Privileging and Protecting Schoolhouse Religion

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I. INTRODUCTION

To what extent does federal law protect public school students from religious discrimination? Intuitively, one would expect children victimized by religious hate, bias, and other discrimination to enjoy the apex of protections afforded under our constitutional system. Structurally, they are victimized at the convergence of the First and Fourteenth Amendments, denied not only the Constitution's "first freedom"[1] but also the very interest in equal educational opportunity that has been constitutionally preeminent since *Brown v. Board of Education*.[2] Moreover, school-age children may be peculiarly vulnerable to the sting of hate and bias incidents, so it is especially important to provide them with the full extent of constitutional support.[3] Nevertheless, students of faith have not always received a level of protection commensurate to the importance of the interests at stake.[4]

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[1] *See generally* Michael W. McConnell, *Religion and Constitutional Rights: Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000) (discussing the concept of the Constitution's "first freedom").

[2] 347 U.S. 483 (1954).

[3] *See generally* Nuxoll v. Indian Prairie Sch..Dist. #204, 523 F.3d 668, 671 (7th Cir. 2008) (finding research to be suggestive but not conclusive that school age children are particularly vulnerable to harassment); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (discussing parents' strong interest in directing the religious education of their children free from persecution); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2333 n.71 (1989) (detailing an epidemic of racist incidents on U.S. college campuses in the 1980s).

[4] *See* Heather M. Good, Comment, "*The Forgotten Child of Our Constitution": The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Their Children,* 54 EMORY L. J. 641 (2005) (construing Robert P. George, Comm'r, U.S. Comm'n on Civil Rights, Statement on Free Exercise of

Congress and the federal courts have failed religious public school students in several ways: failing to prohibit religious discrimination in education statutorily with appropriate enforcement mechanisms; failing to require religious accommodations in cases of religious infringement; and failing to articulate a strict scrutiny standard for cases of religious discrimination in education. To be sure, Congress and the courts have privileged student religious activities which may be characterized as expressive.[5] In various contexts, the Court has held that public schools may not discriminate against religious expression by public school students or student groups.[6] The Equal Access Act generally requires federally assisted public schools that maintain a "limited open forum" to provide religiously oriented clubs with equal access to meeting spaces and school publications.[7] Indeed, some school districts have promoted school-run religious activities in a manner that exceeds the limitations of the Establishment Clause.[8] However; these

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Religion in Public Schools to U.S. Comm'n on Civil Rights (Spring 1999), at http://www.fedsoc.org/Publications/practicegroupnewsletter/religious%20liberties/ statement-religiousv3i1.htm (last visited August 16, 2008) ("I encourage public school officials to take the right to free exercise of religion as seriously as they take other civil rights, and to no longer treat it as the forgotten child of our Constitution.")).

[5] Justice Antonin Scalia has vividly articulated the underlying concern for the protection of expressive religiosity, arguing that, "in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (Scalia, J., plurality op.). Advocates of religious freedom have hung their hats on Speech Clause hooks for the obvious strategic reason that speech rights were on the rise as religious rights were on the decline during the Twentieth Century. For an analysis of the changing fortunes of these constitutional values, *see generally* Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom*?, 8 U. PA. J. CONST. L. 431 (2006).

[6] In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, the Supreme Court held that public universities which allowed political student-run groups to use campus facilities for their meetings could not deny equal access to a Christian student group. Similarly, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the Court held under the Equal Access Act that a chess, scuba-diving and service clubs must allow a group of Christians to form extracurricular group for Bible study, prayer and fellowship. The Court has been similarly solicitous of expressive religious claims in the higher education context. *See* Rosenberger v. Rector of the Univ. of Virginia, 515 U.S. 819 (1995).

[7] 20 U.S.C. § 4071 (2000).

[8] *See, e.g.,* Lee v. Weisman, 505 U.S. 577 (1992) (holding school-sponsored prayers at graduation and other official school functions violated the Establishment Clause).

selective efforts to privilege certain forms of religious expression have, however, masked a broader failure to protect the equal rights of religious students.[9]

Elsewhere, I have discussed the failure of our federal educational equity structure: despite our sincerest misunderstandings,[10] Congress has never acted to prohibit religious discrimination in federally assisted programs and activities, such as public schools and colleges.[11] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of "race, color, or national origin" in federally assisted programs or activities, including public schools.[12] Over the years, this set of prohibited classifications was expanded by legislation intended to eliminate discrimination on the basis of sex,[13] disability,[14] age,[15] and even membership in certain patriotic youth activities.[16] While federally-enforced statutes bar schoolhouse discrimination on the basis of race, color, national origin, age, disability, or membership in the Boy Scouts of America, they are silent as to religion.[17] As a result, the federal administrative civil rights apparatus lacks jurisdiction to investigate religious discrimination claims in the public schools for cases involving teacher-on-student harassment, student-on-student harassment, disparate treatment of minority religious students in discipline cases, or cases involving assignment to gifted

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[9] The distinction between constitutional "privilege" and "protection" is an important one. *See* discussion *infra*, Part I, note 30.

[10] This point has been misunderstood with surprising frequency by courts and government officials, as discussed in Kenneth L. Marcus, *The Most Important Right We Think We Have But Don't: Freedom from Religious Discrimination in Education*, 7 NEV. L. J. 171 (Fall 2006) [hereinafter, Marcus, *The Most Important Right*] and Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837, 877-878 (Feb. 2007) [hereinafter, Marcus, *Campus Anti-Semitism*].

[11] Marcus, *The Most Important Right, supra* note 10.

[12] 42 U.S.C. § 2000(d) (2000).

[13] Title IX of the Education Amendments Act of 1972, 20 U.S. C. §§ 1681-1688 (2000).

[14] § 504 of the Rehabilitation Act of 1972, 29 U.S.C. § 794(a); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 (2000).

[15] The Age Discrimination Act of 1975, 42 U.S.C. § 6101-6107 (2000).

[16] 20 U.S.C.A. § 7905 (2006).

[17] Marcus, *The Most Important Right, supra* note 10, at 173.

and talented programs.[18] By contrast, the OCR would have jurisdiction in those same situations if the basis of the discrimination claims were racial rather than religious.

Similarly, federal law does not consistently require public schools to provide reasonable accommodations to student religious needs[19] unless they are providing similar exemptions for secular needs.[20] In *Employment Division v. Smith*,[21] the Court held that the Free Exercise Clause does not relieve individuals of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[22] In this way, *Smith* swept away exemptions that excused religious students from participating in school requirements that violated their religious obligations. While some courts have acknowledged at least theoretical if not practical protections for religious students in

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[18] The Department of Justice does have limited jurisdiction under Title IV of the Civil Rights Act of 1964 to investigate religious discrimination at public schools in desegregation cases. 42 U.S.C. § 2000c-6(a) (2000). This provision would seem to provide little or no benefit, since desegregation is seldom the issue in religious discrimination cases. Based upon conversations with various senior officials of the Civil Rights Division of the Department of Justice, it does appear that the department construes their authority broadly under this provision. Nevertheless, the Justice Department's jurisdiction is discretionary; it is not required, like the Education Department's Office for Civil Rights (OCR), to resolve all complaints within its jurisdiction. Accordingly, the Department of Justice brings few new civil rights cases in public schools, leaving the bulk of the case load to OCR. OCR, however, has no jurisdiction to investigate religious discrimination. *See, generally,* Marcus, *Campus Anti-Semitism,* supra note 10, at 856-858, 876-884. Moreover, to the extent that CRD brings religious discrimination cases under Title IV's desegregation jurisdiction, its jurisdiction may be vulnerable to charges that its conduct is *ultra vires*.

[19] Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990); Samina Quddos, *Accommodating Religion in Public Schools: Must, May or Never?,* 6 J. ISLAMIC L. & CULTURE 67 (2001).

[20] Employment Div. v. Smith, 494 U.S. 872, 884 (1990). Schools may, however, provide reasonable accommodations under some circumstances. For two contrasting views of permissive accommodations, *compare* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 324 (1991) (defending Smith's rejection of the constitutionally compelled free exercise exemption) with Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 771 (1992) (arguing against discretionary accommodation but maintaining that the Free Exercise Clause sometimes compels accommodation).

[21] 494 U.S. 872 (1990).

[22] *See id.* at 879.

Smith's so-called "hybrid rights" exception,[23] others have construed the exception narrowly or dismissed it as *dicta.*[24]

This is a conspicuous anomaly, considering that courts strictly scrutinize state and federal actions that are conscious as to race;[25] federally conducted actions that discriminate on the basis of religion;[26] state actions which burden religious exercise by incarcerated persons or in land-use planning;[27] and state action discriminating on the basis of religion violates the laws of some states.[28] Federal judicial scrutiny is now deliberately less strict, however, when it comes to state and local non-zoning matters such as schools. Arguably then, public school students would have stronger federally enforced guarantees of religious freedom if they were sentenced to a state or federal prison than if they continued their studies in the public schools.

In the contemporary lexicon of constitutional theory, Congress and the courts have famously "privileged" certain expressive schoolhouse religious activities, particularly where they are supported by separate constitutional provisions, such as the Speech Clause,[29]while failing to provide basic "protections" that have long been extended to other groups.[30] However, they have not provided even the full range of constitutional

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[23] *Id.* at 880-81.
[24] *See* Jack Peterson, Comment, *Exceptions to Employment Division v. Smith: A Need for Change,* 10 LEWIS & CLARK L. REV. 701, 710-16 (2006) (surveying circuit courts' recent treatment of *Smith*'s hybrid rights exception).
[25] *See, e.g.,* Richmond v. J.A. Croson, 488 U.S. 469 (1989); Adarand Constructors v. Pena, 515 U.S. 200 (1995).
[26] Gonzales v. O Centro Espirita Beneficenta Uniao do Vegetal, 546 U.S. 418 (2006).
[27] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-200cc-5 (2000).
[28] For a discussion of this issue in the context of educational institutions, *see* Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education,* 32 U.C. DAVIS L. REV. 531 (1999).
[29] *See, e.g.,* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).
[30] The "privilege" and "protection" terminology was developed in Christopher L. Eisgruber and Lawrence G. Sager, Symposium Article, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,* 61 U. CHI. L. REV. 1245, 1250-54 (1994) [hereinafter, Eisgruber & Sager, *Vulnerability of Conscience*].

privilege, particularly in areas which do not involve expressive activities. Therefore many students cannot avail themselves of the additional support of the Speech Clause.

This Article will argue, in Part II that equal opportunity for religious minorities requires, in practical terms, legislation to establish (i) administratively enforced, statutory anti-discrimination protections and (ii) reasonable accommodations for student religious needs. Part III will argue that this reform is preferable to an alternative potential legislative reform, which would ensure judicially enforced strict scrutiny for school-based conduct that burdens religious exercise.[31] Part IV anticipates and responds to a number of potential criticisms, and Part V addresses the competing model developed in recent work by Christopher Eisgruber and Lawrence Sager.[32]

II. ENSURING RELIGIOUS FREEDOM IN PUBLIC SCHOOLS

Religious liberty legislation can take either of two forms: the "liberty-based approach" or the "equality-based" approach. In recent years, Congress has most frequently taken a liberty-based approach, requiring strict judicial scrutiny for governmental actions that substantially burden the exercise of religious freedom. This approach has been the foundation for most post-*Smith* legislative initiatives, such as the Religious Freedom Restoration Act (RFRA)[33] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[34] The gist of these legislative efforts has been to direct the courts to impose their most stringent level of review on governmental actions

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[31] When federal courts consider school decisions that burden the free exercise of religion by public school students they do not consistently apply a strict scrutiny standard. *See supra* note 6 and accompanying text; *infra* notes 89-112 and accompanying text.
[32] Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 30, at 1250-1254.
[33] 42 U.S.C. § 2000bb (2000).
[34] 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

that significantly constrain religious practice, irrespective of whether the constraints are discriminatory. Alternatively, Congress can take an equality-based or egalitarian approach, providing enforcement mechanisms to police constitutional anti-discriminatory norms within the bounds of the Fourteenth (and perhaps also Thirteenth) Amendment. This is the approach taken in Title VII of the Civil Rights Act of 1964[35] and in the proposed Workplace Religious Freedom Act.[36]

A. Prohibiting Religious Discrimination: An Egalitarian Approach

The most simple and powerful equality-based prohibition on religious discrimination in education would ban religious discrimination in programs or activities that receive federal financial aid. In other words, this ban would extend Title VI to religion, just as Title IX extended protection to sex,[37] the Rehabilitation Act and the Americans with Disabilities Act extended protection to disabilities;[38] and the Age Discrimination Act extended protection to age.[39] This Article argues that a complete prohibition would also need to specify that religious accommodations are sometimes required.

The rationale for such legislation is that Congress must prohibit religious discrimination in the public schools if religious students are to enjoy the equal educational opportunity guaranteed by the Equal Protection Clause of the Fourteenth Amendment and the full range of religious freedoms protected under the Free Exercise

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[35] 42 U.S.C. §2000e (1991).
[36] H.R. 1431, 110th Cong. (2005).
[37] Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (2000).
[38] § 5 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2000); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 (2000).
[39] The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (2000).

Clause of the First Amendment.[40] The significance of constitutional protection is easy enough to grasp. To paraphrase Martin Luther King, Jr., constitutional rights constitute a promissory note which can only be redeemed by legislative codification, regulatory implementation, and administrative enforcement.[41] Providing equal educational opportunities to vulnerable minorities has historically required the federally-legislated tripartite structure of private-party litigation, judicial enforcement, and agency administrative enforcement.[42]

As a first step, Congress should enact legislation prohibiting religious discrimination in programs and activities that receive federal funding, such as public schools and most public and private universities, just as current law prohibits discrimination based on race, color, national origin, sex, age, and disability in these same institutions.[43] The statutory language could be an amendment to Title VI or it could be modeled after it: "No person in the United States shall, on the ground of religion, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[44] The statute would then provide an enforcement structure parallel to the procedures

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[40] For a discussion of the relationship between civil rights statutes and their constitutional antecedents, *see* Marcus, *Campus Anti-Semitism, supra* note 10, at 866-867.

[41] MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 219 (James M. Washington ed., 1996).

[42] For a discussion of this tripartite structure, emphasizing the importance of the administrative process, *see* Marcus, *Campus Anti-Semitism, supra* note 10, at 856-58.

[43] This point has been argued at least three times over the last decade, and for three reasons, in the law review literature. *See* Marcus, *Most Important Right*, *supra* note 10 (to repair a hold in the fabric of civil rights laws and remedy a variety of problems); Erica L. Keller, Note, *I'm Telling! Who Cares?! Student-on-Student Religious Harassment in Public Schools*, 49 WAYNE L. REV. 1071 (2004) (to eliminate religious harassment in public schools); Joshua C. Weinberger, Comment, *Religion and Sex in the Yale Dorms*, 147 U. PA. L. REV. 205 (1998) (to ensure reasonable accommodations to permit religious observance by college students). This section expands upon arguments contained in Marcus, *Most Important Right*, *supra* note 10, at 176-77.

[44] Weinberger, *supra* note 43 at 239 (resting the statute on the relatively firm Spending Clause foundation).

already provided for violations of Title VI and Title IX. There are at least five reasons for this legislation.[45]

First, this legislation is needed to effectuate the principal intent underlying Title VI: to ensure that federal moneys are not being used to fund activities prohibited under the Constitution. As Senator Humphrey explained during floor debate, the purpose of Title VI is "to protect the rights already guaranteed in the Constitution of the United States, but which have been abridged in certain areas of the country."[46] Religious discrimination is clearly prohibited by the Fourteenth and arguably by the Thirteenth Amendment as well. For this reason, the logic behind the initial passage of Title VI compels inclusion of a prohibition on religious discrimination. As Senator Abraham Ribicoff argued at the time, "there is a constitutional restriction against discrimination in the use of Federal funds[,] and [T]itle VI simply spells out the procedure to be used in enforcing that restriction."[47] As a basic matter of public policy, the federal government should not fund activities that involve discrimination on the basis of religion because such conduct is banned under the Constitution.

Second, religious discrimination should be policed with particular zeal because it has an element of duality absent in other forms of bigotry.[48] As with the other forms of discrimination, religious discrimination demeans historically disadvantaged minority groups. To this extent, religious discrimination should be combated as vigorously as other forms of bigotry. Moreover, religious discrimination burdens the exercise of

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[45] *See* Marcus, *The Most Important Right, supra* note 10, at 176-77.
[46] 110 CONG. REC. 1518, 6544 (1964) (statement of Sen. Humphrey).
[47] *Id.* at 13, 333 (statement of Sen. Abraham Ribicoff). *See, generally,* Marcus, *Campus Anti-Semitism, supra* note 10, at 866-67.
[48] *See, generally,* Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 30 (describing two separate arguments for religious freedom).

activities which have a particular social value in our constitutional culture.[49] While some commentators reject the latter notion as reflecting an impermissible preference for religion of irreligion,[50] others argue that religious freedom merits its position as the first freedom.[51] For those who embrace the latter position, religious freedom is doubly worthy of protection.

Third, religious discrimination should be policed because it is so closely inter-related with racial and ethnic discrimination. A religious exception to our anti-discrimination rules allows religious discriminators to escape sanction when acting under the guise of racial bigotry. This point has been demonstrated convincingly in the context of jury selection.[52] The problem is that many people face both racial and religious prejudice. To the extent that racial bias is policed but religious bias is not, discriminators can evade enforcement by feigning that their actions are motivated only by religious animus. Thus, for example, in "hybrid" or "intersectional" cases, those who choose to use racially motivated jury strikes have been able to camouflage their bias as a religious discrimination, thus avoiding censure. In the same way, where racial discrimination is banned but religious discrimination is not, intersectional discrimination can evade enforcement. Creating incentives for government actors to engage in or to feign religious bias is a significant negative externality of the legislative decision to exclude religion from the reach of civil rights law.

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[49] *See* McConnell, *supra* note 1.
[50] *Id.*
[51] *Id.*
[52] Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 169-173 (2005).

Fourth, race and religion are so closely associated that neither can be entirely eliminated without banning the other as well. The continuities between race and religion have led many social scientists to refer to "ethno-religious groups."[53] In some cases, such as anti-Semitism, ethnic, racial and religious discrimination are so closely intertwined as to be indistinguishable.[54] Discriminatory animus is commonly directed at an undifferentiated amalgam of minority group characteristics, such as ethnicity, religion, and race. Some examples of this phenomenon are the mid-century mistreatment of Japanese Americans; the more recent forms of discrimination against Arab and Muslim Americans and Sikhs;[55] and the racially charged historical American mistreatment of Indians, which led to the anti-Peyote laws at stake in *Smith*.[56] In other words, religion is frequently a material constituent in the construction of racial otherness.[57]

Fifth, by banning ethnic discrimination without also banning religious discrimination, Title VI anomalously extends greater protections to members of religious groups that share ethnic or ancestral characteristics than to groups that do not. In 2004, the U.S. Department of Education's Office for Civil Rights (OCR) announced that it

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[53] *Id.*

[54] *Id*. at 169,172; Marcus, *Campus Anti-Semitism*, *supra* note 10, at 862, 872-877. *See*, *e.g.,* Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (holding Jews to be a "race" within the meaning of the Civil Rights Act of 1866 and U.S. Department of Education regulatory guidance and holding anti-Semitism to be a form of prohibited racial discrimination under Title VI of the Civil Rights Act of 1964). *See* Letter from Kenneth L. Marcus, Deputy Assistant Sec'y for Enforcement, Delegated the Auth. of Assistant Sec'y of Educ. for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter, Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), *available at* http://www.ed.gov/print/about/offices/list/ocr/religious-rights2004.html [hereinafter Dear Colleague Letter]. In both cases, the determinations were necessary in order to conclude that certain forms of anti-Semitic discrimination are actionable under these respective statutes. Marcus, *Campus Anti-Semitism*, *supra* note 10, at 840, 887-888.

[55] Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROB. 215, 221-222 (2005).

[56] Kenneth Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi,* 69 TUL. L. REV. 335, 340, 343 (1994).

[57] Chon & Arzt, *supra* note 55, at 225.

would enforce Title VI's race and national origin provisions to protect students who are members of groups exhibiting both religious and racial or ethnic characteristics, such as Jewish and Sikh students.[58] OCR's reason is that, to the extent that these groups are "races" under the "ethnic or ancestral heritage" standard *in St. Francis College v. Al-Khazraji*[59] and *Shaare Tefila Congregation v. Cobb,*[60] they are also covered under Title VI. It would therefore be inequitable and arguably a denial of Equal Protection to deny such groups administrative enforcement on the ground that they also share religious characteristics.[61] At the same time, the question arises as to whether extending protections to those religious groups that are also ethnic or ancestral groups but not extending protections to those that are only religious groups may in turn create the appearance of inequity.

This problem is complicated by the fact that religious discrimination has an undeniable disparate impact on certain ethnic groups. For example, religious discrimination motivated by anti-Jewish animus has a disparate impact on persons of Jewish ethnic or ancestral heritage. OCR has jurisdiction over anti-Semitic discrimination because such discrimination is based on ethnicity or race, not because it is based partly upon the tenets of the Jewish faith.[62] That exception may be difficult to square with OCR's disparate impact regulations. On the other hand, if OCR did not

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[58] Marcus, *Dear Colleague, supra* note 54; Letter from Kenneth L. Marcus, Delegated the Auth. Of Assistant Sec'y of Educ. For Civil Rights, U.S. Dep't of Educ., Sidney Groeneman, Ph.D., Senior Research Assoc., Inst. For Jewish & Cmty. Research, *available at* http://www.eusccr.com/letterforcampus.pdf. This position was also subsequently adopted by the U.S. Commission on Civil Rights. *See* CAMPUS ANTI-SEMIITISM (2006), *available at* http://www.usccr.gov/pubs/081506campusantibrief07.pdf; Jennifer Jacobson, *Civil-Rights Panel Urges Federal Monitoring of Campus Anti-Semitism,* CHRON. OF HIGHER EDUC., Apr. 14, 2006, at A27.

[59] 481 U.S. 604 (1987).

[60] 481 U.S. 615 (1987).

[61] Marcus, *Dear Colleague, supra* note 54; Marcus, *Campus Anti-Semitism, supra* note 10, at 862.

[62] Marcus, *Dear Colleague, supra* note 54.

recognize such an exception, apparently it is concerned that it would be charged with *ultra vires* action to the extent that religious discrimination *per se* is not within its jurisdiction.

Finally, OCR's adherence to its own guidance has been questionable at best over the last few years.[63] The current Assistant Secretary of Education for Civil Rights has made comments which suggest that OCR is no longer as committed to battling anti-Semitism on college campuses as it was during the first George W. Bush Administration.[64] Similarly, OCR's dismissal of the highly publicized anti-Semitism complaint against the University of California at Irvine has caused some members of Congress and others elsewhere to wonder whether OCR's current leadership is unwilling to adhere to its standing policy at all.[65] In light of OCR's recent irresolution, legislation would send a strong signal that the U.S. Department of Education must ensure equal opportunity for all students at federally funded institutions.

B. Requiring Religious Accommodation

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[63] *See, e.g.,* Meghan Clyne, *Education Department Backs Away from Anti-Semitism Safeguards,* N.Y. SUN. Mar. 29, 2006.

[64] Letter from Stephanie Monroe, Assistant Sec'y of Educ. for Civil Rights, to Kenneth L. Marcus, Staff Director of the U.S. Commission on Civil Rights, Dec. 4, 2006, *available at* http://www.eusccr.com/lettermonroe.pdf.

[65] *See* In re University of California at Irvine, OCR Case No. 09-05-2013, Charles R. Love, Program Manager, U.S. DOE, Office for Civil Rights, San Francisco Office, Closure Letter to Susan Tuchman, Zionist Organization of America, dated Nov. 30, 2007, *aff'd by* Arthur C. Zeidman, Director, U.S. DOE, Office for Civil Rights, San Francisco Office, Denial of Reconsideration Letter to Susan Tuchman, dated February 13, 2008. *See* Kenneth L. Marcus, *Higher Education, Harassment and First Amendment Opportunism,*16 WM. & MARY BILL RTS. J. 1025 (2008). Congressional concerns are expressed in the Letter from Senators Arlen Specter, Sam Brownback, and Jon Kyl to Sec'y of Educ. Margaret Spellings, dated February 27, 2008. The facts of the Irvine case are presented in Kenneth L. Marcus, *The Resurgence of Anti-Semitism on American College Campuses,* MODERN PSYCHOLOGY*, 26, No. 3-4* (2007), *available a*t http://ssrn.com/abstract=1028484.

The second step towards achieving student religious freedom is to mandate, through legislation, that religious accommodations be extended to the same degree that disability accommodations are required under the Americans with Disabilities Act.[66] This theory of religious accommodation is based upon the requirements of equal opportunity and derives its constitutional force as much from the values that undergird the Fourteenth Amendment as those associated with the First. Traditionally, accommodationists have founded their arguments upon the liberty-orientation of the Free Exercise Clause,[67] but equal protection is a more durable foundation for religious freedom in this context.

Educational religious freedom legislation should adopt the ADA's definition of "undue hardship."[68] Under the ADA, that term is defined as something that requires "significant difficulty or expense."[69] Public schools should likewise provide religious accommodations that do not require significant difficulty or expense.[70] The rationale for this policy is that religious students, like the disabled, do not receive substantively equal opportunity unless structural biases adverse to them are corrected. Examples of structural biases include examinations conducted on Yom Kippur but not Christmas and the presence of stairs leading to entrances with no accompanying wheelchair ramps. In other words, accommodations are an element of equal treatment, but the courts have not

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[66] 42 U.S.C. § 12111(10)(A) (1991).
[67] *See, e.g.,* Michael McConnell, *Accommodation of Religion,* 1985 SUP. CT. REV. 1.
[68] *Id.*
[69] *Id.*
[70] This same definition of "undue hardship" is also used in drafts of the proposed Workplace Religious Freedom Act. *See generally* Chai Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender,* 54 ME. L. REV. 159, 177 (2002) (discussing the definition of "undue hardship" used in the ADA context).

understood the issue in this manner, choosing instead to permit legislatures to define the scope of requisite accommodations.

This point must be specifically described in legislation or else the courts will likely take a narrow view of schoolhouse religious accommodations, as they have taken a narrow view of workplace religious accommodations. Title VII of the Civil Rights Act of 1964 has always prohibited religious discrimination, but initially it did not explicitly mandate reasonable accommodation.[71] The Equal Employment Opportunity Commission (EEOC) promulgated regulations requiring reasonable accommodations two years later:

> The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.[72]

While EEOC's initial regulations included strong language protecting the reasonable employee's religious needs, those regulations also contained certain restrictions that were later relaxed. For example, the initial guidelines required accommodations only when the employee developed religious commitments after being on the job and, even then, only when it would not "seriously inconvenience" the employer."[73] The following year, the agency issued new guidelines that required employers to accommodate all employees' religious beliefs, regardless of pre-existing work status, but limited accommodations to those that would not impose an "undue hardship" on the employer.[74] Meanwhile, the courts were generally unsympathetic in their view of claims for workplace religious accommodation.

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[71] 42 U.S.C. 2000e-2(a) (1964). *See, generally,* Thomas D. Brierton, *"Reasonable Accomodation" Under Title VII: Is it Reasonable to the Religious Employee?*, 42 CATH. LAW. 165, 167 (2002).
[72] 42 U.S.C. 2000e-2(a) (1964).
[73] Brierton, *supra* note 71, at 168.
[74] 29 C.F.R. 1605.1(b)(c) (1967), *quoted in* 29 C.F.R. Pt. 1605, app. A (2001).

Just a few years later, in the case of *Dewey v. Reynolds Metals Co.,*[75] the Sixth Circuit held that Title VII only prohibited discrimination based on religion, and did not guarantee special accommodations.[76] The court was quite blunt in reading accommodation out of the definition of discrimination:

> The fundamental error of [the plaintiff] and *Amici Curiae* is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.[77]

Rather than expanding the *Dewey* holding to include a guarantee of special accommodations, the Supreme Court affirmed the decision *per curiam* in 1971.[78]

In response to such narrow judicial constructions, Congress modified the definition of "religion" under Title VII in 1972 to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without under hardship on the conduct of his business."[79] Chai Feldblum argues that the legislative record does not reflect whether the congressional sponsor considered accommodation to be a part of "equality" or a form of "equality-plus" for religious people.[80] While this is literally true, one can also infer that by building this notion of accommodation into its conception of religion, Congress demonstrated its position that accommodation is essential to the meaning of religious freedom.[81]

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[75] 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam,* 402 U.S. 689 (1971).
[76] *Id.* at 335.
[77] *Id.*
[78] *Id*.
[79] 118 CONG REC. 705 (daily ed. Jan. 21, 1972).
[80] Feldblum, *supra* note 70 at 175.
[81] In other contexts, commentators have argued that accommodations are required as a matter of equal opportunity. For example, in discussing pregnancy, Herma Hill Kay has argued that "[e]quality of opportunity implies that [a] woman should not be disadvantaged as a result of that sex-specific variation

Unfortunately, the courts have interpreted statutory religious accommodation provisions narrowly. In 1977, the Supreme Court held in *TWA v. Hardison*[82] that any accommodation creating more than a "*de minimis"* cost for the employer would constitute an "undue hardship."[83] Following *TWA*, courts routinely rejected accommodation requests, ruling that virtually all requests would impose an "undue hardship."[84] This effect is not surprising, since most requests for accommodation require more than *de minimis* effort, although there is a great deal of distance on the continuum between *de minimis* and actual hardship. In 1997, the Workplace Religious Freedom Act was introduced.[85] As indicated above, that legislation, which is still pending, would provide Title VII with the same definition of the term as in the ADA.[86]

In contrast to Congress, the courts have not appreciated the fundamental insight that a failure to accommodate can be a form of discrimination *per se* or that accommodation law is an aspect of Equal Protection.[87] For example, in *Alabama v. Garrett*[88] and *Sims v. University of Cincinnati*[89] the Supreme Court and the Sixth Circuit held, respectively, that Congress's power to enforce constitutional antidiscrimination norms under Section 5 of the Fourteenth Amendment does not apply to Title I of the

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[by which only women bear children]…Since a man's abilities are not similarly impaired as a result of his reproductive behavior." Herma Hill Kay, *Equality and Difference: The Case of Pregnancy,* 1 BERKELEY WOMEN'S L.J. 1, 26 (1985).

[82] 432 U.S. 63 (1977).

[83] *Id*. at 84.

[84] Feldblum, *supra* note 70, at 175.

[85] *Id.*

[86] *Id.* at 78.

[87] *See, e.g.,* Goldman v. Weinberger, 475 U.S. 503, 509-510 (1986) (finding no Free Exercise violation in military dress regulations that prohibited Jewish soldiers from wearing yarmulkes while in uniform and holding that the First Amendment does not require religious accommodations).

[88] 531 U.S. 356 (2001).

[89] 219 F.3d 559 (6th Cir. 2000), *overruled in part by* Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003) (holding that state employees may recover money damages for a state's failure to comply with the family-care provision of the FMLA).

ADA or to the FMLA.[90] Judge Frank Easterbrook bluntly explained the rationale for this reasoning in his prior opinion in *Erickson v. Board of Governors*[91]: "The ADA requires employers to consider and to accommodate disabilities, and in the process extends the anti-discrimination principle" beyond Section 5's authorization to enforce the antidiscrimination principle within the Equal Protection Clause.[92]

As this history demonstrates, the courts will not recognize the need for religious accommodation, or give effect to the ordinary meaning of "undue hardship," unless legislation requires them to do so. For this reason, religious freedom legislation should specify that religious accommodations are required, with "undue burden" defined consistently with the ADA definition, rather than Title VII definition. If this specification is not included in the text of the statute, then it should be provided in the conference or committee reports and further detailed in implementing regulations.

III. The Liberty-Based Approach: Requiring Strict Scrutiny for Substantial Burdens of Religious Exercise

The equality-based approach is quite different from the more familiar liberty-based approach, although there is some overlap. For example, both approaches would ban governmental action that targets specific religious groups for adverse treatment and require, in some educational circumstances, exemptions from generally applicable school or college rules. However, a conventional religious liberties action requiring strict scrutiny for educational policies and practices which substantially burden the exercise of

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[90] Christine Jolls, *Antidiscrimination and Accommodation,* 115 HARV. L. REV. 642, 643-644 (2001).
[91] 207 F.3d 945 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001)
[92] *Id*. at 949.

religion would have various drawbacks that the egalitarian approach lacks. In this sphere, a conventional approach to religious liberty legislation would begin with the proposition that protecting school children from religious persecution is so central to our constitutional tradition that governmental actions which restrict student religious freedom must be subject to strict scrutiny.

A. The Current State of the Law

Since *Employment Division v. Smith*[93], the courts have not consistently applied strict scrutiny.[94] In *Smith,* the Court announced a new standard of free exercise jurisprudence: "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" [95] With this bold stroke, the Court threw aside the long-standing tenet of Free Exercise jurisprudence established in *Sherbert v. Verner*,[96] under which the government must have a "compelling" justification whenever it imposes a substantial burden on the free exercise of religion.[97] Despite legislative efforts to overturn *Smith*,[98] its holding remains vital to many actions of

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[93] 494 U.S. 872 (1990).
[94] *Id.* at 877, 879.
[95] *Id.* This rule presumes that the rule of general applicability is neutral, not merely on its face, but also on its intent. A facially neutral rule that is intended to target members of a particular religion would be subject to strict scrutiny even after *Smith*. *See* Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520 (1993).
[96] 374 U.S. 398 (1963).
[97] *Sherbert,* 374 U.S. 398 (holding that the denial of unemployment benefits to a person who lost employment solely for refusing to work under conditions that would violate religious beliefs is unconstitutional). In candor, the courts seldom adhered faithfully to the rule in *Sherbert* except in factually similar cases, such as those dealing with unemployment compensation. *See* James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment,* 78 VA. L. REV. 1407, 1412 (1992).
[98] The most significant federal legislative effort was the Religious Freedom Restoration Act (RFRA), intended to restore *Sherbert's* strict scrutiny standard. RFRA, which was struck down to the extent that it applied to state and local governmental agencies in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Today, RFRA is applicable only to the actions of the federal government. For this reason, RFRA does not apply to

state and local governments,[99] although there are limited exceptions that do not apply to schools.[100]

The *Smith* Court did, however, recognize a significant exception for the public schools. Specifically, the Court acknowledged that the First Amendment sometimes "bars application of a neutral, generally applicable law to religiously motivated action [that] involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children."[101] In support of this crucial proposition, the Court cited *Wisconsin v. Yoder*,[102] incorporating in dicta the insistence upon strict scrutiny in cases impinging upon parental liberty to raise children in their own faith tradition.[103]

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public schools, which remain subject to the rule in *Smith*, except to the extent that the *Yoder* exception, as discussed *infra* at Part III. A, note 102, applies.

[99] In twelve states, state RFRA statutes enacted in the wake of *Smith*, require strict scrutiny for governmental actions that place a substantial burden on the free exercise of religion. *See* Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children,* 103 MICH. L. REV. 2209, 2213 (2005) (listing state statutes). In addition, at least three state supreme courts have held that their state constitutions require a stricter test for religious claims that what the federal constitution provides under *Smith's* interpretation. *See* State v. Miller, 549 N.W.2d 235, 240-41 (Wis. 1996); Atty' Gen. v. Desilets, 636 N.E.2d 233, 236 (Mass. 1994); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). Nevertheless, strict scrutiny is not available for religious claims in approximately 35 states. *See* Lechliter, at 2214 n.33.

[100] The principal exceptions apply to the treatment of incarcerated persons and land-use planning under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

[101] *Smith*, 494 U.S. at 881.

[102] 406 U.S. 205, 234 (1972). In that case, the Court held that the state had no compelling reason to require Amish children to attend public high school because the children received sufficient instruction at home. The fundamental right of parents to direct the upbringing of their children has been reaffirmed as recently as *Troxel v. Granville*, 530 U.S. 57 (2000). Nevertheless, Richard Garnett has commented that the Court's reaffirmation of this right has been less than enthusiastic:

> Although the Supreme Court keeps re-affirming that the 'primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition,' the federal courts tend generally to treat Pierce like a quirky aged relative who, although she is still invited to Thanksgiving dinner, is watched nervously for fear she will embarrass the family and start tossing mashed potatoes.

Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 125-26 (2000), *quoting* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). Indeed, the doctrine of parental rights has been controversial among scholarly commentators. *See, e.g.,* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L.

The lower courts have been inconsistent in their treatment of this parental-rights exception to the rule in *Smith*. Several courts have a recognized *Smith*'s so-called "hybrid-rights" exception, but they have not actually applied strict scrutiny as the primary rationale for any decision under this exception.[104] Some courts apply the hybrid-rights exception in a narrow fashion, requiring that the secondary claim be independently viable or colorable, in which case the Free Exercise claim does little or no work. Other courts have entirely rejected the rule as unbinding dicta.[105] The generally unsympathetic thrust of these cases has led some commentators to conclude that the hybrid-rights doctrine has failed.[106]

B. Liberty-Based Religious Freedom in Education Legislation

In light of the failure of the hybrid-rights doctrine, one potential remedy for religious discrimination in the public schools is a liberty-based religious freedom statute for the educational sector. Such legislation would parallel RFRA and RLUIPA, but would apply only educational institutions. To the extent that a Spending Clause foundation would be constitutionally useful, the bill could be limited to educational

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REV. 1371, 1447 (1994) (arguing that the doctrine of parental rights should no longer be recognized); Abner S. Greene, *Why Vouchers Are Uncontroversial, and Why They're Not,* 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 406-08 (1999) (arguing that *Pierce* should be reconsidered).

[103] *Yoder* in turn relied upon *Pierce*, explaining that:

> *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment.

Wisconsin v. Yoder, 406 U.S. at 232, *quoting* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[104] *See, e.g.,* Brown v. Hot, Sexy & Safer Prods, Inc., 68 F.3d 525, 538-39 (1st Cir. 1995); Swanson v. Gutherie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998); E.E.O.C. v. Catholic Univ. of Am., 83 F.3d 455, 470 (D.C. Cir. 1996).

[105] *See* Laebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003).

[106] *See* Steven H. Aden and Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573 (2003).

programs and activities that receive federal financial assistance. Legislation of this sort would represent a significant improvement over the current state of the law. However, given a choice between legislative approaches, an equaliy-based approach would be more helpful than a liberty-based approach.

As Thomas Berg has pointed out, *Cheema v. Thompson*[107] usefully illustrates what is at stake.[108] There, Sikh students elected to stay at home with their parents rather than obeying a school policy forbidding students to carry weapons. The school district had refused to create an exemption for Sikh students to wear ceremonial knives, or *kirpans*, in school to accommodate a religious requirement that young Sikh males wear such ceremonial objects at all times. This refusal compelled the students to choose between violating their religious beliefs or losing their right to attend a free public school. The Ninth Circuit applied the then-applicable compelling interest test under RFRA to affirm a preliminary injunction requiring the school to permit *kirpans* as long as the blade was dulled, the knife was "sewn tightly to its sheath," and the knife was worn underneath clothing.[109] The court noted that the school district had failed "to build a meaningful record" to demonstrate why less restrictive alternatives would not suffice, especially since other school districts had permitted *kirpans* with appropriate restrictions and without incident.[110] It is unlikely that a court would reach the same outcome today after RFRA's partial invalidation, except in those states that have religious freedom protections that are stronger than the federal norm.

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[107] 67 F.3d 883 (9th Cir. 1995).
[108] Berg, *State Religious Freedom Statutes, supra* note 28, at 558-59.
[109] *Cheema*, 67 F.3d. at 886.
[110] *Id.* at 885-86.

This is unfortunate, because strict scrutiny would serve several important purposes, although each of them is at least equally protected by the equality-based legislative approach. Classically, strict scrutiny protects adherents of discrete and insular minority religions from subordination to more powerful groups before whom they would be relatively powerless.[111] In more contemporary terms, it protects the "vulnerability of conscience" from persecution to which religious adherents may be both particularly vulnerable and peculiarly sensitive.[112] This peculiar sensitivity arises from the fact that infringements on religious liberty, even when of neutral in form and generally applicable, "have the unavoidable potential of putting the believer in a choice between God and the government."[113] Moreover, religious groups serve as important transmitters of cultural and moral values, and they engage their members in contemplation of ultimate questions of meaning[114] and the pressing of social justice issues. More controversially, strict scrutiny recognizes that "religious groups are of special value to a democracy," since they serve as bulwarks against state encroachments or "communities of resistance."[115]

On the other hand, this approach has significant drawbacks. First, by treating religious infringements as a discrete field of constitutional concern, the advantages from aligning religious freedom interests with other fields of civil rights cannot be realized. Such advantages might include a powerful administrative enforcement apparatus within

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[111] In this context, it is worth remembering that religious minorities were mentioned in the same breath as racial minorities as recipients of heightened judicial scrutiny at the dawn of our modern age of constitutional review. *See* U.S. v. Carolene Products Co., 304 U.S. 144, 153 (1938) at 153 n.4. This point is astutely discussed in Chon & Arzt, *supra* note 55, at 218.

[112] Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 30, at 1244-54. Despite their sensitivity to these issues, Eisgruber & Sager reject the application of strict scrutiny to Religion Clause cases for reasons which will be discussed below.

[113] *Lukumi Babalu Aye,* 113 S. Ct. at 2250 (Souter, J., concurring).

[114] Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 136-37 (1993).

[115] *Id.*

OCR, a broad societal consensus as to its legitimacy and importance, and a broad-based coalition in support of its continued support. Second, by emphasizing religious exercise rather than equality, such legislation tends to generate resentment among those who perceive it as providing special benefits to certain groups, rather than as leveling the playing field. Third, the emphasis on free exercise tends to generate defensiveness among those who fear encroachments upon the Establishment Clause. Fourth, the courts have tended to construe liberty-based religious freedom legislation narrowly[116] and have typically applied strict scrutiny less stringently in religious freedom cases than in other areas of the law.[117] For example, the Court has generally held that public schools' failure to accommodate religious requirements does not violate the Free Exercise Clause "if [the school] has pursued its secular policies without reference or regard to religion – even if the exercise of a religion is thereby seriously disadvantaged, or even destroyed."[118] Shifting the ground to anti-discrimination law may provide a stronger basis for permissive accommodation. Fifth, liberty-oriented religious freedom legislation may deter the full development of judicial doctrines to protect religious freedom under the Religion Clauses.[119] This last point is especially important, because there remains a prospect that the courts will develop, even in a post-*Smith* world, a strong Religion Clause jurisprudence that provides for strict scrutiny of student religious freedom claims.

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[116] *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 596 (1998); Derek Gaubatz, *RLUIPA at Four*, 28 HARV. J.L. & PUB. POL'Y 501, 550-552 (2005); Kenneth L. Marcus, *Jailhouse Islamophobia: Anti-Muslim Discrimination in American Prisons* (manuscript on file with author).

[117] Even during the quarter century between *Sherbert* and *Smith*, the courts overwhelmingly sided with the government when purportedly applying the strict scrutiny test. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment,* 58 VA. L. REV. 1407, 1412 (1992).

[118] Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 685 (1992).

[119] Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty,* 21 CARDOZO L. REV. 565, 580-582 (1999).

Indeed, a strong constitutional jurisprudence of religious freedom in education is an important bulwark in the protection of student religious rights.

To put the matter in a more positive light, there are at least four distinct reasons to emphasize that reasonable religious accommodations are "part and parcel of the antidiscrimination project":[120] (i) to counteract efforts to portray accommodations as special or unfair privileges for undeserving groups; (ii) to facilitate the proper definition of the scope of the right entailed, as courts come to understand that the goals of accommodation law are the same as the goals of antidiscrimination law; (iii) to enable identification of doctrinal inconsistencies between accommodation rules and other aspects of antidiscrimination law; and (iv) to place a closer emphasis on socially imposed barriers, making it easier to determine what governmental actions are not in fact legally proscribed.[121]

C. Alternative Judicial Approaches

Short of enacting liberty-based religious freedom legislation, there may be judicial avenues towards establishment of strict scrutiny for religious claims. From *Smith*'s parental-rights exception, one could argue for some exemptions from offensive educational instruction,[122] but the scope of parental rights may also be understood more broadly. Indeed, virtually any encroachment upon student religious freedom can be seen as an infringement of the parental right to direct the child's upbringing. This infringement is one of the costs of religious persecution *per se.*

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[120] Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 864-66 (2004).
[121] *See id*. (discussing these arguments in the context of the Americans with Disabilities Act).
[122] *See* George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 714-715 (1993).

The failure of *Smith's* parental-rights exception may be due to Justice Scalia's unfortunate decision to cast it as a hybrid-rights doctrine, when it is more plausibly understood in different terms. *Smith*'s language speaks explicitly of hybrid claims, addressing multiple rights which together seem to create a greater degree of protection than each enjoys in isolation. While the hybrid-rights doctrine has excited a fair degree of scholarly interest, it has not commanded judicial support. Indeed, "[n]o court has ever relied on a hybrid rights claim as the principal grounds of a decision protecting religious free exercise, and precious few have recognized such claims in any circumstance."[123] The hybrid-rights theory is a hard sell for good reason: it does not make much.

An alternative reading is that the pertinent *Smith* dicta does not address Free Exercise Clause protection *per se,* but instead addresses the scope or boundaries of that Clause's operation. This interpretation explains why *Smith* does not employ the usually applicable standards when considering the scope of Free Exercise protections. With respect to the Speech Clause, the First Amendment's shifting boundaries are more difficult to ascertain than we have commonly realized.[124] There are vast areas of "speech" that are well outside of the First Amendment's reach,[125] and there are numerous forms of non-spoken expression which we nevertheless regulate as if they were

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[123] Frederick Mark Gedicks, *Three Questions About Hybrid Rights and Religious Groups*, 117 YALE LAW JOURNAL POCKET PART at 192 (2007).

[124] The principal text is Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,* 117 HARV. L. REV. 1765, 1767 (2004) [hereinafter Schauer, *Boundaries*]. This line of thinking is also developed in Frederick Schauer, *The Speech-ing of Sexual Harassment, in* DIRECTIONS IN SEXUAL HARASSMENT LAW 347 (Catharine A. MacKinnon & Reva B. Siegel, eds., 2004) [hereinafter Schauer, *Speech-ing*] and; Frederick Schauer, *First Amendment Opportunism, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone, eds., 2001); and Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism,* 16 WM. & MARY B. OF RTS. J. 1025 (2008).

[125] These include, for example, contractual terms, wills, product labels, and securities representations. Schauer, *Speech-ing, supra* note 124, at 349-50. To say that these areas are generally out of the First Amendment's bounds is not, however, to say that egregious conduct cannot bring particular instances in. For example, most competition-restraining speech is outside of the boundaries of the First Amendment, but Noerr-Pennington describes a sub-category that may, arguably, be brought back within the boundaries.

speech.[126] In order to understand whether a particular form of expression is protected under the First Amendment, we must first determine whether it falls within the boundaries of that amendment's applicability.

Smith implicitly operates within this tradition, marking a boundary line outside of which religious activities are not regulated by the Free Exercise clause. In other words, *Smith* is a Free Exercise applicability or boundaries case, not a Free Exercise protection case. First Amendment boundaries are especially important because the strength of the amendments is attributable in large part to their narrowness.[127] This is particularly evident in the area of Free Exercise jurisprudence, in which a failure to demarcate boundaries led to considerable floundering in the years between *Sherbert*[128] and *Smith*.[129] Without the means to distinguish applicable religion from inapplicable religion, the Court could not apply its proper, stringent standard to the bewildering array of cases where it seemed to apply. *Smith* represents a rough effort to set boundaries necessary to impose a sufficiently stringent standard within those boundaries.

By its reference to *Wisconsin v. Yoder,*[130] however, the Court in *Smith* recognizes that the boundary line must zig and zag a little where particularly important interests, such as parental and student religious liberty interests, are involved. However, the extent of the zig or zag around student religious interests is less clear. It may be that schoolhouse religion as a whole is carved in, while other areas, such as zoning law,[131] are

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[126] Examples of the latter may include dancing, mime, music, flag-waving and armband protests. Schauer, *Speech-ing, supra* note 124, 349-50.
[127] Schauer, *Speech-ing, supra* note 124, at 360.
[128] 374 U.S. 398 (1963).
[129] 494 U.S. 872 (1990) (citations omitted); *See, e.g.,* Bowen v. Roy, 476 U.S. 693, 706-07 (1986); Maher v. Roe, 432 U.S. 464, 474 n.8 (1977).
[130] 406 U.S. 205 (1972).
[131] While zoning law appears to be generally carved out, this has not precluded Congress from properly providing protections for some religious land use in areas where the Free Exercise Clause might not even

carved out. The presence of a well-entrenched regulatory system may augur in favor of excluding zoning matters, while the presence of other mutually sustaining constitutional interests may favor including schoolhouse religion.[132] The importance of the religious liberty interest in the schoolhouse is particularly well-established in the Supreme Court's jurisprudence.[133]

Perhaps the schoolhouse occupies a place in Free Exercise geography similar to that which higher education occupies with respect to the boundaries of Free Speech: a zone of heightened coverage in light of the importance of constitutional protection in that area.[134] There are, of course, disadvantages to any institutional analysis that determines constitutional applicability on the basis of a case-by-case institutional determination, particularly with respect to the rule of law. Such determinations are high-stakes, policy-laden judgments, which create a prospect of legal uncertainty, excessive litigation, and potentially an appearance of bias.[135] Nevertheless, a bright-line institutional rule exempting school house religion from the rule in *Smith* would at least have the value of bringing certainty, clarity, and a palpable increase in religious freedom to at least one vital institution where it is much in need

IV. ARGUMENTS AGAINST RELIGIOUS FREEDOM IN EDUCATION

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apply. *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (2000); Cutter v. Wilkinson, 544 U.S. 709 (2005). In other words, the "play in the joints" between the Religion Clauses permits Congress to protect religious activities which are neither protected by the Free Exercise Clause nor prohibited by the Establishment Clause.

[132] *See* Schauer, *Boundaries, supra* note 124, at 1803-07 (discussing the importance of well-established regulatory systems).

[133] *See, e.g.,* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[134] Schauer has discussed higher education's privileged place within the boundaries of the Free Speech Clause in Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 919-26 (2006); Frederick Schauer, *Towards an Institutional First Amendment,* 89 MINN. L. REV. 1256, 1274-75 (2005). *See also* J. Peter Byrne, *Academic Freedom: A "Special Concern" of the First Amendment,* 99 YALE L. J. 251, 256 (1989) (presenting an earlier version of the argument).

[135] *See* Marcus, *Higher Education, supra* note 65 and accompanying text; Dale Carpenter, *Response*: *The Value of Institutions and the Values of Free Speech,* 89 MINN. L. REV. 1407 (2005).

While religious freedom legislation has had strong intuitive appeal for many, certain arguments frequently arise in opposition to efforts to strengthen religious liberty. This section addresses a few of the important objections: the mutability argument, cost arguments, and Establishment Clause arguments.

A. The Mutability Argument

Those who object to the inclusion of religious discrimination among the pantheon of protected civil rights sometimes point to the purported "mutability" of religion. They argue that religion is a mutable characteristic within the discretion of religious person, while the invidious classifications are not.[136] However, mutability is at best a murky concept, and it is not surprising the Circuits have not been in agreement as to what it means.[137] This argument misconstrues inherent characteristics of both religion and race.

The malleability and social construction of race is now a matter of wide-spread scientific consensus. The former belief in its immutability has now been superseded by an understanding that basic racial categories, such as "whiteness," evolve over time, and that the ascription of mutability to race is a cultural process.[138] Many groups who were considered non-white during the Nineteenth Century are generally considered white today.[139] Religion, conversely, is frequently experienced as one aspect of a group

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[136] *See, e.g.,* James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1065-69 (2004) (criticizing the notion that religion is immutable).

[137] *See* Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 169, 174 n.145 (2005); Marc. R. Shapiro, Comment, *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409, 442 (2003).

[138] *See generally,* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind," in* KIMBERLE CRENSHAW ET AL., CRITICAL RACE THEORY 259-62 (1995). Thanks to Sarah Ryan, who generously brought this work to my attention.

[139] *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 612 (1987) (noting that the floor debate over the Civil Rights Act of 1866 was replete with references to Jews, Scandinavians, Chinese, Mexicans, Gypsies,

identity, which will evolve over time with those other constituent parts.[140] Some have argued that religion is so central to personal identity as to be "immutable."[141] Others have argued that some religious groups, such as post-9/11 Muslims or World War II-era Japanese-Americans, have been "racialized" in a manner that ascribes to them immutability, heritability, and a perception of inferiority.[142] Either way, the argument from immutability relies upon largely discredited understandings of race and religion.

B. Cost Arguments

A more practical objection to religious accommodation is that is too costly. This argument is sometimes phrased in terms of basic budgetary costs, such as the expense entailed in providing *kosher* or *halel* lunch to religious students. Such costs are unquestionably a legitimate governmental concern, but not a compelling one. Those who believe that religious freedom is a fundamental right deserving strict scrutiny will reject these narrow cost arguments as insufficiently weighty. Others, however, believe that religious freedom, while important, must be balanced against other practical concerns. Accommodation theory, in the disability context, has been shaped to address this latter concern, but religious accommodations may be denied to the extent that they require an "undue burden."

The notion of cost is sometimes expanded to include the prospect of religious hostility. Arguably, accommodating religious concerns could lead to hostility through

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blacks, Mongolians and Germans as members of different races). In recent years, a number of commentators have documented the process by which various ethnic groups have come to be understood as white. *See, e.g.,* MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998); KAREN BODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998); ERIC L. GOLDSTEIN, THE PRICE OF WHITENESS (2006).

[140] *See* Chon & Arzt, *supra* note 55, at 227-30 (theorizing the "religioning" of race).

[141] Hinkle, *supra* note 137, at 169, 174 n.145 (2005).

[142] *See* Chon & Arzt, *supra* note 55, at 228.

either perceptions of special treatment, accentuation of individual rights or group differences, or religious proselytization.[143] The perception-of-special-treatment argument,[144] or the "heckler's veto," proves too much, in that it has been made against virtually all civil rights, but at the same time proves too little, in that it misconstrues the nature of such rights. The likelihood that the exercise of minority rights will arouse majority resentment is precisely the reason that these rights are enforced.[145]

The social conflict argument provides that assertion of individual or group rights will reduce social harmony.[146] Like the heckler's veto, this argument proves too much because it also may be raised against all civil rights. This social conflict argument assumes that violation of student rights causes less conflict than the preservation of those rights, because enforcement requires complainants to assert themselves in various ways which would not arise if the students lacked any means to protect themselves. The argument has largely the same structure and the same defects whether it is phrased in terms of individual rights or group identity. Whether protection of student religious freedom requires an assertion of individuality or a reliance upon minority group membership, its vindication will increase the level of social conflict only if it is assumed both that (i) the pursuit of justice causes greater conflict than its avoidance and (ii) that conflicts arising from justice and injustice are equally deleterious.

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[143] Sonne, *supra,* note 136, at 1075-79.
[144] The "perception-of-special-treatment" argument is different from the "special treatment" argument in that the former argument may have force even if all groups are in fact treated differently.
[145] *Cf.* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) ("We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive").
[146] Sonne, *supra* note 136.

The proselytization argument is a peculiar one. Student religious proselytization that rises to the level of a hostile environment may be actionable to the extent that religious discrimination is prohibited. This raises a First Amendment conundrum because proselytization is also protected speech. This conflict is an example of the numerous areas in which civil rights and civil liberties rub up against each other in the area of harassing speech.[147] While line-drawing may be a difficult task on a case-by-case basis, the freedom from harassing conduct cannot be drawn so broadly as to prevent speech which is intended to persuade or convert, because such speech is preeminently protected under the First Amendment.

C. The Establishment Clause Argument

Do permissive religious accommodations extended to ensure equal opportunity for all religious groups that do not target any specific group for special benefits or burdens violate the Establishment Clause?[148] In general, the courts have permitted legislative action that requires religious accommodation, but this "most vexing"[149] area of

[147] Some of the leading works on this topic include: David E. Bernstein, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS (2003); Alan Charles Kors & Harvey A. Silverglate, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (1998); Robert Post, *Sexual Harassment and the First Amendment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 382 (Catharine A. MacKinnon & Reva B. Siegel eds. 2004); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*?, 1990 DUKE L. J. 484; Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

[148] The emphasis here is on "permissive," since the question relates to the "play in the joints" between what is permitted under the Establishment Clause and what is required under the Free Exercise Clause.

[149] Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. VA. L. REV. 343, 343 (2007). The vexation has had substantive import insofar as resulting litigation risk has forced public schools to abandon permissive religious accommodations for fear of Establishment Clause challenge. *See* Sarah M. Isgur, Note, "*Play in the Joints": The Struggle to Define Permissive Accommodation Under the First Amendment*, 31 HARV. J.L. & PUB. POL'Y 371, 384 (2008).

constitutional law remains arguably unsettled.[150] Arguably, it is a black letter rule that "[g]overnment may refrain from imposing a burden on religion, while imposing the burden on others similarly situated."[151] On the other hand, potential Establishment Clause vulnerabilities to religious freedom legislation remain unresolved.[152] In this case, where the accommodations at issue do not relate to government imposition of religious burden, but instead relate to government imposition of a barrier to equal opportunity, the Establishment Clause constraints should be less stringent, since there is less likelihood of endorsement, coercion, unequal treatment or undue benefit.[153]

Justice Anthony Kennedy once commented that, "there is a point…at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment."[154] This formulation may be misleading, insofar as it suggests that the boundary on permissible accommodations is a function of the degree of accommodation, when in fact it is a function of whether the accommodation exhibits characteristics which render it qualitatively suspect.[155] In this case, the legislation proposed in this article is

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[150] Carl Esbeck, *When Accomodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis,* 110 W. VA. L. REV. 359 (2007). While frequently framed in terms of exemptions from generally applicable rules, accommodations may also take the form of positive assistance, as in the case of chaplains. Greenawalt, *supra* note 149 at 344.

[151] Greenawalt, *supra* note 149 at 344..

[152] Lupu, *supra* note 119, at 586-586. Professor Lupu wrote this essay after *Boerne* but before *Cutter.* Others have commented generally on the disorderly state of contemporary Establishment Clause jurisprudence. *See, e.g.,* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006). More recently, Lupu and Tuttle have argued that the Court's Establishment Clause jurisprudence is now surprisingly coherent. *See* Ira C. Lupu and Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 93 (2007).

[153] *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 712 (1985) (O'Connor, J., concurring). Modern Religion Clause jurisprudence typically requires that the accommodation relieve a burden on religious practice, rather than promote or sponsor that practice. *See, e.g.,* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 (1989) (plurality op.). For a recent discussion of this point, *see* Greenawalt, *supra* note 149 at 348-50.

[154] Bd. of Educ. v. Grumet, 512 U.S. 687, 725 (1994) (Kennedy, J. concurring).

[155] Admittedly, this approach is difficult to reconcile with *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703 (1985), which affirmed a Connecticut Supreme Court decision striking down a state statute prohibiting employers from requiring sabbatarian employees to work on their Sabbath. If it were taken seriously, Chief Justice Warren Burger's opinion, which emphasized the statute's impermissible effect, would imply the

unlikely to create Establishment Clause problems for several reasons:[156] it has a primary secular (anti-discriminatory) purpose and effect;[157] it does not entail favoritism of any one religious group of others;[158] it does not confer a particular benefit upon religious groups *per se*;[159] it does not compel anyone to participate in the accommodated religious activity; and it treats secular claims similarly.[160]

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impermissibility of any statutory anti-discriminatory religious accommodation, including those contained within Title VII and the legislation proposed in this Article. However, in her concurrence, Justice Sandra Day O'Connor specifically distinguished the statute at bar in *Thornton* from Title VII on the ground that Title VII is an anti-discrimination law and calls for reasonable rather than absolute accommodation. *Id.* at 712 (O'Connor, J., concurring). More generally, O'Connor argued that "a statue outlawing … discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring [equal] opportunity to all groups in our pluralistic society." *Id.* at 713.

[156] *See* Martha McCarthy, *The Law in Providing Education: Religious Influences in Public Schools: The Winding Path Toward Accommodation*, 23 ST. LOUIS U. PUB. L. REV. 565, 567 (2004) (discussing the need to enumerate several bases that arises from the apparent displacement of the Lemon test caused by shifting standards including an endorsement standard, a coercion test, a modified *Lemon* test, etc., depending on the circumstances). The challenge is particularly acute for public schools in light of their unique Establishment Clause issues. *See* Isgur, *supra* note 149, at 371. *See generally* Ira C. Lupu and Robert W. Tuttle, *The Cross at College: Accommodation and Acknowledgement of Religion at Public Universities*, 16 WM. & MARY BILL OF RTS. J. 939 (2008) (discussing the various Establishment Clause tests).

[157] It is important to recall that banning discrimination on the basis of suspect classifications, including religion, is itself a secular basis for religious accommodations. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 712 (1985) (O'Connor, J., concurring). For this reason, it is unnecessary for equal opportunity advocates to tie themselves into knots justifying accommodations on unrelated grounds such as health and safety. *See* P.F. Huffstutter, *A Safety Hazard or Special Treatment*?, L.A. TIMES, July 30, 2007, at A9 (quoting the University of Michigan's announcement that it is installing foot baths "to make…bathrooms safer and improve plumbing—not [to] endorse[e] a religion.") In fact, the obvious purpose of the foot baths is to accommodate the religious needs of Muslim students, since a failure to do so would place them at an educational disadvantage vis-à-vis students who are not frustrated by their inability to exercise their religion.

[158] Indeed, since this legislative provision is intended to protect all religious groups, including minority religious groups, it averts the suspicion that is directed at legislation which appears to advance a majority interest at the expense of a minority one. *See* William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000) (arguing that legislation supportive of minority religions should be less subject to suspicion that legislation which supports the majority). The limitation according to which accommodations must not favor specific religious groups with benefits not enjoyed by other groups is established in *Grumet*.

[159] *Cf.* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality op.) (striking down Texas law providing tax exemption for religious periodicals).

[160] The secularity of its purpose is most salient to the oft-criticized Lemon test. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). The Supreme Court has recognized the secular basis for religious accommodations in other contexts. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336-37 (1987). See Greenawalt, *supra* note 149, at 344 (discussing that the Establishment Clause viability of at least some religious accommodations is not dependent upon the Lemon test, since justices who reject that approach have joined opinions affirming accommodations). *See, e.g.,* Cutter v. Wilkinson, 544 U.S. 709 (2005); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

Even if Justice Kennedy's argument is accepted, however, the Court has recently affirmed religious exemptions to generally applicable rules on a case-by-case basis, suggesting a willingness to permit religious accommodations notwithstanding Establishment Clause objections.[161] Indeed, the Court not only dismissed the Establishment Clause argument in *Cutter,* but ridiculed it as "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[162]

Does this fully dispatch the Establishment Clause argument? If we are to consider the matter fairly, we must consider the argument in its most sophisticated recent formulation, which is to say, the form in which it has taken in the recent work of Christopher Eisgruber and Lawrence Sager. Because their formulation of the argument is broader than the Establishment Clause itself, and in respect to the subtlety of their analysis, their theory is addressed next in a separate section.

V. The Equal Liberty Model

A. Privileging or Protecting Schoolhouse Religion

Eisgruber and Sager argue that religious accommodations violate core constitutional concerns if they are not equally extended to persons who harbor deeply felt nonreligious convictions that are similarly inconsistent with generally applicable

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[161] *See, e.g.,* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Cutter v. Wilkinson, 544 U.S. 709 (2005). This argument is developed in somewhat greater length in Marcus, *The Most Important Right, supra* note 10, at 179-80.

[162] *Gonzales*, 546 U.S. 418, 436. For a useful discussion of this point, *see* Richard W. Garnett & Joshua D. Dunlap, *Taking Accommodation Seriously: Religious Freedom and the* O Centro *Case,* 2006 CATO SUP. CT. REV. 257, 274.

governmental policies. The Eisgruber and Sager "equal liberty" model arises from the conviction that religious freedom arises from the vulnerability of conscience to persecution, rather than from any peculiar importance attaching to religion. For this reason, appropriate religious liberty protections must be tailored to the "protection" of religious equality, not "privileged" from generally applicable requirements.

The equal liberty model has a certain resonance for those of us who view the egalitarian foundations of religious freedom as being insufficiently developed in contemporary legislation, jurisprudence and commentary. Nevertheless, it is ultimately unsatisfying for several reasons. The privilege/protection dichotomy is ultimately untenable, in light of the overlap between privilege and protection. Moreover, equal liberty does not sufficiently account for the unique place of religion in the constitutional text and our constitutional culture. Finally, extending religious accommodations to analogous deeply-felt secular convictions would raise irresolvable conflicts.

B. Religious Liberty as Equality

Equal liberty's most attractive feature is its foundation upon the goal of protecting people from discrimination on the basis of religion. As Eisgruber and Sager acknowledge, religious distinctions have inspired political repression from colonial times through more recent twentieth century bouts of anti-Catholicism and anti-Semitism.[163] Similar challenges have continued through 9/11 into the twenty-first century.[164] Rejecting the "mistaken notion" that religion is "uniquely valued" by the Constitution,

[163] Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 30, at 1282-83.
[164] CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 2 (Harvard University Press 2007).

equal liberty's protectionist approach is based upon the "special vulnerability of minority religious beliefs to hostility or indifference."[165]

Eisgruber and Sager argue that equal liberty should occupy the judiciary's "active agenda" because of the "confluence of two circumstances;"[166] viz., the deep concern of religious believers to conform their conduct to their beliefs and the vulnerability of believers to governmental discrimination.[167] The equality principle at work in equal liberty is intended largely to take the place of the privileged principle which Eisgruber and Sager perceive to be at work in contemporary jurisprudence and commentary. In other words, Eisgruber and Sager are hesitant to replace religion's putative privileges with a leveling principle which will provide all persons of conscience with protections against victimization.

C. The Privilege/Protection Dichotomy

Eisgruber and Sager elegantly situate their theory by distinguishing between two constitutional traditions: one in which speech is "privileged" from content-based restrictions, and another in which minority groups, particularly African-Americans, are

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[165] Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 30, at 1283. Eisgruber and Sager speak frequently of "minority religious groups," but they do not appear to place too much weight on the term "minority," nor for that matter the term "groups." For example, they do not appear to deny the religious claims of non-minority or mainline religious groups, and they are certainly sensitive to the claims of individual conscience. It appears that their repeated reference to "minority religious groups" is largely rhetorical, reminding us that the harms caused by religious discrimination bear certain resemblances to the paradigmatic harms suffered by African Americans and other racial minorities as a result of racial discrimination.

[166] *Id*. Others, who are more textually inclined, might have thought those two circumstances to have been the First and Fourteenth Amendments.

[167] *Id.*

protected from forms of discrimination which would deny them the equal protection of law:[168]

> Speech is a practice that is privileged in our constitutional tradition, indeed privileged to a high degree. The state is often barred from restricting speech because of its content, even when there is reason to suppose that important concerns would be advanced if the speech in question were suppressed. In contrast, African Americans are not privileged, but rather protected. Constitutional law struggles to abolish caste and its residue, to secure for African Americans treatment as full and equal citizens of our national community.[169]

In this sense, a person who locates her behavior within the core of protected activity "acquires the privilege of immunity from the reach of governmental authority, even under circumstances that would otherwise offer strong grounds for the exercise of that authority against her."[170] She may act in a way that increases the likelihood of harm to others, act in a way that is itself harmful to others, or act in a way that is harmful to the public interest.[171] By contrast, a person who argues for "protection," often on grounds of racial equality, insists on parity.[172] She demands that the state treat her as an equal citizen, not as a member of a subordinate class.[173] In Eisgruber and Sager's terms, "[h]er racial status is constitutionally distinct in the sense that it marks her as vulnerable to injustice, to treatment as other than an equal; her claim is for protection from that injustice."[174]

While the distinction is somewhat useful as an explanatory device, it must be noted up front that the terminology has a questionable pedigree. Specifically, the very word privilege carries heavy baggage, reminiscent of reactionary arguments that civil

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[168] *Id.*
[169] *Id.* at 1250.
[170] *Id.* at 1250-1251.
[171] *Id.* at 1251.
[172] *Id.*
[173] *Id.*
[174] *Id.*

rights claims amount to requests for special privileges, whether for African Americans;[175] gay, lesbian, bisexual and transgendered persons;[176] or any other group.[177] In this context, the notion of favoritism or privilege is inevitably used by those who oppose the extension of civil rights because it is a rhetorically effective means of suggesting that the rights in question would diminish, rather than increase, social equality.

More importantly, the dichotomy is ultimately incapable of bearing the analytical weight which it is asked to carry. Broadly speaking, the concepts of privilege and protection demark important segments along the continuum of equal opportunity. For certain groups, (and perhaps all groups), there simply is no equal protection without the constitutional assurances which have been characterized as privileges. This is in part a logical argument about the relationship between the two concepts and in part a policy argument about the nature of equal opportunity.

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[175] Contemporary conspiracy theorist Michael A. Hoffman II bemoans the rise of "black privilege" through what he calls the "monstrous injustice of the Federal government's misnamed 'Civil Rights' policies." *See* Michael A. Hoffman II, *What About Black Skin Privilege*?, http://www.revisionisthistory.org/skinpriv.html.

[176] The anti-gay movement uses the term "homosexual privilege" in a similarly derogatory fashion:

> The homosexual activist desires to coerce others not to take into account the inclination of homosexuals to practice same-sex sodomy when they make decisions, even though those others–including employers, landlords, and parents – have a right to take this preference into account. Our courts always have protected such "legitimate discrimination" as a basic right. To give such *special protection or privilege* to homosexuals is to take away that basic right.

CCV/Citizens for Community Values, *Homosexuality: Where do we stand – and why?*, www.ccv.org/homosexuality_where_we_stand.aspx (emphasis added).

[177] The historical antecedent for these arguments is in the Civil Rights Cases, 109 U.S. 3, 25 (1883):

> When man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some state in the progress of his elevation when he takes the rank of a mere citizen and ceases to be special favorite of the law.

The former argument is based upon the important continuities between privileging and protecting.[178] In a broad sense, this relation may be seen as an application of the maverick[179] observation that accommodation is either a subcategory of antidiscrimination or an overlapping category.[180] Certain aspects of antidiscrimination law are accommodation requirements in the context of pregnancy claims.[181] However, there are various additional applications of disparate impact theory in contexts where traditional different treatment is not present,[182] including grooming rules (such as no-beard rules);[183] job selection criteria (such as height and weight requirements)[184] and general ability testing;[185] and English-only requirements.[186] While the analogy to disability is nevertheless "inexact,"[187] in some cases sex, race and national origin receive

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[178] *See generally,* Andrew Koppleman, *Is it Fair to Give Religion Special Treatment?,* 2006 U. ILL. L. REV. 571, 581-83 (2006).

[179] For examples of the contrary position (*i.e.,* that antidiscrimination and accommodation are entirely distinct), *see, e.g.,* Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?,* 79 N.C. L. REV. 307, 310-11, nn.21-22 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation,* 46 DUKE L.J. 1, 2-4, 9 (1996). Jolls, *supra* note 90, is not primarily concerned with religious discrimination, but her ADA analysis applies quite well to religious discrimination.

[180] Jolls, *supra* note 90, at 645. For purposes of her analysis, Jolls defines "antidiscrimination" to include only the prohibitions on sex, race and national origin discrimination contained within the Equal Protection Clause and Title VII of the Civil Rights Act of 1964. *Id*. at 643. Nevertheless, her work is sufficiently broad in scope to provide useful insights with respect to other suspect classifications (*e.g.,* religion) and other antidiscrimination laws (*e.g.,* Title VI).

[181] Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978,* 94 YALE L. J. 929, 940-46 (1985); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality,* 13 GOLDEN GATE U. L. REV. 513, 559-60 (1983).

[182] *See* Jolls, *supra* note 90, at 653-666.

[183] *See, e.g.,* Bradley v. Pizzaco of Nebraska, Inc., 939 F.2d 610 (8th Cir. 1991) (striking down a no-beard rule at a restaurant franchise on the ground that it had a disproportionately negative impact on black men with the skin condition pseudofolliculitis barbae).

[184] *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977).

[185] *See, e.g.,* Lanning v. Southeastern Penn. Transp. Auth., 181 F.3d 478 (3d Cir. 1999), *cert. denied,* 528 U.S. 1131 (2000). *See generally,* Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing,* 104 HARV. L. REV. 1158 (1991).

[186] *See, e.g.,* EEOC v. Synchro-Start Products, Inc., 29 F. Supp.2d 911 (N.D. Ill. 1999) (holding that workplace English-only policy "unarguably impacts people of some national origins … much more heavily than others").

[187] Jolls, *supra* note 90, at 668 (*quoting* Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction,* 100 YALE L.J. 1329, 1381 (1991)).

accommodation through the application of disparate impact principles.[188] To the extent of this overlap, it is not possible to protect vulnerable groups from discrimination without privileging them through reasonable accommodations under some circumstances.

Insofar as the two concepts share not only continuities but also identity, the privilege/protection dichotomy would collapse. In fact, the so-called privileges which religious groups purportedly receive are no different from the way in which paradigmatically protected groups are treated. The parallels between religious and disability accommodations are readily apparent. Women, ethnic minorities, and racial minorities also receive what Eisgruber and Sager would call privilege through the use of disparate impact[189] and "accommodation laws" such as the Family and Medical Leave Act of 1993.[190]

The fragility of the privilege/protection dichotomy is further illustrated because every act of protecting may also be characterized as one of privileging. That is to say, each time Student A is privileged relative to Student B, Student A is also given a status equal to a Student C.[191] Religious privileges given to Muslim students, such as excused absences for religious observances, must also be given to students of other religions. If this accommodation is not made for the Muslim student, the student arguably is denied both a requisite privilege and also a requisite form of antidiscrimination protection. Similarly, some groups of non-religious students enjoy various kinds of privilege, such as equal access rights to school facilities. Denying these rights to religious students could be characterized as either a loss of privilege or a loss of protection.

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[188] Jolls, *supra* note 90, at 668-69.
[189] *Id*.
[190] 29 U.S.C. §§ 2601-2654 (1994 & Supp. III 1997).
[191] *See* Koppelman, *supra* note 178, at 581-82. Koppelman speaks of persons, rather than students, since his comments (like Eisgruber and Sager's) are not limited to the educational context.

Members of certain patriotic youth groups, like the Boy Scouts, now have an administratively enforced federal civil right to obtain school facilities that are no less desirable than those given to any other organization. This "most favored nation" right is a creature of one of the newest and least understood federal civil rights laws: the Boy Scouts of America Equal Access Act.[192] To the extent that religious groups are also extended a "most favored nation" right, such as under the Equal Access Act, [193] their statutory privilege also protects them from discrimination vis-à-vis secular patriotic groups. This would become apparent if the Equal Access Act was repealed but the Boy Scouts of America Equal Access Act remained in place. In that eventuality, school principals would be required to provide the Boy Scouts with facilities no less desirable than those given to, for instance, Christian Bible Clubs; but Christian Bible Clubs would not enjoy a reciprocal privilege. In the sense that different facilities are never truly equal, this would effectively mean that Bible Clubs would be provided facilities inferior to those given to patriotic youth groups. This loss of privilege would inevitably yield a loss in protection. Similarly, if a school denies students excused absences from classes to pray, it denies a privilege, but it also denies a protection vis-à-vis other students who are dismissed for extracurricular activities, athletic events, or medical needs.[194]

The implication of this argument is that a government or a school which fails to privilege religion also fails to protect it. This is also true with respect to any educational administrator's failure to exempt religious students from generally applicable school regulations. Suppose, for example, that an educational administrator refuses to

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[192] 20 U.S.C. § 7905 (2006).
[193] 20 U.S.C. § 4071 (2000).
[194] *E.g.,* FOP Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999). Consider, then-Judge Samuel Alito's opinion striking down a mandatory shaving policy for police officers that included an exemption for medical reasons but not religious reasons.

accommodate a religiously motivated request to excuse a student from a sex-integrated school athletic program, such as swimming, which would violate the student's religiously-based modesty requirements.[195] Under the privilege/protection theory, this appears to be a refusal to provide a privilege. However, it is also a refusal to protect the students. First, since other students would undoubtedly be exempted from this requirement for secular reasons, such as a disability accomodation, the refusal to provide an accommodation denies the religiously devout student an educational opportunity equal to that enjoyed by other students, unless the religious student must sacrifice deeply-held religious convictions. Whether the educational opportunity is elective or mandatory, this is a significant disparity.

Moreover, the privilege/protection dichotomy fails to appreciate a fundamental characteristic of legal equality. A basic principle of civil rights policy is that reasonable accommodations are sometimes required to ensure equal opportunity. In some respects, contemporary civil rights law is based upon the proposition that "in order to treat some persons equally, we must treat them differently."[196] While reasonable accommodation is analogous in this respect to affirmative action, it is decidedly not a form of affirmative action or preferential treatment. Reasonable accommodation merely allows the members of a protected class to compete on equal terms, rather than affording the protected class

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[195] Interestingly, the Education Department's new single-sex education regulations, which generally liberalize Title IX restrictions on sex-segregated educational programming, do not loosen these restrictions with respect to non-contact physical education.

[196] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part); *see also* Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities,* 46 BUFF. L. REV. 123, 145 (1998) ("[I]t is impossible to deny that for disability, if for no other characteristic, perfectly equal treatment can constitute discrimination.").

any preferential advantage to increase participation.[197] Congress made this understanding of reasonable accommodation explicit when it enacted the Americans with Disabilities Act: "[T]he reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed."[198] The Rule Implementing Executive Order 11914 articulates this understanding with even greater explicitness:

> [I]t is equal opportunity, not merely equal treatment, that is essential to the elimination of discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory.[199]

In this sense, it is discriminatory, for example, not to exempt blind students from generally applicable rules barring animals, such as seeing-eye dogs, in the classroom. For precisely the same reason, it is discriminatory to deny Sikh boys permission to wear appropriately constrained *kiwans* in the classroom.

Resistance comes, in part, from the notion that it is unfair to provide religion with exemptions that are not provided to other similarly important pursuits. As a legal matter, the answer is simply that those other pursuits will be provided with equal privilege as soon as they are enumerated in the Constitution. For instance, the Free Exercise of Artistic License can be recognized when it is embodied in the Constitutional amendment. Until that time, however, it is entirely appropriate for the courts to recognize the unique constitutional status conveyed upon religious exercise. As a matter of fairness, one might

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[197] Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act,* 139 U. PA. L. REV. 1423, 1431-32 (1991). *But see* Whitlock v. Donovan, 598 F. Supp. 126, 130 (D.C. Cir. 1984) (characterizing reasonable accommodation as part of a federal employer's "affirmative-action obligation"), *aff'd mem. sub nom.,* Whitlock v. Brock, 790 F.2d 964 (1986).

[198] H.R. REP. NO. 485, pt. 2, at 65, reprinted in 1990 U.S.C.C.A.N. at 347-48.

[199] Cooper, *supra* note 197, at 1429 n.33 (*quoting* 43 Fed. Reg. 2, 134 (1978)).

debate whether nonbelievers should receive, presumably through the amendment process, a degree of privilege comparable to what we provide to religious persons. Here, the answer is inherently political, philosophical, or theological rather than religious; but for now, the collective constitutional election to privilege religion over other pursuits is supported by the substantial net social benefits enjoyed by a society in which religious devotion is accommodated.

Sager and Eisgruber's problem arises from their methodology. Rather than beginning with the constitutional text, they begin more abstractly from the broad norms of our constitutional culture.[200] This model has its attractions, as it enables the authors to explore the values underlying our constitutional culture. In this case, they have pushed their philosophical method to the point where it has lost touch with the constitutional text. Sager and Eisgruber have conceded that their views on the Establishment Clause would be no different if we lacked a written Establishment Clause in our Constitution, since the same principles could be deduced from other constitutional provisions. They have said the same of their views on the Free Exercise Clause. In other words, they have achieved a Religion Clause interpretation which is so philosophically rarefied that it can dispense with the Religion Clauses altogether. It is constitutional law as if the written constitution does not matter. This is not a criticism per se, but an observation. By passing too blithely over the constitutional text, they ignore the privileged place which the Free Exercise of Religion – not the free exercise of deeply held, secular commitments, but the free exercise *religion* – occupies not only within our constitutional culture[201] but also

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[200] Eisgruber & Sager, Vulnerability of Conscience, supra note 30.

[201] *See* Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 136-37 (Nov. 1993).

within the text of the Constitution.[202] As Justice Stewart emphasized, "it is a written Constitution that we apply."[203] In arguing that religion should not be privileged above other serious life projects or commitments, equal liberty unduly diminishes the role of religion in the constitution.

D. Equal Liberty's Approach to Serious Life Commitments

Eisgruber and Sager argue that it is unfair to privilege religious interests over other deep human commitments. "To single out one of the ways that persons come to understand what is important in life, and to grant those who choose that way a license to disregard legal norms that the rest of us are obliged to obey, is to defeat rather than fulfill our commitment to toleration."[204] Instead of privileging religious claims against secular claims, Eisgruber and Sager propose "that the state treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[205]

This theory is intuitively appealing for those who take seriously the dangers of religious persecution but who nevertheless seek guiding principles which are neutral as between religion and non-religion. This project is particularly important in light of the Court's teaching that the First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion."[206] In this sense, Eisgruber and Sager are pursuing the Court's mission "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if

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[202] McConnell, *supra* note 1.
[203] Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 579 (1972).
[204] Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 30, at 1315.
[205] *Id.*
[206] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

expanded to a logical extreme, would tend to clash with the other."[207] Despite the importance of this project, and the skillfulness of Eisgruber and Sager's efforts, they are ultimately unsuccessful either negatively, as critics of the privileging of religion, or positively, as theorists of a new approach to the Religion Clauses.

Most importantly, Eisgruber and Sager do not take their own equality/discrimination metaphor sufficiently seriously. As discussed above, an equality-based approach to religious freedom implicitly requires reasonable religious accommodations. The requirement exists not to supplement equality, but to level the playing field between adherents and non-adherents.

Secondly, Eisgruber and Sager disregard the important ways in which the constitutional text and deeply felt intuitions work together to require a stronger degree of protection for religion than for other deep and valuable human commitments. Central to Eisgruber and Sager's theory is the claim that "religion does not exhaust the commitments and passions that move human beings in deep and valuable ways."[208] As a textual matter, religion does exhaust the commitments and passions that are protected under the Free Exercise Clause.[209] As a matter of policy, religion does have a special place in our understanding of fundamental rights.

In a moment of admirable self-knowledge, Eisgruber & Sager themselves acknowledge that equal liberty could be criticized for "precisely the vices of its virtues,"[210] because it cannot account for instances where religion and nonreligion are

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[207] Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).
[208] Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 30, at 1245.
[209] In other words, "the Religion Clauses 'single out' religion by name for special protections." McConnell, *supra* note 118, at 691.
[210] EISGRUBER & SAGER, *supra* note 164, at 57.

treated differently.[211] They acknowledge that almost everyone believes that religion should sometimes be treated differently: for example, churches might be exempt from hiring laws that prohibit discriminating against women in the hiring of priests.[212] Eisgruber and Sager share this belief and argue that such an exemption can be accommodated by Equal Liberty. Specifically, they argue that there are two respects in our constitutional tradition that appropriately provide religion with a special status.[213] First, antidiscrimination policy routinely focuses on "cultural fault lines" such as race and gender, where vulnerable groups are singled out for special consideration "precisely because of their vulnerability."[214] This is appropriate, in their view, because the aim of this approach is "parity, not advantage."[215] Ensuring parity in the accommodation of religious belief, and not for other characteristics, inevitably reflects a societal determination to confer a degree of privilege on this attribute.

The other way in which Eisgruber and Sager account for our shared intuitions about religion's distinctive role relies on constitutional rights of privacy and association.[216] These strands in constitutional law, they believe, support a "structural anomaly" in which institutions like the Catholic Church discriminate against female applicants for clerical positions.[217] The reason is that priests "play an amalgam of … relational and guidance roles" in "formal, visible, compensated, group environments."[218] In these contexts, the "latent constitutional values of associational autonomy suddenly

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[211] *Id.*
[212] *Id.* Eisgruber and Sager concede that this intuition is not universally held, citing the contrary position espoused in Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination,* 67 B.U. L. REV. 435, 435-38 (1987).
[213] EISGRUBER & SAGER, *supra* note 164, at 57.
[214] *Id.*
[215] *Id.*
[216] *Id.* at 63-65.
[217] *Id.* at 63.
[218] *Id.*

become important" for reasons that are not rooted in attributes that are unique to religion.[219] "The idea, in rough, is this: If the state told its citizens whom to turn to as mentors, as best friends, as role models, as moral advisors, as sources of consolation in times of need – for example, by requiring that we make such choices without regard to gender or race – we would easily conclude that the state had overstepped the boundaries of its authority and entered a domain the Constitution preserves for private choice."[220] The problem here is that Eisgruber and Sager have again proven too much, but in a different sense. There are also a lot of secular positions that call upon occupants to "play an amalgam of … relational and guidance roles" in "formal, viable, compensated, group environments." Arguably, this could be said of deans of students, directors of human resources, chairs of psychiatry practices, and perhaps even managing partners and chief executive officers.[221] Yet neither our shared moral intuitions nor our constitutional traditions will allow us to discriminate on the basis of race or sex when we select people to fill these roles. If we agree that religious institutions may discriminate, it is because of the important role that they play, which cannot be reduced to any set of unique attributes. Religion is provided its special status for reasons that cannot be reduced to neutral principles or attributes, and has fundamental moral, political and jurisprudential value.

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[219] EISGRUBER & SAGER, *supra* note 164, at 64.
[220] *Id.* at 63.
[221] Eisgruber and Sager might respond that many occupants of these positions do not fill the various roles which Eisgruber and Sager attribute to priests: "moral advisors, as role models, best friends and mentors." *Id.* However, if it were demonstrated that at least some occupants of these positions were called upon to fill these roles, would anyone conclude that they could be selected based upon discriminatory criteria? Alternatively, Eisgruber and Sager would undoubtedly stipulate that there are some priests who are not called upon to fill these roles (such as the so-called "Devil's Advocates.") The logic of their theory is that the church should not be able to discriminate in selecting applicants to fill these priestly positions. We allow Catholic Universities to discriminate in favor of priests (and therefore in favor of men) when selecting their presidents, even if the role that their presidents are expected to fill is structurally identical to that of the presidents of secular post-secondary institutions, who typically must be selected in a nondiscriminatory manner.

This is why, in protecting deep commitments and spiritual foundations, Eisgruber and Sager invariably fall back upon the distinct role of religion.[222]

Third, Eisgruber and Sager's notion of serious life projects is impracticable precisely because determining which life plans are important enough to preserve is difficult. For instance, As Andrew Koppelman has asked, "[w]hy support highbrow art, but not romance novels, karate movies, or pornography?"[223] This difficulty can be resolved in either of two ways, neither of which is satisfactory. On the one hand, the state could determine the seriousness of life plans, entangling the state in subjective valuations of competing conceptions of worth. At the same time the state would discriminate between religious commitments, which are protected under this model regardless of their seriousness, and between secular commitments, which are subject to an unavoidably intrusive and subjective bureaucratic or judicial evaluation. Since Eisgruber and Sager's theory does not provide a justification for this discrimination, it becomes guilty of the very vice which it is intended to address. The alternative is worse: the state would evaluate both religious and secular life projects to determine which ones

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[222] Ira C. Lupu and Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Discrimination,* 85 TEX. L. REV. 1247, 1267 (2007). In other words, Eisgruber and Sager fail to establish their central claim that "all religion-protecting norms can be fully explained in … terms [that] deny … the constitutional distinctiveness of religious commitments and religious institutions. *Id.* at 1250. Eisgruber and Sager respond that they do not deny this distinctiveness. Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L. REV. 1273, 1274 (2007). On the contrary, Eisgruber and Sager argue, they affirm religion's constitutional distinctiveness in two ways. First, they include religion with race and gender among the suspect classifications deserving special "constitutional solicitude." *Id.* at 1274. Second, they maintain that courts must recognize the cultural significance of religious symbols and institutions in order to avoid violating the principles of Equal Liberty. *Id.* This response is not entirely satisfactory. The problem is fundamentally deeper: religion's constitutional distinctiveness essentially divides religious conviction, whether or not deeply committed and spiritually founded, from secular deep convictions and foundations.

[223] *See* Koppelman, *supra* note 178, at 580 (pointing out, all of these activities, whether high cultural or low cultural, have some degree of complexity, and that complexity could be lost if the state does not support its preservation).

were sufficiently serious to merit protection. This alternative would ameliorate the discrimination problem, but it unconstitutionally would entangle the state in determining the seriousness of both religious and secular plans – a determination for which the state is singularly unsuited, and rife with dangers. This project is most impractical in the schoolhouse setting. It is one thing to ask educational administrators to protect students from religious discrimination; it is another to ask them to protect students from the serious—but only the serious—life commitments to which they or their parents are attached.

V. CONCLUSION

To fill a critical gap in the civil rights laws applicable to public elementary and secondary schools, Congress must enact religious anti-discrimination legislation. Religious discrimination in the public schools implicates fundamental constitutional rights and core public values. Congress must act to ban religious education in the schools for several reasons: to fully effectuate the primary intent underlying Title VI; to protect vulnerable minorities from perpetuation of long-standing forms of discrimination; to uphold the privileged status of religion within our constitutional culture; to prevent racial discrimination from escaping detection; to ensure equitable treatment among different religious minority groups; and to solidify inconsistently applied OCR policies.

An appropriate legislative correction would address both religious discrimination and also the specific need for religious accommodation. While religious accommodation is an element of religious freedom, jurisprudence indicates that courts will not apply a meaningful accommodation standard unless it is legislatively mandated to do so in

unequivocal terms. Specifically, the correct standard for requiring accommodation is forth under the Americans with Disabilities Act, rather than the standard employed under Title VII of the Civil Rights Act of 1964. This ban on religious discrimination in education, conjoined with a strong accommodation standard, could be characterized as an equality-based approach.

The equality-based approach is preferable to a more conventional liberty-based approach because it requires strict judicial scrutiny for governmental actions that substantially burden the exercise of religion. The equality-based approach would align religious freedom interests with other fields of civil rights: it would utilize a powerful administrative enforcement apparatus within the OCR; leverage a broad societal consensus as to the legitimacy and importance of civil rights law; cultivate broad-based coalition in support of its continued support; reduce the prospect of resentment from secular individuals and groups; ameliorate separationist concerns; and encourage parallel developments within the judicial branch.

This article has addressed several potential objections that an equality-based legislative proposal could generate, including arguments relating to mutability, cost and constitutional concerns. Among these arguments, the strongest challenges arise from the recent work of Christopher Eisgruber and Lawrence Sager. In particular, their work elegantly poses Establishment Clause challenges to the requirement that institutions (including public schools) accommodate the religious needs of public school students to the extent that it is not accompanied by a similar requirement with respect to the serious secular commitments of nonreligious students. Eisgruber and Sager have appropriately postured this challenge within an equality-based interpretation of the dictates of the

Religion Clauses. Their theory, however, has several critical weaknesses: it rests upon an untenable dichotomy between constitutional privilege and constitutional protection; it fails to acknowledge the extent to which accommodations are implicit in the concept of equal opportunity; it diminishes the importance of religion to our constitutional text and constitutional culture; and it requires the use of a concept of serious life commitments which is itself deeply problematic.

In short, an equality-based, strongly accommodationist religious freedom statute would protect the vulnerability of religious minority students while recognizing the importance of the first freedom to our constitutional culture. This legislation would fill a critical gap in our civil rights law, provide more effective civil rights enforcement, and avert potential constitutional challenges.