student groups . . . [could] exclude groups because of the content of their speech."<sup>232</sup> The Court was "unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion."<sup>233</sup> Similarly, in *Board of Education v. Mergens*,<sup>234</sup> the Court held that equal access by high school students to school facilities for religious purposes was fully compatible with the Establishment Clause.<sup>235</sup> Justice O'Connor emphasized that when the government treats religious groups equally,

the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."<sup>236</sup>

*Widmar* and *Mergens* rendered completely untenable any suggestion that speech by private parties, in government facilities available for use by a variety of outside organizations, could somehow trigger a violation of the Establishment Clause.

In *Lamb's Chapel v. Center Moriches School District*,<sup>237</sup> the Court also required equality of religious access. In *Lamb's Chapel*, a New York public school district refused to allow an outside religious organization to use school facilities during non-school hours on the same basis as other outside organizations.<sup>238</sup> The school district attempted to justify the discrimination based on the need to avoid a violation of the Establishment Clause, because the group wanted to show a film series on family values and child-rearing from a religious perspective.<sup>239</sup> The Supreme Court held that denying access to even non-public forums solely on the basis of the religious perspec-

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<sup>232</sup> *Widmar*, 454 U.S. at 273.

<sup>233</sup> *Id.*

<sup>234</sup> 496 U.S. 226 (1990).

<sup>235</sup> *Id.* at 253.

<sup>236</sup> *Id.* at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).

<sup>237</sup> 113 S. Ct. 2141 (1993).

<sup>238</sup> *Id.* at 2142.

<sup>239</sup> *Id.* at 2144-45.

tive of the speech was unconstitutional viewpoint-based discrimination.<sup>240</sup> Leaping over *Lemon* in a single bound, the Court had “no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation [were] unfounded.”<sup>241</sup>

It is important to note why the Court rejected the states’ repeated efforts to justify their discrimination on the asserted need to avoid an establishment of religion. In *Widmar*, Justice Powell agreed that an interest in complying with “constitutional obligations may be characterized as compelling. It [did] not follow, however, that an ‘equal access’ policy would be incompatible with” the Establishment Clause.<sup>242</sup> The Court was particularly impressed with the fact that the government benefit was open generally, and equally, to nonreligious organizations.<sup>243</sup> Sensibly and faithfully applying the language of *Lemon*’s effects test, the Court could not find an advancement of religion when a broad range of organizations equally enjoyed the government’s benefits.<sup>244</sup> Without a showing of inequality—a domination by religious groups in enjoyment of the government access—there was no Establishment Clause violation.

*Mergens* and *Lamb’s Chapel*, while adopting the reasoning of *Widmar*, cut back on its limitations of the equality principle to provide more room for expression of religious sentiments and exercise of religious worship. In finding the Equal Access Act<sup>245</sup> consistent with the restrictions of the Establishment Clause, the *Mergens* Court noted that “neutrality” required equal access; anything less would “demonstrate not neutrality but hostility toward religion.”<sup>246</sup> The Court warned that any effort to enforce the discrimination by defining religion out of the forum would not be countenanced.<sup>247</sup> As in

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<sup>240</sup> *Id.* at 2147.

<sup>241</sup> *Id.* at 2148.

<sup>242</sup> *Widmar*, 454 U.S. at 271. In trying to squeeze the equality principle within the triangular limits of *Lemon*, the Court reinterpreted the holding of *Tilton v. Richardson*, 403 U.S. 672 (1970). There, the Court had said that the Establishment Clause would not permit government to fund, on an equal basis with nonreligious universities, the construction of buildings at religious universities that might, at some point in the future, be used at any time for religious purposes. *Id.* at 683. Reinterpreting *Tilton* slightly, the Court in *Widmar* suggested that use of such buildings as a forum “equally open to religious and other discussions” would not violate the Establishment Clause. *Widmar*, 454 U.S. at 272 n.12.

<sup>243</sup> *Id.* at 274.

<sup>244</sup> *Id.* at 273-75.

<sup>245</sup> 20 U.S.C. §§ 4071-4074 (1988). The Act requires that public secondary schools receiving federal funds treat all student organizations, including religious organizations, the same as other noncurriculum related organizations when the school creates a limited open forum. *Id.* § 4071(a). The only differential treatment arises from administrative limitations designed to avoid government entanglement with religion. *Id.* § 4071(c)(3).

<sup>246</sup> *Mergens*, 496 U.S. at 248.

<sup>247</sup> *Id.* at 244. Compare the Fourth Circuit’s approval of the University of Virginia’s

*Widmar*, the Court's Establishment Clause discussion only briefly touched upon *Lemon*'s purpose prong,<sup>248</sup> focusing instead on the primary effect of the Act. The Court noted the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."<sup>249</sup> While using problematic "endorsement" language,<sup>250</sup> the Court nevertheless reaffirmed the special place religion holds in the Constitution, sometimes enjoying the protection of both the Free Exercise Clause and Free Speech Clause. Driving home the sound logic that an establishment of religion cannot exist if there is equality of treatment, the Court emphasized that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated."<sup>251</sup>

In cutting back the limitations left in *Widmar*, the Court in *Mergens* found no problem in the Act's requirement that equality be granted even when there is only one other noncurriculum-related student group enjoying the benefits of the limited public forum.<sup>252</sup> The Court further broadened the equality principle in *Lamb's Chapel*, barely mentioning *Lemon*, while

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definitional maneuvering in *Rosenberger*. There, the university defined religion and politics as subjects not contributing to the "educational mission" of the university. *Rosenberger v. Rector of Univ. of Va.*, 18 F.3d 269, 284 (4th Cir.), *cert. granted*, 115 S. Ct. 417 (1994). The Fourth Circuit deferred completely to the university's definition even though subjects about religion and politics were taught at the school. *Id.* This allowed the university to define its way out of the requirements of the First Amendment. *See supra* notes 61-69 and accompanying text.

<sup>248</sup> The Court recognized the limitations of the purpose prong in at least three instances. First, the Court, in interpreting the language of the Act, refused to rely on the legislative history, calling such a reliance in the circumstances "hazardous at best." *Mergens*, 496 U.S. at 242. The Court acknowledged that both sides could cite to legislative history supporting their arguments. *Id.* at 238. Second, even though ending unequal treatment of religion "advances" religion, the Court approved of Congress's clear purpose to end discriminatory treatment of religion. *Id.* at 239. Finally, the Court noted that "[e]ven if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Id.* at 249; *cf. supra* notes 44-60 and accompanying text.

<sup>249</sup> *Mergens*, 496 U.S. at 250.

<sup>250</sup> *See id.* at 262 (Kennedy, J., concurring in judgment). Because of the reservations of Justices Kennedy and Scalia about the "endorsement" language, as opposed to the more historical and logically supportable "coercion" test, the endorsement reasoning was approved by only a plurality.

<sup>251</sup> *Id.* at 250.

<sup>252</sup> *Id.* at 235-36. The Court did note later the breadth of student groups in the limited public forum, but this came more as an aside towards the end of the opinion, and the Court never suggested that the Act's application would be unconstitutional in a more limited circumstance. *Id.* at 252 (citing *Widmar*, 454 U.S. at 263).

extending equal protection to non-student religious groups during nonschool hours in even nonpublic forums.<sup>253</sup> Relying exclusively on free speech cases that prohibited content and viewpoint based discrimination, the Court refused to justify religious discrimination on the basis of the Establishment Clause.<sup>254</sup>

At a minimum, the *Widmar-Mergens-Lamb's Chapel* line of cases clearly holds that the First Amendment precludes any governmental effort to single out and censor, or otherwise burden, the speech of private parties solely because that speech is religious. Significantly, the Court recognized that through the Fourteenth Amendment, the First Amendment requires that states treat religious speech, including religious worship that constitutes speech, as deserving of equal treatment under the Free Speech Clause. Let one suggest that the equality principle is limited to the *Widmar-Mergens-Lamb's Chapel* type of speech situation, an analysis of a growing number of cases demonstrates that the Court has a broad understanding of the equality principle that embraces protection of nonspeech activity.

## 2. Equality in Nonspeech Cases

As the Court has retreated from *Lemon* in cases that directly challenge state action under the Establishment and Free Exercise Clauses, it also has recognized equality as the governing principle for analyzing the Religion Clauses. Beginning with *McDaniel v. Paty*,<sup>255</sup> the Court began to sidestep *Lemon's* constraints when addressing religious liberty issues. In finding that Tennessee could not condition service in its state legislature on the surrender of the right to be a member of the clergy, the plurality viewed the state as "punishing a religious profession with the privation of a civil right."<sup>256</sup> Rejecting the state's contention that the Establishment Clause required the discrimination, Justice Brennan explained:

The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.

. . . .

. . . Religionists no less than members of any other group

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<sup>253</sup> *Lamb's Chapel*, 113 S. Ct. at 2147-48.

<sup>254</sup> *Id.* at 2148.

<sup>255</sup> 435 U.S. 618 (1978) (plurality op.).

<sup>256</sup> *Id.* at 626 (quoting James Madison, Observations on Jefferson's Draft of a Constitution for Virginia (ca. Oct. 15, 1788), in 11 THE PAPERS OF JAMES MADISON 1788-89, at 281, 288 (Robert A. Rutland et al. eds. 1977)).

enjoy the full measure of protection afforded *speech, association, and political activity generally*. The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from *any aspect of public life*.<sup>257</sup>

Expanding on the equality basis for the Court's decision, Justice White suggested that the state law should be found "unconstitutional under the Equal Protection Clause of the Fourteenth Amendment."<sup>258</sup>

As the Court has turned to an equality reasoning under the Religion Clauses, the focus has been on the "benefit" of a law as it relates to comparable benefits made generally available. *Larson v. Valente*<sup>259</sup> provided the natural bridge over which religious equality could travel from the Free Speech Clause to the Establishment Clause. Citing *Widmar*, the Court in *Larson* subjected a statute to strict scrutiny because it imposed greater administrative burdens on those religious groups that solicited more than fifty percent of their funds from nonmembers, while not imposing a comparable burden on other religious groups.<sup>260</sup> Finding the statute to be a violation of the Establishment Clause, Justice Brennan explained:

Madison once noted: "Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects." Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference.<sup>261</sup>

Likewise, in *Mueller v. Allen*,<sup>262</sup> a state statute that provided tax deductions for school expenses to parents of children attending public and private schools was found not to violate the Establishment Clause.<sup>263</sup> Then Justice Rehnquist explained:

Just as in *Widmar v. Vincent*, where we concluded that the

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<sup>257</sup> *Id.* at 640-41 (Brennan, J., concurring in judgment) (emphasis added).

<sup>258</sup> *Id.* at 643 (White, J., concurring in judgment).

<sup>259</sup> 456 U.S. 228 (1982).

<sup>260</sup> *Id.* at 246-47.

<sup>261</sup> *Id.* at 245 (quoting THE FEDERALIST NO. 51, at 326 (James Madison) (H. Lodge ed., 1908)).

<sup>262</sup> 463 U.S. 388 (1983).

<sup>263</sup> *Id.* at 390-92.

State's provision of a forum neutrally "available to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of state approval," so here: "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."<sup>264</sup>

Similarly, in *Bowen v. Kendrick*,<sup>265</sup> the Court noted that it "ha[d] never held that religious institutions [were] disabled by the First Amendment from participating in publicly sponsored social welfare programs."<sup>266</sup> Chief Justice Rehnquist summarized this view of neutrality in *Zobrest v. Catalina Foothills School District*.<sup>267</sup>

We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." For if the Establishment Clause did bar religious groups from receiving general government benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.<sup>268</sup>

In the Court's latest Establishment Clause case, all nine justices agreed with this principle of equality.<sup>269</sup> As Justice Kennedy explained:

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<sup>264</sup> *Id.* at 397 (citations omitted).

<sup>265</sup> 487 U.S. 589 (1988).

<sup>266</sup> *Id.* at 609; *see also* *Witters v. Washington Dep't of Serv. for Blind*, 474 U.S. 481, 487 (1986) (quoting *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 782 n.38 (1973)) (finding fact that state aid was "made available generally without regard to the sectarian, or public-nonpublic nature of the institution benefited" central to Court's conclusion that Establishment Clause was not violated).

<sup>267</sup> 113 S. Ct. 2462 (1993).

<sup>268</sup> *Id.* at 2467 (citing *Bowen*, *Widmar*, *Mueller*, and *Witters*) (citations omitted).

<sup>269</sup> *See* *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2487 (1994) (Souter, J., joined by Blackmun, Stevens, and Ginsburg, JJ.) (plurality op.); *id.* at 2497 (O'Connor, J., concurring in judgment); *id.* at 2504 (Kennedy, J., concurring in judgment); *id.* at 2508 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). According to Justice O'Connor, an "emphasis on equal treatment is . . . an eminently sound approach." *Id.* at 2497 (O'Connor, J., concurring in judgment).



Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.<sup>270</sup>

The danger of stigma or animosity is not lessened simply because the religious segregation results from discrimination in the provision of cash benefits, as opposed to in-kind benefits.

In *Rosenberger*, the university sought to justify its religious segregation by drawing a fine distinction between the provision of equal access required in *Widmar* and *Lamb's Chapel*, and the equal provision of general subsidies.<sup>271</sup> This strange notion of "neutrality" is out of step with the Court's trend towards equality after *Lemon*. The university could not explain how the inequality in the provision of access forbidden by the Court is not as "neutral," under its definition, as inequality in the provision of cash. Instead, the university simply offered a novel definition of "neutral," meaning discrimination against all religion.<sup>272</sup> This is, however, the exact definition of "neutral" the Court refused to accept in *Widmar*, *Mergens*, and *Lamb's Chapel*.<sup>273</sup> The next logical step for religious equality is to extend the neu-

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<sup>270</sup> *Id.* at 2504 (Kennedy, J., concurring in judgment).

<sup>271</sup> Brief for Respondents in Opposition to Petition for Writ of Certiorari at 14, *Rosenberger v. Rector of the Univ. of Va.*, 115 S. Ct. 417 (No. 94-329), *certifying questions to* 18 F.3d 261 (4th Cir. 1994).

<sup>272</sup> *See id.* at 17.

<sup>273</sup> The university tried to save its strained logic by comparing the bus transportation in *Everson* to the benefits at issue in *Rosenberger*. *Id.* at 18 n.10. "[B]ecause bus transportation is not a religious activity," *id.*, the university argued that the Court should swallow its bitter notion of "neutrality," backing up its definition with *Lemon* and a long list of its aberrant offspring, *id.* at 19. The logic is insupportable. The subsidy of parochial school salaries, *Lemon*, 403 U.S. 602, the reimbursement of expenses in connection with maintenance and teacher-prepared tests, *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973), and the presence and use of public school personnel on parochial school premises, *School Dist. v. Ball*, 473 U.S. 373 (1985), *inter alia*, are not considered "religious activities," yet all these have been held unconstitutional under the *Lemon* test. In fact, unless the university is worried about providing one-tenth of its blessings to Wide Awake, rather than equal and generally available funds, the provision of cash is no more a "religious activity" than the examples listed. At base, the

trality principle to all forms of generally available government assistance, so as to completely bridge the gap between the Establishment Clause and the rest of the First Amendment. This does not require a novel construction project; *Lemon*, in fact, has smoldered, slowly spreading to consume planks of equality that the Court had laid throughout its prior interpretations of the Religion Clauses.

### 3. *Equality before Lemon and Smith*

First Amendment decisions prior to *Lemon* recognized equality as the governing principle of the Religion Clauses. In *Cantwell v. Connecticut*,<sup>274</sup> the Court recognized the dual and complementary aspect of the Religion Clauses:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts,—freedom to believe and freedom to act.<sup>275</sup>

The Court's view of equality of religious choice in *Cantwell* was not itself new. In 1899, the Court upheld an agreement between the Commissioners of the District of Columbia and a religiously affiliated hospital whereby the Federal Government would pay for the construction of a building on the hospital grounds.<sup>276</sup> Without a showing that the hospital discriminated on the basis of religion or otherwise operated inconsistent with this aid, its religious affiliation was found to be "wholly immaterial."<sup>277</sup>

A commitment to equality of belief continued throughout the Court's opinions addressing the Establishment Clause. In *Everson v. Board of Education*,<sup>278</sup> Justice Douglas wrote that government

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university's long list of citations supporting its understanding of "neutrality" is simply a convenient compilation of the Court's departures from the equality principle since 1971. For a similar, though not exhaustive, list, see *supra* note 135.

<sup>274</sup> 310 U.S. 296 (1940).

<sup>275</sup> *Id.* at 303.

<sup>276</sup> *Bradfield v. Roberts*, 175 U.S. 291 (1899).

<sup>277</sup> *Id.* at 298.

<sup>278</sup> 330 U.S. 1 (1947).

cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. . . . We must be careful, in protecting the citizens of [a state] against state-established churches, to be sure that we do not inadvertently prohibit [the state] from extending its general state law benefits to all its citizens without regard to their religious belief.<sup>279</sup>

Justice Jackson, though disagreeing with the majority's application of this principle, offered his understanding of the equality notion in the context of the police and fire protection example: "Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church?'"<sup>280</sup>

Numerous justices consistently have referred to the religious voluntarism that protects the freedom either to choose a religion or to choose none at all. In analyzing legislation, Justice Harlan once explained:

This legislation neither encourages nor discourages participation in religious life and thus satisfies the voluntarism requirement of the First Amendment. . . . *Neutrality in its application requires an equal protection mode of analysis.* The Court must survey meticulously the circumstances of government categories to eliminate, as it were, religious gerrymanders.<sup>281</sup>

The Court has made it clear that the First Amendment should be viewed as "mandat[ing] government neutrality between religion and religion, and between religion and nonreligion."<sup>282</sup> The Supreme Court's opinions before *Lemon* clearly evidence a very different understanding of "neutrality" than

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<sup>279</sup> *Id.* at 16. Note that the majority did not distinguish between those general state law benefits that were in the form of cash and those in the form of access to buildings or services.

<sup>280</sup> *Id.* at 25 (Jackson, J., dissenting).

<sup>281</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring) (emphasis added).

<sup>282</sup> *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also Everson*, 330 U.S. at 18 ("[The First] Amendment requires the state to be a [sic] neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than it is favor them.").

that approved by the Fourth Circuit in *Rosenberger*. Instead of barring religious accommodations, the First Amendment forbids “[a]ny use . . . of coercive power by the state to help or hinder some sects or to prefer all religious sects over nonbelievers or vice versa.”<sup>283</sup>

Similarly, the Court’s encounters with free exercise issues have contained overtures of an equality reading of religious freedom. In *Torcaso v. Watkins*,<sup>284</sup> the Court held that a notary public could not be denied his commission because he refused to declare his belief in God.<sup>285</sup> In holding that the test oath could not be administered consistent with Torcaso’s freedom of religion, the Court declared that “[n]either [the State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”<sup>286</sup> In *Larson v. Valente*,<sup>287</sup> the Court noted:

[E]quality [for all religion] would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations. As Justice Jackson noted in another context, “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles

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<sup>283</sup> *Zorach v. Clauson*, 343 U.S. 306, 318 (1952) (Black, J., dissenting). In *Zorach*, the Court upheld a released-time program that allowed public school students to receive religious instruction off of school grounds during school hours. *Id.* at 315. Justice Black argued that the school’s actions were not neutral, *id.* at 319 (Black, J., dissenting), but never explained how a public school system would be exercising “neutrality” by refusing to allow religious students to leave for religious instruction, when it allowed children to leave the premises for a variety of nonreligious reasons. Despite his protestations of support for neutrality, Justice Black, like Justice Brennan, had difficulty remaining faithful to the logical import of his own language. *See supra* note 177. Perhaps more than anyone on the Court, it was Chief Justice Burger, the author of *Lemon*, who learned of the dangers of language in this area of constitutional adjudication. *See Aguilar v. Felton*, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting) (expressing the view that “the Court’s obsession with the criteria identified in *Lemon* . . . has led to results that are ‘contrary to the long-range interests of the country’”) (citations omitted); *see also* *Wallace v. Jaffree*, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting) (“[O]ur responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.”).

<sup>284</sup> 367 U.S. 488 (1961).

<sup>285</sup> *Id.* at 495-96.

<sup>286</sup> *Id.* at 495.

<sup>287</sup> 456 U.S. 228 (1982).

of law which officials would impose upon a minority must be imposed generally."<sup>288</sup>

Because free exercise of religion may compel different duties for different religious beliefs, this equality is best preserved by providing for consistent, predictable, and equitable standards for granting accommodation, whether through legislative or judicial relief.<sup>289</sup> Thus, in the area of free exercise, equality is a way of "identifying workable limits to the government's license to promote the free exercise of religion."<sup>290</sup>

The Supreme Court has recognized that the First Amendment sometimes compels the government to grant exemptions from generally applicable laws to religious adherents in order to permit the free exercise of their religion.<sup>291</sup> Moreover, government may accommodate religious individuals in this way, even when not compelled to do so, without violating the equality required by the Establishment Clause.<sup>292</sup> The accommodation, brought about in an effort to respect "our traditions of religious liberty,"<sup>293</sup> does not violate the principal of equality commanded by the First and Fourteenth Amendments.

Absolute equality of treatment has never been constitutionally mandated. As the Court has explained:

The fact that the ordinance is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.<sup>294</sup>

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<sup>288</sup> *Id.* at 245-46 (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

<sup>289</sup> *See Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2503 (1994) (Kennedy, J., concurring in judgment).

<sup>290</sup> *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring in judgment).

<sup>291</sup> *See, e.g., Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>292</sup> *See, e.g., Corporation for Presiding Bishop of Church of Jesus of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (finding "ample room for accommodation of religion under the Establishment Clause"); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145-46 (1987); *Walz*, 397 U.S. at 669.

<sup>293</sup> *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in judgment).

<sup>294</sup> *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). The Court has not always

Equality of religious free exercise must mean that the government show no favoritism in granting exemptions or accommodations based on religious obligations and duties. "Not every religion uses wine in its sacraments, but that does not make an exemption from Prohibition for sacramental wine-use impermissible . . . ."<sup>295</sup> This does not mean that an exemption for Catholic use of wine impermissibly discriminates against Protestants. Equality must be analyzed with a view toward the process and practice of granting such exemptions, not in the context of the specific exemption or accommodation.<sup>296</sup> Thus, there is no inequality on the basis of religious exercise. Similarly, although religion and religious adherence may be the basis of a classification in this instance, it does not mean that religious adherents and nonreligious citizens are treated unequally. The nonreligious citizen is in essentially the same position as the religious citizen who does not need an accommodation for sacramental wine use; his freedom to choose not to exercise religion is not hindered by the government's accommodation of another.<sup>297</sup>

The Court, like the ratifiers of the Religion Clauses, has recognized a small exception to this principle of equality of religious freedom. Almost in the same language used by the states before ratification of the Bill of Rights, the Court has long enforced the narrow exception to free exercise in the acknowledgment that the health, safety, and welfare of society may justify suppression of even religious freedom. In *Reynolds v. United States*,<sup>298</sup> the Court upheld a conviction of polygamy in the Utah Territory

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recognized this revered status for religious liberty. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990); *Hamilton v. Regents*, 293 U.S. 245, 263-64 (1934); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878). There is, however, no more reason to sanction an erroneous interpretation of free exercise than there is to accept *Lemon* and the Court's unwise stewardship of the Establishment Clause.

<sup>295</sup> *Grumet*, 114 S. Ct. at 2513 (Scalia, J., dissenting).

<sup>296</sup> Although they disagree on the application of this principle, the eight justices of the Court who have addressed the issue agree that equality of accommodation of religious freedom is required by the First Amendment. See *id.* at 2491 (Souter, J., joined by Blackmun, Stevens, O'Connor, and Ginsburg, JJ.); *id.* at 2503 (Kennedy, J., concurring in judgment); *id.* at 2513 (Scalia, J., dissenting). According to Justice Kennedy, in order to determine whether there is an equality of accommodation, a "court would have only to determine whether the [religious] community does indeed bear the same burden on its religious practice" as the one receiving the initial accommodation. *Id.* at 2503 (Kennedy, J., concurring in judgment); see also *id.* at 2513 (Scalia, J., dissenting).

<sup>297</sup> See *id.* at 2505-16 (Scalia, J., dissenting). Justice Scalia has explained concisely the rationale underlying the equality principle of religious voluntarism. Arguing that the majority was wrong in its application of equality in *Grumet*, he suggested that "when there is no special treatment there is no possibility of religious favoritism; but it is not logical to suggest that when there *is* special treatment there is *proof* of religious favoritism." *Id.* at 2510 (Scalia, J., dissenting).

<sup>298</sup> 98 U.S. 145 (1878).

despite the testimony that the defendant was compelled by his religious faith, upon penalty of eternal damnation, to engage in polygamy if the opportunity arose.<sup>299</sup> Rather than tersely dismissing the defense, the Court engaged in an elaborate discussion of the meaning of religion, the dangers of polygamy, and the justification for Congress's jurisdiction to criminalize the practice.<sup>300</sup> Concluding that polygamy "has always been odious among the northern and western nations of Europe," punishable in Europe and the United States at various times with death, the Court rejected the plea for a special exemption to protect religious freedom.<sup>301</sup>

Frequently the Court has recognized the obligation of the government to protect the general public, sometimes at the expense of individual liberty and freedom. In *Jacobson v. Massachusetts*,<sup>302</sup> a personal exemption from the requirements that all adults be given vaccinations was denied in light of the grave interest in eradicating a serious health risk.<sup>303</sup> Justice Harlan explained the interests at stake:

There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.<sup>304</sup>

The very purpose of the strict scrutiny test is to weigh these important interests, repressing religious liberty only when a sufficiently important public need is shown. The Court demonstrated its fundamental misunderstanding of the purpose of the strict scrutiny test when it attempted to limit its application in *Employment Division v. Smith*.<sup>305</sup> A return to a common sense interpretation of the Establishment Clause, in which religious freedom yields only to the most compelling of governmental interests, is required to return religious liberty to its proper constitutional status and to remove reli-

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<sup>299</sup> *Id.* at 166-67.

<sup>300</sup> *Id.* at 162-67.

<sup>301</sup> *Id.* at 164.

<sup>302</sup> 197 U.S. 11 (1905).

<sup>303</sup> *Id.* at 37.

<sup>304</sup> *Id.* at 29.

<sup>305</sup> 494 U.S. 872 (1990); see *supra* notes 152-69 and accompanying text.

gious segregation from public life. This can only occur with an application of the original understanding of the Religion Clauses as a guarantee of equality of religious choices.

#### IV. CONCLUSION

Viewing problems of establishment and free exercise through the lens of equality of religious choice brings into sharpened focus the original meaning of the Religion Clauses, and demonstrates that nonestablishment and free exercise are but two sides of the same coin used to purchase liberty of voluntarism in the area of religion. This was the view of religious liberty envisioned by the Framers of the First Amendment, and consistently respected by the Court's Religion Clauses cases before the aberrational decisions of *Lemon* and *Smith*. It is the view nurtured in various areas of the Court's Free Speech, Establishment, and Free Exercise Clause jurisprudence since *McDaniel v. Paty*. Hopefully, the Supreme Court will take the opportunity presented by its review of the Fourth Circuit's decision in *Rosenberger* to return to the historical underpinnings of the Religion Clauses by removing the judicial deviations that spoil the picture of equality.