YODER AND THE QUESTION OF EQUALITY

LAURA S. UNDERKUFFLER-FREUND*

INTRODUCTION

The unifying theme of the panel discussions in this symposium is consideration of the landmark case of *Wisconsin v. Yoder*,[1] decided twenty-five years ago. That case represents, by anyone's account, the high water mark in Supreme Court protection for religious free exercise. By upholding a religious claim for exemption from a government interest generally regarded to be of the highest order—the goal of universal childhood education—*Yoder* represents the farthest extension of the principle of judicial protection of the value of free exercise of religious beliefs. Depending upon one's perspective, it also represents the high water mark for judicially sanctioned *unequal* treatment of citizens: the privileging of religious beliefs and religious individuals in the application of otherwise neutral[2] state laws.

Yoder therefore raises, in a very direct way, what I believe is one of the central questions presented by the Religion Clauses: the extent to which equality, as a constitutional value, constrains our understanding of religious guarantees. This subject is a large one, and it is impossible to address in all of its dimensions in this paper. However, the *Yoder* opinion deals with one aspect of this issue in particular, and it is that aspect which will be the focus of my remarks: whether the granting of exemptions to religious individuals, from laws which bind all other (nonreligious or "otherly religious"[3]) individuals, violates the principle of equality of all citizens before the law.

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* Professor, Duke University School of Law. This article is based on a presentation given at a symposium entitled Wisconsin v. Yoder *After Twenty-Five Years*, held at Capital University Law School on February 14-15, 1997.

[1] 406 U.S. 205 (1972).

[2] By "otherwise neutral" state laws, I refer to laws that, by their terms, make no distinctions on religious grounds. There are, of course, different tests for "neutrality," such as those which examine legislative motive, or legislative purpose, or the nature of values on which particular legislators relied. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 530-38 (1993) (stating that neutrality is a function of the law's object or purpose, in the free exercise context). The first understanding of neutrality—that of textual neutrality—is the most encompassing; it is that which was assumed in *Yoder*, and it is that which I shall assume here.

[3] "Otherly religious" is a bit awkward, but its use is intended to encompass the fact that the granting of an exemption from law to a particular religious group raises issues of

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As my point of entry into this subject, I will use an excellent essay recently published by Christopher Eisgruber and Lawrence Sager, entitled *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*.[4] I have chosen this essay because it presents, in a particularly cogent fashion, difficult questions that those who support religious exemptions try to avoid. It is also an excellent example of a growing school of thought in Religion Clause jurisprudence. This school is unified by the belief that equality is an indispensable principle for the interpretation of the Religion Clauses, and that although equality may be supplemented or explicated by other ideas, any approach that ignores the need for equal treatment will be, in the end, intellectually indefensible and constitutionally illegitimate.

I. EQUALITY'S CHALLENGE TO RELIGIOUS PRIVILEGE

To argue that religion is not a special constitutional category is, of course, not possible. The text of the Constitution clearly grants religion particular recognition, from the points of view of both protection (free exercise) and prohibition (anti-establishment). No judge or scholar of any sophistication can deny that this special status of religion exists. The question is, rather, what this particular status means; to frame the question in terms of the particular issue here, whether this special status is to be interpreted as conferring special privilege to religious individuals and groups, when faced with the enforcement of otherwise neutral laws.

Eisgruber and Sager directly challenge the common assumption that religion enjoys a privileged status in constitutional law.[5] They challenge this assumption by challenging the core idea upon which it rests: that religion is somehow more worthy than other kinds of beliefs or other kinds of activities. A claim for constitutional privilege, they write, requires a showing of virtue or precedence over competing ideas or goals.[6] The idea of constitutional privilege for religious beliefs or religious actions rests upon the idea that religion is more important, to individuals and to society,

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equality not only between the religious and the nonreligious, but between the favored religious group and non-favored religious groups.

[4] Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

[5] Eisgruber & Sager, *supra* note 4, at 1248. *See also* Christopher Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 448-49 (1994). A similarly direct challenge is made by William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

[6] Eisgruber & Sager, *supra* note 4, at 1265.

than are other kinds of human beliefs or human actions. "[T]he claim for the laudability of religious commitment . . . is offered as a reason for exempting behavior that defies otherwise valid general laws."[7]

Eisgruber and Sager argue that this idea of the particular importance of religion is deeply flawed. Religious beliefs are, in fact, often "arbitrarily demanding, . . . greedy in their demands on both the individual and the society committed to [their] . . . unimpaired flourishing . . . ."[8] They often have an "all-or-nothing quality;" they are "absolute or categorical." Rather than encouraging a society characterized by peace, harmony, and tolerance, the principle of religious flourishing "commends a vision of a world" that is conflict-ridden, "unrecognizable, unattractive, and ultimately incoherent."[9] They write:

> [The] privileging of religion appeals to our desire as a society to remain alive to the moral, non-self-regarding aspects of life, and sees organized religion as a taproot of this vital aspect of human flourishing. But while religion sponsors the highest forms of community, compassion, love, and sacrifice, one need only look around the world, or probe our own history, to recognize that it also sponsors discord, hate, intolerance, and violence. . . . [R]eligious faith or belief need not be founded in reason, guided by reason, or governed in any way by the reasonable. . . . [T]here is no warranty on the laudability of religious commitments.[10]

Religion is, as an empirical matter, no more likely to yield positive societal results than are "other deep commitments that persons have."[11] With the collapse of the idea of the special value of religion, "the claim that religion so breeds virtues that it is constitutionally privileged becomes indefensibly partisan among conflicting views of what is valuable in life and how that which is valuable is best realized."[12] Religious conscience becomes "just one of many very strong motivations in human life."[13] "[A] citizen's ability to contribute to the regime does not depend upon

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7 *Id.*
8 *Id.* at 1257.
9 *Id.*
10 *Id.* at 1265.
11 *Id.* at 1255.
12 *Id.* at 1266.
13 *Id.* at 1263.

membership in any particular religion, or, indeed, upon religiosity at all."[14] With the legal privileging of religion comes the unjustified legal privileging of certain beliefs, certain ways of knowing, certain *persons*—all in violation of deep notions of equality.[15]

Equality, in this view, prevents the constitutional privileging of religious beliefs, persons, or groups; it also provides the foundational principle for the handling of free exercise claims. The constitutional guarantee is not that religion be privileged, but "that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[16] "Equal regard insists on parity for religious belief, not privilege."[17] Because of the access of majority religious believers (and nonbelievers) to political power, minority religious beliefs are particularly vulnerable to majority hostility and indifference. Religious exemptions from generally applicable laws may be employed only to protect religious minorities from the majority's failure to treat the minorities' religious concerns with the same respect that is afforded to the similar (religious or nonreligious) concerns of others.[18] Beyond this kind of "equal protection guarantee," the affording of special protection to religious beliefs and persons is unjustified—and illegitimate.

For those of us who have assumed that religion occupies a privileged place in our constitutional scheme, this essay raises serious and troubling questions. Its postulates might be summarized (fairly, I hope) in the following manner:

1. There is a strong commitment, in our hierarchy of constitutional values, to the equal treatment of citizens (similarly situated) before the law.

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[14] *Id.* at 1266.

[15] *Id.*

[16] *Id.* at 1283.

[17] *Id.* at 1286.

[18] *Id.* at 1285. Protection is also extended to secular claimants who are threatened by the majority's religious discrimination. *Id.* at 1291-97; *see also* Eisgruber & Sager, *supra* note 5, at 456-57:

> This principle takes stark inequalities of treatment as a sufficient ground for constitutional solicitude, and it applies to inequalities that burden non-believers as well as to those that target religion. . . . Government betrays the ideal of equal regard when it treats religious interests less favorably than secular ones, when it treats some religious interests better than others, and when it treats religious interests more favorably than secular ones.

2. As a result of this commitment to equality, sectarian favoritism by the state toward holders of different belief systems is prohibited.

3. The privileging of religious belief and religious believers—in a way not afforded to the holders of other belief systems—is sectarian favoritism and is prohibited by the principle of equality.

4. There is no specially valuable character of the religious that would justify this violation of equal treatment principles.

In the section that follows, I will examine each of these important propositions.

II. PRIVILEGE AND EQUALITY EXAMINED

There is little disagreement about the truth of the first postulate: there is a strong commitment in our hierarchy of constitutional values to the equal treatment of citizens (similarly situated) before the law. Although there is no over-arching textual command in our Constitution requiring that all of its provisions be interpreted with equality in mind,[19] concern for equality in the interpretation of the Religion Clauses has been a continual theme in the Supreme Court's decisions[20] and in the writings of most commentators on the subject.[21]

Agreement that equality is a vital principle does not, however, imply agreement about what this principle means. When we consider equality

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[19] Compare, for instance, the newly enacted Constitution of South Africa, in which the guarantee of religious freedom is expressly subject to general values of human dignity, equality, and freedom. Constitution of South Africa Ch. 2, Secs. 36(1), 39(1).

Some have argued that the Equal Protection Clause of the Fourteenth Amendment performs this function. *See* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 374 (1989-90).

[20] *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 215 (1963) (holding that the Constitution requires "'absolute equality before the law, of all religious opinions and sects'").

[21] For a sampling of literature discussing equality concerns from differing points of view, see JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 15-16, 41-53, 97-159 (1995); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 BYU L. REV. 645; Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7; Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990); Ira C. Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

and the privileging of religious believers (postulates two and three above), we must back into this question carefully.

There is little doubt that state sectarian favoritism in the usual sense—the explicit favoring of Catholics over Protestants, or Muslims over Jews, or Christians over atheists, and so on—is violative of equal treatment guarantees. The state cannot privilege particular citizens over others on the basis of religious affiliation or identity, or lack of either. The end of such religious status or identity discrimination was one of the evils targeted by reformers during the Founding Era[22] and is a bedrock principle today.[23]

The more difficult question presented by the postulates above is whether this prohibition on discrimination on the basis of religious status or religious identity can be extended to general state privileges granted to religious persons or religious beliefs. In one sense, the situations are indeed identical. If an individual is granted a state privilege (for instance, state employment) because he is a Lutheran (and not a Mormon, an atheist, or a Catholic), this is an action which is clearly based upon religious status; the individual is granted a privilege *because of the nature* of his religious beliefs. Religious status is no less involved if a *different* privilege is granted (for instance, exemption from compulsory education laws) because the individual is Amish (and not Jewish, agnostic, or Baptist). In both instances, the privilege is available only if particular criteria of identity are fulfilled.

However, are these situations—in a deeper sense—the same? It has been argued by several commentators that the apparent similarity in these situations rests upon a faulty premise. There is a strong commitment, in our hierarchy of constitutional values, to the equal treatment of citizens—*similarly situated*—before the law (postulate one above). It can be argued that religious citizens, forced by law to act in violation of their religious beliefs, are not "similarly situated" to other citizens; they are, in fact, subjected to psychological pain that others do not experience. As Stephen Pepper has written, "the person whose religious life is invaded by a legal

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[22] *See* Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 928-29, 947-49 (1995) (discussing ideas of religious equality in the American Founding Era).

[23] Indeed, only rarely have cases involving pure religious status or identity discrimination reached the Supreme Court—and the laws in those cases were summarily invalidated. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (examining a state requirement that belief in God be declared for the holding of public office); Larson v. Valente, 456 U.S. 228 (1982) (invalidating state regulations that targeted religious denominations involved in nonmember solicitation); *see also* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (holding that race, religion and alienage are "suspect" classifications).

provision is not similarly situated to the person for whom the provision has no such effect. The impact of the legal provision on those differently situated persons is not equal."[24] In this view, true "substantive" equality may require the granting of exemptions for religious believers from otherwise neutral laws.

Whether this argument is convincing will depend upon one's acceptance of its premise: that by "equality before the law" we mean not only the law's terms, but also its differential impact.[25] The need for a reckoning of a law's effects upon individuals differently situated has certainly been recognized in many contexts; cases involving affirmative action to achieve racial or gender equality come most quickly to mind.[26] Perhaps such concerns should be extended to persons who are, by their own religious choice, differently situated from others.[27] Although the justness of this "differing impact" principle may be easily accepted by those who value religion and religious exemptions, it is not as easily accepted by others. For those who believe that the problem is inequality based upon religious identity, the explanation that identity simply *requires* this inequality will be unconvincing.

To develop a convincing answer to the equality challenge, we must consider the evils which sectarian favoritism, in the usual sense, presents. Such favoritism is evil because it extends a benefit to some citizens only. By conditioning legal benefits upon particular religious identities, we declare that—by definition—some citizens are eligible for beneficial treatment and others are not. This kind of unequal treatment, for irrelevant

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[24] Pepper, *supra* note 21, at 41; *see also* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 148-49 (1986) (arguing that government "neutrality" may, in fact, penalize citizens with particular religious needs).

[25] For a discussion of "formal" and "substantive" equality in the religion context, see Pepper, *supra* note 21; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

[26] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509-11 (1989) and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-09 (1978) (Powell, J.) (describing permissible circumstances for race-based affirmative action); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (arguing that "race-neutral" laws entrench historic socio-economic disadvantage); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977) (arguing that a law's impact must be fully considered in determining issues of racial equality).

[27] *See* David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 79 (1991) (religious exemptions for members of religious groups can be seen as a form of affirmative action).

reasons, seems to be inherently unfair. It can also be seen as belief-coercive,[28] something deeply antithetical to religious freedom guarantees.

Are the same evils present when we favor the religious over the nonreligious believer, for the purpose of exemptions from otherwise neutral laws? The answer to this question depends, fundamentally, upon what our understanding of "religion" is. If by "religion" we mean "organized religion,"[29] or "conventional[ ] religious system[s] of belief,"[30] then the evils of special-status treatment and belief coercion arguably persist, although in attenuated form. Conferring benefits on members of organized religious groups is exclusive of some, although clearly more inclusive (and less belief-coercive) than conferring benefits on Baptists or Christians. In fact, the degree to which the principle of equality is offended is a direct function of the expansiveness of our understanding of what the "religious" is. If, for example, we extend protection to the exercise of individual conscience, broadly defined—if the "religious" is the ability, and responsibility, of individuals to make personal, reasoned, moral inquiry[31]—then religious freedom, and the idea of religious exemption, approaches the status of a pure "public good:"[32] of equal value, and equal availability, to all citizens. Under this approach, *Yoder* does not represent a benefit afforded to Amish, or to Protestant Christians, or to members of organized religions; it represents a benefit—freedom of conscience, and potential exemption from conflicting laws—which is available to all citizens.

A sharp critic will challenge the position that I have outlined on several grounds. First, it can be argued that freedom of conscience is too broad an understanding to be workable in this context. If constitutionally protected freedoms are those of "conscience," then that word must have some kind of distinct meaning and exclusionary power. Conscience must have definitive content; it must identify particular kinds of human inquiry, particular kinds

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[28] *See* CHOPER, *supra* note 21, at 118-23 (footnote omitted) (discussing government benefits which have the effect of "coercing or significantly influencing people either to violate their existing religious tenets, or to engage in religious activities or adopt religious beliefs when they would not otherwise do so").

[29] *See* Eisgruber & Sager, *supra* note 4, at 1259, 1265.

[30] *See id.* at 1266.

[31] *See* Laura S. Underkuffler, *Individual Conscience and the Law*, 42 DEPAUL L. REV. 93 (1992).

[32] *Cf.* Joseph Raz, *Rights and Individual Well-Being*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 29, 37 (1994) (stating that public goods "serve the interest of the people generally in a conflict-free, non-exclusive, and non-excludable way").

of human belief. We cannot, as a practical matter, incorporate "the fantastic idea that it is a matter of constitutional regret whenever an otherwise valid law collides with the commitments of an individual or group."[33]

There is, in fact, a rich literature about what conscience in this culture is generally understood to be. One of the best discussions can be found in a recent book by Professor Anne Patrick.[34] She describes conscience as "a dimension of the self, one central to our experience of moral agency."[35] It is "a personal moral awareness, experienced in the course of anticipating future situations and making moral decisions, as well as in the process of reflecting on . . . [the] past."[36] Conscience is, under this and other formulations, of a distinctly moral character; it is, as I have stated elsewhere, the ability and responsibility of individuals to make personal, reasoned, moral inquiry.[37]

The framing of religion and religious freedom in this way does not, of course, answer all questions. There are certainly differing opinions as to what "moral" decision making is, and one can certainly imagine factual situations in which application of this understanding of the function and purpose of religious freedom would be difficult. However, application of the idea of conscience, understood in this way, would seem to be no more difficult than application of the ideas of equal protection, free expression, fair procedure, and other important constitutional ideas; and it offers considerably more guidance than the simple meaning of "religion" with which the courts now struggle.

A second objection may follow the first. I have not stated that freedom of conscience *is* a pure public good; I have stated that it *approaches* this status. It must, of necessity, approach (and not achieve) this status because it must, of necessity, be of more value to some citizens than to others. *If* conscience is given sufficient content to be useful (for instance, with grounding in ideas of moral agency), then that very content will result in selectivity and exclusion. Although the universe of citizens who value

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[33] Eisgruber & Sager, *supra* note 4, at 1268.

[34] ANNE E. PATRICK, LIBERATING CONSCIENCE: FEMINIST EXPLORATIONS IN CATHOLIC MORAL THEOLOGY 35 (1996).

[35] *Id.*

[36] *Id.*; *see also* WALTER E. CONN, CONSCIENCE: DEVELOPMENT AND SELF-TRANSCENDENCE 1-2 (1981) ("[T]he term 'conscience' does not refer to any power or faculty, but is rather a metaphor pointing to the specifically moral dimension of the human person, to the personal subject as sensitive and responsive to value.").

[37] *See* Underkuffler, *supra* note 31.

freedom of conscience must be large, it does not include (in the words of Eisgruber and Sager) those who prioritize instead "the pulls of love, passionately demanding life projects, and the infinitely creative demands of strong psychological compulsion."[38] The amount of discrimination involved will depend upon the particular question analyzed; for instance, those who value freedom of conscience as a general matter will presumably be more numerous than those who value conscientious refusal to participate in war. However, freedom of conscience—even in its most abstract formulation—undoubtedly benefits some citizens more than others. Although the broad privileging of conscience undoubtedly excludes fewer citizens than more narrow understandings of the religious, it just as undoubtedly excludes some. We cannot avoid some degree of "content discrimination."

To the extent that this argument presents a tautology, it is easily answered. If protection is afforded to some persons or human endeavors, then it is—by definition—not afforded to other persons or human endeavors. However, content neutrality, or the absence of discrimination in this sense, is clearly not required in law. The law obviously privileges some human values, projects, and goals over others. The issue is not whether some projects or expressions are protected and others are not; rather, the issue is whether the choice of protection for some over others can be justified. The privileging of conscience must still find justification (although less, perhaps, than the privileging of Episcopalians or Muslims) in some extrinsic value. We are, therefore, brought to the last postulate above: that there is no specially valuable character of conscience that would justify residual inequality.

We have finally arrived, one might say, at the fundamental question. There is little doubt that state choice of the members of one religious sect over the members of other sects, on the simple basis of religious identity or belief,[39] is troubling and (in the end) unjustified. The real question is: what about religion and nonreligion? Is equal treatment required here, as well?

If one were to take the Supreme Court's tests at face value, one could certainly conclude that equal treatment is required. Repeatedly, the Court has stated that "neutrality" requires governmental evenhandedness toward religion and nonreligion. In theory, neither can be favored over the other

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[38] Eisgruber and Sager, *supra* note 4, at 1269.

[39] This must be distinguished from state "discrimination" on the basis of conduct, which corresponds—coincidentally—to particular religious groups. To flatly prohibit "discrimination" in this sense would prevent the implementation of all collective norms.

by government[40]—although this principle has often been compromised by concomitant beliefs that religion should be "accommodated,"[41] that many "historic" religious practices by government are harmless,[42] and so on.

For those who believe that religion should be privileged, there is the easy way out: religion is privileged, simply enough, because it is *textually* privileged. The Free Exercise Clause explicitly states that religious free exercise shall not be "prohibited" by law, a textual guarantee not given to the general run of human beliefs and human activities. Freedom of religion is one of a number of fundamental values that are textually protected, others being free speech, the protection of liberty, the protection of property, and so on. These constitutional values are privileged against general expressions of majoritarian desires. Religious freedom and other, non-constitutional goals of government are, therefore, clearly *not* equal. The constitutional idea of equality cannot require the equality of religion and nonreligion in contradiction to the First Amendment's explicit, textual guarantee.

Although this argument is appealing, it assumes its conclusion: that religion is constitutionally privileged because we interpret the constitutional text in a manner that makes religion constitutionally privileged. In fact, the text of the First Amendment is more ambiguous than this textual argument would suggest. The statement that "Congress shall make no law . . . prohibiting" free religious exercise could conceivably mean, as Eisgruber and Sager argue, that religious beliefs (of minorities, particularly) should be given the same regard as the deep beliefs of citizens generally.

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[40] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2521 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (stating that nonreligion is not to be favored over religion); Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 704-05 (1994) (stating that religion is not to be favored over nonreligion).

[41] *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (discussing accommodation of religious institutions' employment practices); Wisconsin v. Yoder, 406 U.S. 205 (1972) (discussing accommodation of religious parents' attitudes toward public schooling); Sherbert v. Verner, 374 U.S. 398 (1963) (discussing accommodation of religious workers' sabbaths); *see also* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (discussing accommodationist principle in the Supreme Court's decisions).

[42] *See* County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989) (opining that legislative prayer, the national motto ("In God We Trust"), and religious references in the Pledge of Allegiance ("one nation under God") are permissible as historical, "nonsectarian references to religion by . . . government"); Marsh v. Chambers, 463 U.S. 783, 786 (1983) (stating that certain government religious practices are permissible because they are "deeply embedded in the history and tradition of this country").

Certainly, the idea that religious beliefs and practices are privileged over otherwise neutral state laws is not an uncontrovertible conclusion from the Amendment's language.[43]

One could also argue that we should privilege religion, or conscience, because this is the approach that was assumed by the majority of those who were involved in the drafting and ratifying of the Constitution and its amendments.[44] However, this argument also falls short. Putting aside the serious questions involved in determining the Founders' intent in this (or any other) instance,[45] there is no conclusive reason why colonial norms must control our interpretation of the constitutional text in our own time. We have, in fact, jettisoned many norms that were prevalent in the Founding Era in favor of more contemporary values.[46] Perhaps disillusionment with the power and value of religion or conscience—or, perhaps, a new sense of the importance or meaning of equality—renders the idea of fidelity to the Founders' values incoherent in these post-modern times.

In the end, the only convincing answer to the equality challenge is for the utility or value of religion or conscience to stand on its own merit. Is there, in short, any particularly valuable function or purpose served by religious freedom guarantees?

If religion is broadly defined—and I realize that this is (in the minds of many) a large "if"—then I believe that there is a particular value to freedom of religion in our Bill of Rights. *If* religion is understood to be

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[43] Indeed, one could argue that the textual argument was essentially rejected in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) and *Employment Division v. Smith*, 494 U.S. 872 (1990). In those cases, the Supreme Court held that if prohibiting or burdening religion is not the object of the law—if the law is "neutral" in its object—then the individual must be *coerced by government to act* in violation of his religious beliefs, to state a cognizable claim under the Free Exercise Clause.

[44] The relevance of historical inquiries to modern First Amendment interpretation is urged by many commentators. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Stephen Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309. *Cf.* Underkuffler-Freund, *supra* note 22 (arguing that although we are not bound by the "Founders' intent," understandings of the meaning of religious freedom in the Founding Era, and the roles of those understandings in the constitutional project, might be of value in our consideration of the same issues today).

[45] *See* Underkuffler-Freund, *supra* note 22, at 877-79 (discussing the difficulties in determining dominant ideas about religious questions in the American Founding Era).

[46] Examples include most notions of the acceptable limits of cruel and unusual punishment, notions of racial and gender equality, notions of property protection in the age of the regulatory state, and so on.

rooted in the exercise of individual conscience, then I believe that freedom of religion has very distinct value (in two different ways) in our constitutional scheme.

First, the protection of religious freedom—or freedom of conscience, as I have chosen to define it—encourages and protects the idea of individual moral agency as a vital part of our society and our governmental processes. We express our belief—through the protection of religious conscience—that individuals have the ability, *and the responsibility*,[47] to attempt to discern and implement a sense of personal moral awareness.

The idea of protection for moral reflection and decision making is, of course, not without its risks. Conscience—like any other human endeavor—can lead to behavior that is misguided or wrong. As Daniel Maguire has written, "[t]o the general statement that one should always follow one's conscience should be added that one should always question one's conscience. The autonomy of conscience is not absolute."[48] However, it is the general value of free exercise—not the guarantee of infallible results—that is proclaimed by the constitutional guarantee. Just as free speech will not always yield just or desirable results, so freedom of conscience will not either. And just as free speech must have limitations, imposed in the name of superseding values, so freedom of conscience must also be limited.[49] But the core idea of conscience—as a necessary, vital, and protected part of individual *and* collective human experience—is the idea that we must encourage and maintain.

The second reason for the protection of religious conscience is perhaps less universal but, I believe, still of critical importance to most of us. Conscience, as I have just argued, reminds us of the importance of moral questioning in individual and collective life. It also, I would suggest, reminds us of our inextricable connection to the community of others.[50]

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[47] *Cf.* Smith, *supra* note 21, at 661, 675-86 (arguing that conscience, in this context, should be restricted to "compelled behavior"—behavior that is a matter of moral duty).

[48] DANIEL MAGUIRE, THE MORAL CHOICE 379 (1978).

[49] I have previously argued that the state may restrict religious free exercise when there is "something akin to a compelling government interest" at stake. In particular, governmental action that serves to protect the state from a manifest danger or to protect the reciprocal rights of others would be justified. Underkuffler-Freund, *supra* note 22, at 964-65. Upon further reflection, I am not certain that this formulation captures all of those instances when the state's interest should prevail. But clearly, the state's interest must be one that entails deeply-held societal values—and that cannot readily be met by alternative means.

[50] Professor Pepper has noted the seeming uniqueness of the Free Exercise Clause in endorsing the value of (religious) group life. *See* Pepper, *supra* note 21, at 41-42 (Religious life "characteristically [involves] a profound connection to . . . [religious] community;" in

(*continued*)

Although it is certainly possible to imagine individuals whose conceptions of conscience are not of this order, for most of us conscience only has meaning—indeed, moral agency only has meaning—in the context of the consideration of the self with others. As Anne Patrick writes, "in reality conscience is a very social phenomenon." In this context, "the individual is always a self in relation to others . . . ."[51] It is what our decisions are, vis-à-vis others, that comprises most moral dilemmas. Questions of our moral agency most often arise when deciding who we are, what values we choose, in the complex web of social interactions that comprise our lives.

It could be argued, therefore, that of all of our constitutionally guaranteed personal freedoms, conscience is the most intrinsically *relational*. As the only personal freedom which is rooted in—and imposes an obligation of—moral agency, it is, in turn, the only one which subtly contradicts completely individualistic notions and reminds us of the social fabric in which each of us is intrinsically caught. Freedom of religion is protected because of the value of conscience; freedom of conscience reminds us of our relationships to others, in the context of moral choice.

CONCLUSION

The equality challenge to religious privilege is real. The privileging of religious beliefs and religious individuals, as a constitutional matter, contravenes our basic instincts of equality. Pretending that this discomfort does not exist will not make it go away. Indeed, the failure of the Supreme Court to acknowledge the validity of the equality challenge in this context is part of our uneasiness with the *Yoder* decision and others like it.

To the extent that religion is more broadly defined—to the extent that protection of the "religious" provides more benefit to more citizens—then the power of the equality challenge is diminished. However, it does not disappear. As long as "religion" remains a meaningful (and exclusionary) category, there will be "content discrimination" in the implementation of ideas of religious protection and religious privilege.

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the Free Exercise Clause, "the value of community and connection are given explicit constitutional protection.").

[51] PATRICK, *supra* note 34, at 35-36; *see also* MAGUIRE, *supra* note 48, at 379 ("Conscience is not individual or social in persons. It is both. It is not a center of moral judgment which is atomistically cut off from other centers. Genuine conscience lives in dialogue and mirrors our social nature."); Smith, *supra* note 21, at 681 ("[T]he pursuit of conscientious commitments is generally more concerned about others or matters external to one's self than it is about internal or egoistic concerns.").

This content discrimination can be justified, I believe, only on the basis of substantive value choice. The legitimacy of granting religious exemptions from otherwise neutral laws depends, in the end, upon the convincing nature of arguments that assert that religion has value that deserves protection. In the face of the equality challenge, we cannot assume this value; rather, the question of its existence must be examined, and the reasons for it articulated. I have argued that *if* we define religion broadly, as the protection of individual conscience—*if* we understand religion to be rooted in the ability, and responsibility, of individuals to act as moral agents—then we can justify the special protection of religion as a substantive value choice. Although not an unlimited value (just as free speech is not an unlimited value), the protection of conscience is a vital part of what we value in individual life. It is also a critical part of collective life: both as a reminder that collective decisions must be morally accountable and that we—as individual morally imagining beings—are inextricably related to others in the conduct of our lives.

I realize that many who raise the equality challenge will feel profoundly uncomfortable with this conclusion. Equality, for them, is closely related to "neutrality"—the state should not, in their view, pick and choose among competing values. However, to this objection I make the following answer. It is impossible, in fact, to escape from the necessity of value choice. Equality is, itself, a substantive value; it is only one of many values that we (as a collectivity) have chosen and upon which we believe that the legitimacy of our social and governmental orders depend. The question is not whether substantive value choice can be avoided; it is, instead, whether religion (understood as individual moral agency) is a value that we should strive to protect.

In an article entitled *The Constitutional Value of Assimilation*,[52] Professor Eisgruber convincingly argues that there are certain values which our constitutional enterprise assumes. He argues that through the Constitution, Americans are unified "around a vigorous, judgmental, and bruising argument about justice."[53] In a bold and candid statement, he argues that the Constitution endorses several values, including equal opportunity, the value of reason, the value of open public debate, and the freedom of individuals to create domestic arrangements on their own terms. He also argues that "[c]itizens, as individuals, should think

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[52] Christopher Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87 (1996).

[53] *Id.* at 88.

responsibly about what justice requires," and should "honor their convictions."[54] In addition, the polity, as a collective, should continually reconsider its commitments in light of new experiences and new insights.[55] With all of these observations I heartily agree. I would only add that in my view, it is precisely this commitment to individual and collective moral inquiry that religious freedom serves.

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[54] *Id.* at 91.
[55] *Id.*