Separate Is Inherently Unequal, Unless You're Religious: The Peculiar Constitutionalization of Religious Segregation

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SEPARATE IS INHERENTLY UNEQUAL, UNLESS YOU’RE RELIGIOUS: THE PECULIAR CONSTITUTIONALIZATION OF RELIGIOUS SEGREGATION

FRANCISKA COLEMAN

ABSTRACT

This article seeks to explain how a relative newcomer to constitutional anti-discrimination jurisprudence, secular identity, has managed to garner a far higher degree of protection than historically suspect classes, such as race and gender. It attributes this phenomenon to the “separate but equal” model of equality inherent in the doctrine of “separation of church and state.” It notes that, despite acknowledging that government segregation is per se unequal in the Brown decision, the Supreme Court has continued to enforce religious segregation as a requirement of the Establishment Clause. In doing so, the Court has created a new type of discrimination based on level of religious exercise. After comparing protection of secular identity to the protections afforded to race and gender, this article recommends that the Court abandon the wall metaphor and its progeny and apply the equal protection analysis it uses to secure gender equality to secure religious equality.

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I. INTRODUCTION

• “Government practices that purport to celebrate or acknowledge events [of significance to white racial groups] must be subjected to careful judicial scrutiny.”1
• “The effect [of governmental celebration of Columbus Day on Native American groups, as well as on those who may reject discovery theories], is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.”2

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Separate Is Inherently Unequal

- “[C]onfining the government’s own [celebration of its heritage to its race-neutral aspects … permits the government to acknowledge [its history] without expressing [allegiance to any particular racial group].”

Despite a civil war, three constitutional amendments, and a civil rights movement, one would search judicial opinions in vain for the robust protection accorded to racial minorities in the above quotes. Such protection is only accorded to non-religious minorities. Under current judicial interpretations of the First Amendment, crosses and crèches in public parks and courthouses alienate the non-religious and must be removed. Confederate flags and celebrations of Christopher Columbus alienate many African Americans and Native Americans, but the alienation of these groups does not create a constitutional issue. Thus, though the Constitution now guarantees Santa and Frosty a place in the manager, Frederick Douglas need not be given space in memorials to Jefferson Davis, nor must famous Native American chiefs be included in Columbus Day celebrations.

This seems to suggest that non-Christians are entitled to greater protection from feelings of exclusion and discrimination than Native Americans and African-Americans. One cannot help but wonder why. Is the celebration of the birth of Christ more offensive to non-Christians than the celebration of Columbus’s “discovery” of

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3 Id. at 611 (replacing religious references with racial references).
4 Id. at 579 (finding that a crèche displayed in a courthouse violated the Establishment Clause).
5 See N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1562 (11th Cir. 1990) (finding no violation of equal protection for African-Americans when the confederate flag is flown from the state capital, despite the flag’s long association with the ideas of white supremacy and black inferiority); see also Bill Gallo, War of the Words, DENVER WESTWORD NEWS, Oct. 6, 2005 available at http://www.westword.com/2005-10-06/news/war-of-the-world/2/ (discussing the Native American view of Christopher Columbus as a monster and a mass murderer, and the arrests of individuals protesting Columbus Day parades).
6 Cnty. of Allegheny, 492 U.S. at 598 (placing significance on the fact that no secular symbols were in the crèche display, and concluding that their presence in other parts of the courthouse was insufficient).
America is to Native Americans or than the celebration of a state’s right to practice slavery is to African-Americans? What makes government celebration of the religious aspects of a secularized “religious” holiday more constitutionally suspect than government celebration of the invasion and extermination of countless Native American tribes or government affirmation of a right to reduce African-Americans to chattel? If decisions of how and whether a community will celebrate Columbus Day or its confederate heritage are left to the discretion of the political branches, why not decisions about how and whether a community will celebrate Christmas and Hanukkah? Why does the Constitution only proscribe offensive religious displays while allowing other displays that are equally (if not more) offensive, and that have also have much closer connections to governmental persecution and oppression?

This article seeks to explore how secular identity, a relative new-comer to constitutional anti-discrimination jurisprudence, has managed to garner a far higher degree of protection in the passive display context than historically suspect classes, such as race and gender. It does so in four steps. First, this article discusses the rise of “separation of church and state” as the constitutional framework for the religion clauses, its ideological similarity to the doctrine of “separate but equal” and its permutation into the Lemon and endorsement tests. Part II discusses the doctrinal incoherence that has resulted from the use of the “separate but equal” framework in Establishment Clause jurisprudence. It focuses on the contradictory nature of definitions of religious neutrality that favor secular identity over religious identity. It also addresses the constitutional paradox created by a judicial focus on the role of belief in analyzing the Free Exercise Clause but on the content of belief in analyzing the Establishment Clause.

In Part III, this article compares the heightened protection given to marginalized secular identities under the principle of secularity with the protections afforded to marginalized racial and gender identities under the principle of equality. It finds that logic, history, and precedent are aligned against the principle of secularity as separate from and superior to constitutional guarantees of equality. Part III concludes that religious discrimination under the Establish-
ment Clause should be adjudicated like all other suspect discrimination, under principles of equal protection rather than secularity. Part IV applies an equal protection analysis to the “discrimination” inherent in passive religious displays, and finds that the constitutionality of passive displays is non-justiciable under the equal protection clause.

II. CREATING A SEPARATE BUT EQUAL CHURCH AND STATE

A. *Everson v. Board of Education of Ewing*

The earliest appearance of “separation of church and state” as an interpretation of the Establishment Clause was the Court’s 1947 decision in *Everson v. Board of Education of Ewing Township*. In a majority opinion authored by Justice Black, the Court found that the Establishment Clause was intended to erect ‘a wall of separation between Church and State.’\(^7\) The Court interpreted this to mean that:

> [n]either a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.\(^8\)

\(^7\) *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

\(^8\) *Id.* at 15-16.
This is a very comprehensive list of prohibitions that seems impossible to put into practice without an equally comprehensive list of narrowing constructions. The fire protection analogy is frequently deployed as a narrowing construction to show that “no aid” cannot apply to government services. But “no aid” also cannot apply to democratic privileges. It cannot be true that the “government cannot participate in the affairs of any religious organization or group;” for, the principles of self-governance and equal representation limit the affairs of government to the affairs of the citizens it represents. Can the government truly represent religious people while excluding their interests from its consideration or notice?

The “no-aid” doctrine is particularly problematic given the Everson Court’s simultaneous concession that a state is not precluded “from extending its general State law benefits to all its citizens without regard to their religious belief.” This suggests that, sometimes, the government and its aid are permitted to cross the wall of separation in the name of equal citizenship, and, other times it is not, while leaving the distinction between these two situations unclear. One thing is clear from this caveat, if government aid and influence can pass through the wall if they have the proper credentials—i.e. if they are part of an appropriately general and comprehensive scheme—Jefferson’s Establishment Clause wall is more properly considered an equal protection gate. The majority resists this interpretation, however, and the dissent correctly notes that the conflation of a general rule of no aid and a general rule of aid only in the proper circumstances strikes a discordant note that renders the decision internally inconsistent.

9 Romer v. Evans, 517 U.S. 620, 633 (1996) (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”).
10 Everson, 330 U.S. at 16.
11 Id.
12 Id. at 19 (“the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case
This inconsistency is both surprising and unnecessary, for in 1947, the Establishment Clause was virgin constitutional soil. Most religion clause cases prior to that point had focused on the boundaries of the Free Exercise Clause, so Justice Black had wide discretion in shaping the contours of the Establishment Clause prohibition, and faced no pressures to sacrifice coherence in order to reconcile competing precedents. Though, as a textualist, Justice Black looked to the Constitution itself and to founding era documents to give content to the broad constitutional outline, textualism alone did not demand choosing Jefferson’s wall metaphor (expressed in an informal personal communication fourteen years after the Amendment was passed) over Madison’s more contemporaneous statements made during the actual debates over the religion clauses. This is particularly true given that Madison defined the Establishment Clause as meaning “that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience,” an articulation more consistent with Justice Black’s actual application of the clause in *Everson*, than the wall metaphor on which he purported to rely. However, the wall metaphor had a significant advantage over Madison’s debate remarks—its ideological resonance with existing interpretations of the Fourteenth Amendment that constitutionalized minority segregation.

**B. Religious Segregation in the Era of *Plessy v. Ferguson***

In 1947, *Plessy v. Ferguson* was fifty-one years old. That means that, at the time *Everson* was argued, the equality of segregation had been a constitutional fact for over half a century. Every sitting justice had come of age and studied law in a system where the segregation of a minority group against their will was neither unjust nor discriminatory, but a practical necessity. To many in

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13 1 ANNALS OF CONG. 758 (1789) (Joseph Gales ed., 1834).
14 16 S. Ct. 1138 (1896).
society at that time, African Americans were the “Other,” alien in their appearance and culture and thus potentially unwilling to play by the social rules established by the White majority. Fear of the non-conformity of African Americans made it seem logical to separate them from White people and relegate them to a special “Black” sphere removed from wider society. The resulting White supremacy was viewed as the natural result of the intellectual, political, and social superiority of White individuals, not of discriminatory governmental policies. Indeed, any argument that there was injustice or unfairness in limiting the civil and political access rights of African Americans in order to maintain the existing social order was incoherent, as there was no room in the dominant paradigm for the equality of Whites and Blacks.

Part of the longevity of segregation, however, lay in the fact that it was not inconsistent with equality for African Americans within their sphere. Outside of their sphere, civil and political power in the hands of African Americans was viewed as a threat to the existing social order and to democracy itself. Thus, under the perceived wisdom of the time, the most effective and equitable way to deal with the growing power and influence of those who were non-conforming was equality through segregation.

As a result of such reasoning, strong enforcement of the segregation paradigm did not occur until emancipation and reconstruction threatened to empower African Americans to achieve gains in political society that threatened the existing power structure; so too, strong enforcement of segregation against religious others did not displace broad free exercise rights until religious immigrants began to achieve political gains in civil society that threatened the existing power structure. The doctrine adopted to deal with the threat posed by the Catholic Other was the same one that had worked so well against the African American Other, a separate but equal paradigm that prevented the Other from attaining and exercising “too much” political power in civil society.

The reasoning that underlies the two separatist regimes is almost identical. The Enlightenment view of religion, forcefully articulated by Thomas Paine (and inherent in Jefferson’s wall metaphor), characterizes religious individuals as “mythologists” who are
unwilling to be guided by reason, and who create absurd and extravagant fables to terrify and enslave mankind.\textsuperscript{15} Fear of the non-conformity of the religious caused Jefferson and his fellow deists to advocate separate spheres of operation for the secular and the sectarian and to argue that the sectarian sphere must be set apart from wider society as a safety measure. To the deists, the superiority of reason over revelation was as natural as the superiority of Whites over Blacks, leaving no room for civil and political equality between the secular and the sectarian. Thus, under the wall metaphor and similar doctrines, arguments that there is injustice and unfairness in limiting the civil and political access rights of religious individuals in order to maintain the existing social order are incoherent.

Moreover, as with racial segregation, the continuing appeal and longevity of religious segregation lies in the emphasis it places on “equality” for religious people \textit{in their sphere}. Outside of their sphere, however, religious individuals, like African Americans in the Jim Crow era, are viewed as a threat to liberty and democracy.\textsuperscript{16} Thus, unlike Madison’s comments during the debates, which focused on not coercing people into religious observance, the wall metaphor focuses on controlling or eliminating the political power of religious people. It met the need of the political moment—controlling the growing power of a religious Other—in a way more egalitarian doctrines did not.

The 1948 \textit{McCollum} decision\textsuperscript{17} seems to demonstrate the existence of a segregationist philosophy at the core of the Court’s wall metaphor. In that case, the Supreme Court noted that, “both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”\textsuperscript{18} The

\textsuperscript{15} See \textsc{Thomas Paine, Age of Reason} 1 (1974).
\textsuperscript{16} Letter from Thomas Jefferson to Horatio G. Spafford (Mar. 17, 1814) (“In every country and in every age, the priest has been hostile to liberty. He is always in alliance with the Despot, abetting his abuses in return for protection to his own.”); \textit{Everson}, 330 U.S. at 53-54 (Rutledge, J., dissenting) (noting that allowing religious groups to fight for a share of government assistance or aid will “destroy the cherished liberty”).
\textsuperscript{17} \textit{McCollum v. Bd. of Educ.}, 333 U.S. 203 (1948).
\textsuperscript{18} \textit{Id.} at 212.
Court held that allowing religious teachers to enter the public school and provide the option of religious instruction to students during the school day was unconstitutional.\textsuperscript{19} It appeared to believe that religious instruction in the public school, no matter how voluntary, was presumptively unconstitutional because it allowed religion to escape its “proper” sphere. On the other hand, the Supreme Court later validated a similar program in which religious students were dismissed from the public school to go to separate schools for religious instruction.\textsuperscript{20} Though the use of the taxpayer’s “three pence” was held unconstitutional when the government sought to accommodate religious parents within the same sphere that it accommodated all other parents, such use was constitutional when it supported religious parents and their children in their segregated spaces.

In his concurrence, Justice Frankfurter deployed another staple of segregationist ideology—segregation produces social harmony.\textsuperscript{21} Justice Frankfurter began by noting that permitting religious instruction in schools causes children to be sharply conscious of religious differences,\textsuperscript{22} and that awareness of these differences inevitably results in divisiveness. This allowed him to conclude that, because divisiveness is contrary to the spirit of community the common school is designed to foster, religious segregation is essential to a school’s mission.\textsuperscript{23} To Frankfurter, the mere acknowledgement of difference is divisive, and one builds community best by masking difference or excluding those whose differences cannot be masked. By this reasoning, the best way to foster racial peace and tolerance is by educating African-Americans in separate schools set apart from White Americans, and the best way to foster religious freedom and tolerance is by educating deeply religious students in isolated habitats separate from secular students.

\textsuperscript{19} Id.
\textsuperscript{20} Zorach v. Clauson, 343 U.S. 306 (1952).
\textsuperscript{21} See McCollum, 333 U.S. at 228 (Frankfurter, J., concurring).
\textsuperscript{22} See id. (“As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care.”).
\textsuperscript{23} See id.
Of course, the 1950s and 60s revealed that, not only did segregation not promote racial tolerance and a sense of community, it somehow managed to foster truly frightening levels of bigotry, intolerance and inequality. Watching children mauled by dogs and gunfights on university campuses challenged the smug American assumption that “E pluribus unum” was a simple matter of ignoring and excluding those who were non-conforming. Violence and bloodshed cast the principle of racial segregation into doubt—though it did not completely eliminate the practices. There have, however, been no similar levels of violence or bloodshed resulting from religious segregation, and the judiciary has continued to support such segregation as an equitable and legitimate constitutional principle.

When one confronts the reality that religion is a comprehensive explanation of the thoughts and actions of a community, continued adherence to religious segregation and its “no aid” rule becomes very difficult to justify as consistent with modern ideals of equality. One cannot deny aid to a religion anymore than one can deny aid to an explanation. One can only deny aid to the people whose thoughts and actions are explained by a particular religious doctrine. Thus, one cannot deny aid to Catholicism; one can only deny aid to Catholics acting in a way Catholicism explains. This creates an inverse relationship between the exercise of religion and equal treatment. The more actions a person takes that can be explained by their religious beliefs, the more discriminatory “denials of aid” the Constitution will countenance against them. Thus, a person whose religious beliefs only account for how s/he spends her Sunday or Saturday morning, will encounter much less state sanctioned discrimination than a person with a more comprehensive religion doctrine that explains the school her children attend, how she votes, the civil policies she supports, where she works, and whom she marries. This dynamic seems to turn the religious clauses on their heads by penalizing rather than guaranteeing the free exercise of

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religion. Though Justice Black tried to define religion in Everson as meaning religious institutions but not religious individuals,25 the dissent (and subsequent majority) describes discrimination against religious individuals as the constitutional “price” of their free exercise rights26—apparently seeing no contradiction in a constitution’s guaranteeing “free” exercise in one clause, only to exact a price for that exercise of religion in the very next clause.

Moreover, embedded in expressions like “separate but equal” and “separation of church and state” are presuppositions about who has the power to separate and who deserves to be separated. The racial segregation paradigm assumes that White people alone, not a unified citizenry, are the best judges of what is best for a society that includes both Black people and White people. Similarly, the religious segregation paradigm assumes that secular people alone, not a unified citizenry, are the best judges of what is best for a society that includes both secular and religious people. In addition, just as the racial segregation paradigm presupposes that having black skin justifies segregation in a way that having blue eyes or red hair does not, so too, the religious segregation paradigm presupposes that a belief in theology justifies political segregation in ways that beliefs in anarchy or communism do not.

The doctrine of “separation of church and state,” like its parent “separate but equal,” is a doctrine that presupposes the legitimate and non-discriminatory nature of state mandated segregation. That assumption has no place in a post-Brown world, in which segregation is the touchstone of illegitimacy and discrimination. Thus, the Court’s attempts to use a doctrine that presupposes the legitimacy of religious discrimination has only produced doctrinal incoherence. Audre Lorde described this phenomenon as using the

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25 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (finding that while New Jersey cannot “contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church”, it also “cannot hamper its citizens in the free exercise of their own religion”).

26 Id. at 59 (Rutledge, J., dissenting) (“Religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for their children mixed with secular, by the terms of our Constitution the price is greater than for others.”).
master’s tool to tear down the master’s house;\textsuperscript{27} one cannot use tools that presuppose outcomes fundamentally at odds with one’s goals and expect to achieve those goals. It is simply not possible to use a doctrine that presupposes the inequality and inferiority of religious identity to secure equality and neutral treatment of religious identity. This is why almost the only times the Court has been able to avoid discriminating against religious individuals under its current doctrine has been when it abandoned the Establishment Clause completely and characterized the issue as one of freedom of speech or association\textsuperscript{28} rather than of religion. Unfortunately, the peculiar persistence of religious discrimination under its “religiously neutral” Establishment Clause jurisprudence has not led the Court to re-examine its tools; it has only led it to describe them differently.

C. The Lemon Test

In 1963, segregation was a beleaguered practice as the Civil Rights Movement spread across the South and highlighted the unequal distributions of power inherent in the right of White people to exclude Black people. Perhaps not by chance, the Supreme Court in the same year began to emphasize neutrality more than segregation in its interpretations of the Establishment Clause. Thus, in \textit{Abington v. Schempp}, the Court distilled the reasoning of all of its previous cases into a constitutional requirement of “wholesome neutrality.”\textsuperscript{29} However, as a practical matter, there is little difference between separate but neutral and separate but equal. The test of “wholesome neutrality” was whether the legislation had “a secular legislative purpose and a primary effect that neither advance[d] nor

\begin{footnotesize}
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\item[\textsuperscript{28}] See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (granting religious groups equal access to school property under the viewpoint neutrality requirements of the free speech clause); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995) (requiring funding of religious student journal on same terms as secular student journals as a matter of viewpoint neutrality under the Free Speech Clause).
\item[\textsuperscript{29}] Abington v. Schempp, 374 U.S. 203, 221 (1963).
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inhibit[ed] religion." In *Lemon v. Kurtzman*, the Court further refined its definition of wholesome neutrality by adding that neutral laws must not promote "excessive" government involvement with religion. These three prongs—all laws must have a secular legislative purpose, must not have the primary effect of advancing or inhibiting religion, and must not promote "excessive" government involvement with religion—became known as the *Lemon* test.

The *Lemon* test’s "wholesome neutrality" repeats the conceptual flaw inherent in the wall metaphor by assuming that "religion" is somehow separate and distinct from religious people, rather than a comprehensive explanation of their actions. When one realizes that religion is a fundamental characteristic of religious people, and not a separate thing in itself, the flaw in this articulation is readily apparent. Under the *Lemon* test, laws must not reflect the purposes of religious people, must not advance the interests of religious people, and must not promote "excessive" government involvement with religious people. When one substitutes other fundamental characteristics for religion, the incompatibility of "wholesome neutrality" and representative democracy is underscored. Wholesome racial neutrality would prohibit all laws whose purpose or effect is improvement in the welfare of racial minorities or that require legislators to become too entangled in the affairs of racial minority groups. Similarly, wholesome gender neutrality would require voiding all laws that reflect the purposes of American women, that advance the interests of American women, or that "entangle" representatives in the interests and affairs of their female constituents.

How can the Constitution be read to permit, much less require, wholesale denials of representation? If the people are the sovereign, then the government that represents them cannot be wholly secular without denying membership in the sovereign to religious people. Denial or suppression of one’s religious identity is not a proper precondition of democratic participation or representation; in a republic, the government has taken an oath to represent the

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30 Id. at 222.
31 403 U.S. 602 (1971).
32 Id. at 612-13.
33 Id.
interests of all people, this includes religious people, as well as Black people and female people. Interpreting wholesome constitutional “neutrality” as denying representation to select groups betrays our constitutional commitment to equality in an egregious manner.

Under the *Lemon* test, any and every group of citizens may successfully lobby their government for enhanced protection of their interests, a greater share of community resources devoted to the causes they value, and improved opportunities for their members, except citizens and groups whose values and interests are religious in nature. Religious people cannot benefit from laws passed by their representatives if the benefit is desired because of their religious beliefs or if the interests they support can be explained by a religious creed. Like the wall metaphor, the *Lemon* test relegates religious people and their interests to the fringes of the republic, limited to the crumbs of representation that flow from the occasional confluence of religious and non-religious interests.

In the *Lemon* analysis, representation of religious adherents as religious adherents is proscribed as an advancement of religion. On the other hand, representation of women as women and of Black people as Black people is considered the advancement of representative democracy. However, unlike African Americans and women, from the very founding of this country, the Constitution’s “We the People” included those whose social and political actions were guided and accounted for by their religious beliefs. The citizenry that voted to ratify the Constitution was not wholly secular. Thus, it proves too much to argue that the representative government they created was designed around a secular bias that required the government to ignore the values and interests of the very people who created it. Neither the make-up of “We the People” then, nor the make-up of “We the People” now can justify a reading of the Establishment Clause that conditions the representation of religious adherents on their ability to create secular pretexts for their values and interests. If my representation in government is conditioned on my espousing the values and interests of someone else, I, myself, have no representation. Indeed, such surrogacy seems to violate every principle of freedom of speech and of equal protection modern courts have come to recognize.
Unfortunately, modern courts have justified this constitutional anomaly by suggesting that the founders in their great and unchallengeable wisdom believed that religious segregation was necessary for the creation and preservation of American democracy, and so it must be. The founding generation also believed that slavery, patriarchy, and the extermination of Native Americans were necessary for the creation and preservation of American democracy—for some, that might warrant taking their assertions of the need for even more discrimination with a grain of salt. Moreover, under modern Fourteenth Amendment jurisprudence, we have largely managed to outgrow the racist, sexist, and nativist inclinations of the founding generation. Somehow, however, religious discrimination continues to thrive, not merely against religious sects or the irreligious, but most strongly against those individuals perceived as taking their religion “too seriously.” For the latter group, the Constitution provides no remedy, and, instead, places its blessing on their marginalization. How has religious identity, the only identity specifically protected in the Bill of Rights, managed to be the only identity still confined to the back of the bus?

D. The Endorsement Test

In the 1980’s, as the “religious right” succeeded in building a political coalition around allegations that Supreme Court precedents discriminated against religious individuals and abridged religious freedoms, the Court made yet another attempt to define religious segregation as religious neutrality. In a concurring opinion in *Lynch v. Donnelly* (which later became the Court majority’s approach), Justice O’Connor created the endorsement test. It defined establishment as “making adherence to religion relevant in any way to a

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34 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (purporting to the interpret the clause as Jefferson intended); McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (finding the same).
35 See supra Part II. B.
person’s standing in the political community.”\textsuperscript{37} While this sounds like an end to government sanctioned segregation and denials of representation, in practice, it devolved into a continuation of those very things. A right is no more extensive than its remedy, and the neutrality right Justice O’Conner so skillfully articulated was not remedied by the foreclosure of religious discrimination in general, but only by foreclosure of the subjective injury of “government approval of religious beliefs.”\textsuperscript{38} As a matter of internal consistency, if it is the religious nature of a person’s beliefs that gives non-adherents a roving right of enforcement against her whenever she appears to receive government approval, then her religious identity is always relevant to her standing in the political community, for it is always relevant in determining whether the government has a duty to suppress approval of her beliefs. If she holds no beliefs of a religious nature, the government has no such duty in relation to her. The “neutrality” of a right designed to prevent the government from “making adherence to religion relevant in any way to a person’s standing in the political community,”\textsuperscript{39} which places duties on the government only with respect to individuals and groups with religious affiliations is purely chimerical.

This fallacy is compounded by the asymmetrical nature of enforcement. According to the \textit{Lynch} concurrence, endorsement “sends a message to nonadherents of religion that they are outsiders, not full members of the political community, and an accompanying message to adherents of religion that they are insiders, favored members of the political community.”\textsuperscript{40} Similarly, according to the concurrence, disapproval sends the “opposite message,” presumably to religious adherents that they are outsiders, not full members of the political community, and an accompanying message to non-adherents of religion, that they are insiders, favored members of the

\textsuperscript{38} See \textit{id.} at 694 (O’Connor, J., concurring) (“Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.”).
\textsuperscript{39} \textit{id.} at 687.
\textsuperscript{40} \textit{id.} at 688.
While this formulation is facially neutral, the Court is not seriously suggesting that witches and broomsticks are now constitutionally barred from public displays during Halloween because they send messages of exclusion to those who associate such symbols with evil or with Wiccan ideologies. Enforcement runs only against the symbols of traditional religions and religious groups. As a result, the endorsement test is non-neutral in application and fails to account for the psychic harms attendant upon judicial invalidation of displays only when those displays purport to respond to the values and interests of religious citizens, as they are the only group required by law to stay in their closets and out of publicly owned spaces.

Scholars such as Eisgruber and Sager argue that the removal of displays from the public square can never “disparage” or psychologically harm religious adherents in any way comparable to the harm done to the areligious. Using social meaning as a framework, they argue that “it would be bizarre to say that the social meaning of taking the [symbol] down is that mainstream Christians are not full and respected members of the community.” Instead, they suggest that the alleged harm of removal lies in denying mainstream Christians an entitlement to have the government validate their specialness. This argument, must fail. First, it is far from clear that there is one identifiable “social” meaning or consensus on religious symbols and their removal. More to the point, when some citizens are singled out and required to forfeit all gains in the political process merely because the interests for which they successfully lobbied are rooted in and reflect their religious values, it is not an issue of specialness. It is an issue of religious groups being deprived of political gains and benefits secular groups would have been entitled to retain.

Despite what Eisgruber and Sager imply, majorities in a democracy actually are entitled to assert the right to “recognize what [they] have in common and to take pride in what makes [them] special.”

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41 See id.
43 Id. at 130.
ian values and commemorate those occasions in which the majority of the people take pride or joy. This is why some communities celebrate Hispanic History Month, Native American Day, and Juneteenth, while others do not. The freedom to make such choices is what democratic rule generally means, and it is normally only limited by equal protection principles. However, when the democratic majority wishes to show respect to religious values, there are additional, special, vague, judicially created limitations. As a result, any “social” meaning of display removal cannot be merely, “Religious majorities are not more special than everyone else.” It must also reflect the belief that religious majorities alone, and thus the religious citizens that comprise those majorities, are the only ones who cannot be trusted with the expressive rights and powers that normally attend democratic governance. Singling out associations of people with religious identities as uniquely more dangerous to democracy than all other associations seems quite inconsistent with “the requirement of ... ‘equal regard’ that lies at the heart of the Establishment Clause.”44 Ultimately, suggesting that the Constitution mandates discrimination against religious people because they are more dangerous to democracy than any other group is not to offer a neutral basis of decision, but rather to offer a justification for abandoning neutrality in favor of segregation. Unless one “acquires a vested or protected right in violation of the Constitution by long use,”45 the practices of religious discrimination and segregation need to be reconsidered in light of modern understandings of equality and neutrality.

III. NEUTRALITIES AND RELIGIONS

A. The Creation of Two Neutralities

The Court’s speech and display cases have created two competing definitions of neutrality, one requiring equality and the other requiring inequality. In religious speech cases, the Court defines

44 Id. at 126.
neutrality as requiring equal access for both religious and secular identities. Thus, if a school or university provides access to its facilities for secular viewpoints and groups, it must also provide the same access to religious viewpoints and groups. 46 Under this interpretation, the Establishment Clause is not a license to discriminate against religious identity; instead, such discrimination violates constitutional principles of neutrality.47

In religious display cases, on the other hand, the Court defines religious neutrality as consistent with according unequal levels of access to religious and secular identities. Thus, in the City of Allegheny County v. A.C.L.U., the Court relied on the principle of neutrality in barring government displays that celebrate the religious aspects of holidays that have both secular and religious components.48 The Court rejected the argument that neutrality means that the right to acknowledge religious aspects of dual holidays is co-extensive with the right to acknowledge secular aspects of the same holidays. Instead, the Court found that there is a constitutional mandate “that the government remain secular, rather than affiliate itself with religious beliefs or institutions.”49 Under this rule, religious symbols are denied the equal protection afforded to religious

46 See, e.g., Widmar v. Vincent, 454 U.S. 263, 269 (1981) (finding unconstitutional discrimination when school facilities were made available for use by all student groups, except religious student groups); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993) (finding unconstitutional discrimination in a policy that allowed school property to be used for family values presentations from secular viewpoints, but not religious viewpoints); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 840 (1995) (finding unconstitutional discrimination in a university policy that provided funds for the publication of secular student journals but denied funding to religiously oriented student journals).

47 Lamb’s Chapel, 508 U.S. at 393 (1993) (rejecting the school’s Establishment Clause defense as a justification for the exclusion of all religions and uses for religious purposes).

48 See Cnty. of Allegheny v. A.C.L.U., 492 U.S. 573, 611-12 (1989) (noting that “confining the government’s own celebration of Christmas to the holiday’s secular aspects does not favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs ....”) (emphasis in original).

49 Id. at 610.
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viewpoints and expression,\textsuperscript{50} though it is far from clear that religious symbols are truly distinguishable from the latter.

If neutrality means something other than disenfranchise-ment, the focus of the Establishment Clause cannot be the viewpoint endorsement that invariably attends majority rule, but rather must be on discrimination that invades minority rights and on the neutral treatment of religious identity. In other words, democracy and equality cannot be squared with a constitutional mandate that the govern-ment can never represent religious people. Rather, a neutral inter-pretation of the clauses lies in diversity, not secularity, namely that the government cannot only represent religious people. There is an entire constitution between only and never that the Court has so far disregarded.

Moreover, in order to effectively adjudicate religious cases, the Court must recognize that the privileging of secular identities does not occur in a vacuum, but inevitably places non-reciprocal duties on those individuals who have chosen to embrace religious identities instead of secular ones. The Court cannot allocate different levels of rights and burdens based on identity without acknowledging that it is purposefully assigning different values to the conflicting interests in community disputes. Moreover, using the principle of neutrality as a mask for the enforcement of its secular objectives only serves to destabilize the Court’s jurisprudence while failing to establish the legitimacy of the underlying principle of secularity through segregation.\textsuperscript{51}

\textsuperscript{50} See Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010) (striking down the use of crosses to memorialize dead highway patrol officers regardless of the officers’ religious affiliations).

\textsuperscript{51} See Zorach v. Clauson, 343 U.S. 306, 314 (1952) (finding that there is no constitutional requirement that the government prefer those who believe in no religion over those who do believe, nor any requirement that the government “throw its weight against efforts to widen the effective scope of religious influence”). See also Marsh v. Chambers, 463 U.S. 783, 792 (1983) (casting doubt on the principle of secularity by noting that “invok[ing] [d]ivine guidance on a public body entrusted with making the laws” does not violate the Establishment Clause); Van Orden v. Perry, 545 U.S. 677, 686-90 (2005) (affirming that whatever else the Establishment Clause may prevent, it does not prevent government acknowledgment of the nation’s religious heritage).
B. Is Religion a Belief or the Role of a Belief System?

A related source of tension in religious equality jurisprudence lies in the fact that “religion” as used in the non-Establishment context appears to mean something different from “religion” as used in the Free-Exercise context, causing religious equality to place conflicting demands on the government under the free exercise and non-establishment doctrines. For example, in the Establishment Clause context, religion is defined by the content of beliefs, and secularity is viewed as neutral because it does not take a position on the truth or falsity of religious doctrines. Under the Free Exercise Clause, however, religion is not defined in terms of belief or doctrine, but rather in terms of the role a doctrine or belief system plays in a person’s life. Thus, the question the Court asks under the Free Exercise Clause is “whether a given belief that is sincere and meaningful occupies a place in the life of the possessor parallel to that filled by orthodox belief in God.” For some people, a belief in God is central to their understanding of and engagement with the world, their perceptions of themselves and others, and their evaluation of good and evil. For others, a belief in enlightenment, rebirth, or the perfection of the soul through non-violence is central to their understanding of and engagement with the world, their perceptions of themselves and others, and their evaluation of good and evil. The last examples, though atheistic, are considered religions under the Supreme Court’s definition because the non-deistic belief systems they embody function as an external source of moral values that influence life choices to the same extent as value systems rooted in theology. Though secularity does not take a stance on the content of belief, it does take a stance on the role of religion.

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53 The Encyclopedia of World Religions 66 (Richard S. Ellwood & Gregory D. Alles, eds., 2007) (noting that the focus of Buddhism is following the path to enlightenment, not the worship of gods).
54 Id. at 200 (noting that Hindus may be polytheistic, monotheistic or atheist, but share a common belief in the centrality of rebirth).
55 Id. at 229 (noting that non-injury is the cardinal rule of Jainism).
in a person’s life, and seems to mandate a single, private role for religious belief for the entire nation.

However, if the role assigned to religious belief is as much a part of religion as the content of belief, as the Supreme Court’s broad definition of religion suggests, then the orthodoxy of secularity and its prescription of a single “proper” role for religion should present an establishment problem. In the Establishment Clause context, however, the Court has consistently obsessed over governmental ratification of specific doctrines as true, while at the same time, ignoring equally problematic governmental messages about the proper role of external moral codes and the proper degree of reliance on them. This results in doctrines under which those with a “proper” view of the role of religion—as a private individual affair that plays no role in social or public life—are full members of the political community, while those with an “improper” view of the role of religion—as communal, interpersonal, and central to both their private decisions and civic engagement—are deprived of the right to engage in civil society on equal terms, and are denied the right to use the democratic process to obtain concessions and protections from the government. It can be argued that current Establishment Clause doctrine, while attempting to be neutral in terms of the content of beliefs, unabashedly provides different levels of rights and privileges to citizens according to the role they assign to their beliefs—with greater political access afforded to those who assign more nominal public roles to their religious beliefs.

Discriminating against people according to the role they assign to their religious beliefs—and thus the way they practice their religion—would seem to be discrimination in the exercise of a fundamental right, justifiable only if required by a compelling interest. Is the government’s interest in secularity a compelling one?
IV. SECULAR SUPREMACY AND THE FOURTEENTH AMENDMENT

A. The Rights of Racial and Non-Religious Minorities

Obviously, protecting a pre-existing constitutional right is a compelling interest. The question is, what right does the principle of secularity protect? At its most basic level, it seems to be the right not to feel like a religious minority or outsider. This raises the question of whether there is a corresponding right not to be made to feel like a racial minority or outsider. For, if a right not to be made to feel like a minority exists in the interstices of the Constitution, one would think that a group that had been subjected to slavery, kidnapping, rape, and torture would have first claim to its remedy. Yet, Brown v. Board of Education, arguably the Supreme Court case most solicitous to feelings of subordination, limited itself to laws that mandated racial segregation and did not address the pervasive yet amorphous system of white supremacy that infested the social practices of its day and positioned African Americans as eternal “Others” distinct from the American polity. Moreover, after Washington v. Davis, racial minorities are protected only from actual and intentional discrimination. Nonreligious minorities, on the other hand, continue to be protected from psychic feelings of outsideriness. This means that the principle of racial equality enshrined in the Fourteenth Amendment does not provide constitu-

56 See Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (noting that the Establishment Clause is violated under the endorsement test when the government sends a message to non-adherents that they are “outsiders, not full members of the political community”).
57 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (concluding only “that in the field of public education the doctrine of ‘separate but equal’ has no place”).
58 See Washington v. Davis, 426 U.S. 229, 248 (1976) (finding that a statute that is “more burdensome to the poor and to the average black than to the more affluent white” is nevertheless constitutional, so long as its purpose is neutral and there was no intentional discrimination). Under this theory, the real and psychic harms to the African-Americans so burdened are constitutionally insignificant.
tional protection against the psychic harms of white supremacy, but the principle of secularity, “enshrined” in an informal personal letter,\(^\text{59}\) does provide constitutional protection against the psychic harms of theology. The extent of this asymmetry seems to call for an explanation. Why is being made to feel like a nonreligious minority so much more constitutionally suspect than being made to feel like a racial minority? Such clarity is especially needed given that the racial minorities denied protection in the first instance are also more likely to be members of the religious majorities denied democratic gains in the second instance.\(^\text{60}\) When Supreme Court jurisprudence creates a situation in which groups who completely lack representation on the Court (poor minorities) are always the losers in constitutional adjudication, it is time to consider whether the result is conscious constitutionalism or subconscious classism.

Secondly, one could concede that the Court’s passive display cases are protecting more than the right not to feel like a nonreligious minority and still not establish that these cases are protecting a right so inherent in the “concept of ordered liberty” that it must be inferred where it is not explicitly stated.\(^\text{61}\) There is certainly no clear historic right to secular public spaces traceable to the founding era.\(^\text{62}\) Nor can the “secular liberty” protected in the passive cases be seen as creating a situation in which “groups who completely lack representation on the Court (poor minorities) are always the losers in constitutional adjudication.” The result is conscious constitutionalism or subconscious classism.

\(^{59}\) Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), reprinted in Michael W. McConnell, John H. Garvey, & Thomas C. Berg, Religion and the Constitution 44 (3rd ed. 2011) (advocating a wall of separation between church and state—a metaphor that has historically been used to justify the doctrine of secular supremacy).


\(^{61}\) See Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (noting that the central due process question is whether an act or statute “violates basic values ‘implicit in the concept of ordered liberty’” (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

\(^{62}\) Compare Erwin Chemerinsky, Why the Rehnquist Court Is Wrong about the Establishment Clause, 33 LOY. U. CHI. L.J. 221, 224 (2001) (agreeing with Professor Laurence Tribe’s conclusion that there were at least three distinct approaches to the religious clauses among the framers—those seeking to protect
display cases be justified as similar to the rights of privacy and personal autonomy recognized, however controversially, in *Roe v. Wade* \(^{63}\) and *Lawrence v. Texas*. \(^{64}\) The passive display cases are not about preventing government interference with private choices, but rather about enforcing governmental discrimination against religious viewpoints. Historically, viewpoint censorship has been considered anathema to, rather than inherent in, constitutional protections of liberty, especially religious liberty. \(^{65}\)

If anything, the Court’s passive display precedents raise the specter of *Romer v. Evans*. \(^{66}\) There, a state constitutional amendment denied gays the right to ever seek or obtain government recognition as a protected group. \(^{67}\) The Supreme Court found this to be a clear and unequivocal violation of the Fourteenth Amendment. \(^{68}\) It held that “a law declaring that, in general, it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” \(^{69}\) Nevertheless, in its Religion Clause cases, the Supreme Court has adopted the very same approach by effectively establishing as a matter of federal constitutional law that no religious group may seek or obtain government recognition as a protected group. Protection of religious interests and improvement in the standing of religious individuals are both eternally damned

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\(^{63}\) *Roe v. Wade*, 410 U.S. 113 (1973) (upholding a right to abortion in the name of privacy and autonomy).


\(^{65}\) *See Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 828 (1995) (noting that “[v]iewpoint discrimination is ... an egregious form of content discrimination” that is forbidden even when the government has created a limited public forum).


\(^{67}\) *Id.* at 624.

\(^{68}\) *Id.* at 632.

\(^{69}\) *Id.* at 633.
under the Establishment Clause because government affiliation with the efforts of religious individuals is a proscribed affiliation with religion.\footnote{See Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (interpreting the wall metaphor to mean that the government violates the Establishment Clause if its laws result in aid to religion, however indirectly, or when it promotes religious interests).} Thus, what \textit{Romer} harshly criticized as an irrational fear of homosexuals in violation of the Fourteenth Amendment has become, under the endorsement test, a quite rational, justified and \textit{constitutionally mandated} fear of religious believers.\footnote{Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) ("Ordinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.... The potential divisiveness of such conflict is a threat to the normal political process.").}

It is beyond ironic that the amendment designed to protect religious believers from discrimination has instead become a command to discriminate against religious identities.\footnote{See id.} This shift occurred because the segregationist impulses animating both the endorsement test and the Lemon test construe the religion clauses as guaranteeing freedom \textit{from} religion (by their emphasis on secular purpose) rather than freedom \textit{of} religion. This transforms constitutional protection of religious identity into a bias in favor of secular identity. The first step away from religious segregation is the same one that pointed away from racial segregation, recognition that neutral and equal treatment under the laws is incompatible with segregation in any form.

\section*{B. Equal Protection Must Trump Secularity}

[\textit{I}n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution ... neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are}
equal before the law. The humblest is the peer of the most powerful. The law regards man as man.\textsuperscript{73}

This was not true in 1896, and it is still not true today. But we can make it more true by abandoning segregation as a control mechanism for the religious and having more faith in the democratic process. Though Establishment Clause jurisprudence has become hopelessly bogged down over equality of beliefs, the Fourteenth Amendment has historically attempted to ensure equal treatment among persons with different social identities. At the core of the Fourteenth Amendment is the idea that people should not be treated differently because of their race or ethnicity. Race and ethnicity are markers of personhood and emblems of “otherness” that have long invited public and private discrimination, and religious identity has historically functioned in a similar way.

Thus, incorporation of the Religion Clauses should not be read as transforming the Fourteenth Amendment's concern with identity into a concern for beliefs, whether expressed publicly or privately. Instead, incorporation of the religion clauses into the Fourteenth Amendment should be construed as expanding the protection of identities to include the identity that was first in the mind of the founding generation—religious identity. Just as the Fourteenth Amendment prevents racial minorities from being relegated to a separate class governed by separate rules, so, too, it should prevent individuals with religious identities from being relegated to a separate class subject to separate rules. It makes no sense to insist that discrimination violates the Constitution when there is intent to treat people differently based on their racial identity, but not when there is intent to treat people differently based on their religious identity. When the benefits of democracy cease to flow from votes and citizenship and instead are made to rest on personal characteristics such as race and degree of religiosity, the Court embraces the founder's weaknesses rather than building on their strengths.

Moreover, as a matter of history and practice, the ideology of white supremacy has led to more oppression, persecution and

\textsuperscript{73} Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
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murder in this country than any variation of theology. Yet, racial minorities have only the Fourteenth Amendment to protect them should future White majorities decide again to run amok in the fields of genocide and racial oppression. If the Fourteenth Amendment is good enough for racial minorities, whose persecution by white supremacist governments ended only a few decades ago, why is it not sufficient protection for non-religious minorities whose persecutions by government ended centuries ago, if comparable persecution ever occurred at all? It is only the Court’s continued use of the flawed tools of the founding generation that makes it more solicitous of the rights of non-religious minorities than of the racial and ethnic minorities who have yet to recover from the effects of concentrated government persecution. After all, the men who wrote the religion clauses were non-religious minorities, not racial or ethnic minorities.

What is the alternative? Though the racial analogy highlights the flaws of our current jurisprudence, it is gender jurisprudence that provides an alternative method of adjudication. In gender equality cases, the Fourteenth Amendment sometimes requires that women be treated differently from men, and, other times, it requires men and women to be treated identically. This variability springs from the fact that there are real biological differences between men and women, as well as genuine social differences in terms of the extent of their victimization by other members of society. Gender equality cases thus require judicial determinations of just what difference these differences make in treatment before the law, and reflect a recognition of the fact that the existence of difference precludes a blanket rule of identical treatment.

A similar variableness can be found in our Religion Clause jurisprudence. Sometimes having a religious identity is treated differently than not having a religious identity, and at other times, the two are treated the same.74 Though the Court has offered no

coherent rationale for its shifts between these two positions, this article suggests that implicit in these shifts are recognitions and denials of differences in volition. The law has long recognized that there is a significant difference between individuals who embark upon a course of action purely as a result of internal processes, and individuals who are constrained by externalities to embark upon that same course of action. The existence of external influence, and thus differences in volition between the religious and non-religious, has historically been construed as the source of difference in the religion context. Thus, one of the earliest rationales for religious freedom was the belief that democratic governments should not force individuals to choose between losing their soul and obeying the law. In modern times, however, the existence of God, and even souls, has become highly contested.

For example, religious individuals often believe that submission to external entities or codes is essential for their soul’s survival. As a result, they interpret religious freedom to mean that actions taken to preserve their soul from destruction will be treated as solicitously (if not more solicitously) under the law as actions taken to preserve their lives. Secular and non-religious individuals, however, tend to deny the existence of external threats to the soul and often view religion as a form of self-fulfillment and self-actualization that is indistinguishable from non-religious attempts to live and enjoy life on one’s own terms. This view informs their belief that the religious are the same as the non-religious and are not entitled to more solicitous treatment.

These two extremes present a difficulty for the courts, because the government is required to be neutral on the issue of higher powers and external moral codes. This means that the government can neither confirm nor deny whether a person’s soul is at stake when they are forced to choose between the laws and their religion. This is often, erroneously, interpreted as ignoring this dilemma and conducting government as if God and souls do not exist. In reality, it requires remaining open to the possibility that the religious should be treated the same as the non-religious without conduct that the State is free to regulate").
foreclosing the possibility of treating the two differently. While the
government cannot definitively say, “Yes, your soul is truly at
stake,” it also cannot definitively say, “No, your soul is not at stake.”
Instead, in passing laws that touch upon religion, the government
must weigh the harms that would result if each were false and try to
choose the path that would result in the least harm to society and the
one most likely to contribute to the creation of a society in which all
citizens have equal access to the benefits of participatory demo-
cracy, regardless of their religious identity. When these two con-
siderations pull in opposite directions, the government should
prioritize the latter.

It is in this respect that an analogy to gender can be most
instructive, for differential treatment of the genders is not an always
or never proposition; instead, it is contingent and deliberative.
Moreover, where differential treatment is allowed, it is informed
by history and thus is always designed to equalize the opportunities of
women in society or remove barriers to their participation, but never
to enforce their exclusion. Our gender equality jurisprudence does
not allow the government to limit the civil and political gains of
women as a group as the “price” of those laws that specifically pro-
tect women from victimization. More importantly, in distinguishing
between differences that do and do not matter in the gender context,
the Court has adopted an anti-stereotype principle. It has struck
down laws that incorporate stereotypes concerning the proper role of
women in society,75 despite the fact that these stereotypes were held
by a majority of the drafters of the Equal Protection Clause.

The same approach could be and should be used to improve
our religious equality jurisprudence. Religious equality should never
function as a pretext to marginalize the religious in the secular
sphere or exclude the religious from full democratic participation.
Moreover, the denial of the civil and political gains of religious
individuals should never be justified as the “price” of the protection

about ‘the way women are’ [and] estimates of what is appropriate for most
women” do not justify discrimination against women who do not fit these
stereotypes).
of religious liberty. More importantly, the Court must adopt an anti-stereotyping principle in the context of religious identity, striking down laws that incorporate negative stereotypes about religious identity or the proper role of religion in public life, regardless of the misconceptions of the framers. This would be far truer to the ideals of religious freedom and equality than the current system that practically requires laws to incorporate stereotypical fears of religious tyranny and elitist generalizations about the proper role of religion in public life. True neutrality between religion and non-religion requires a presumption of equal treatment coupled with a judicious weighing of the costs and benefits of treating religious people the same as non-religious people in situations in which they may, in fact, be quite different.

It is thus past time to recognize that fidelity to the Constitution does not require the Court to adopt the prejudices of the founders as legal principles; the Fourteenth Amendment was designed to replace such prejudice with equality and to ensure that differences in religious identity would not be a basis for discriminatory treatment. Reviving this interpretation of the Fourteenth Amendment

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76 See Everson v. Bd. of Educ., 330 U.S. 1, 59 (1947) (Rutledge, J., dissenting) (stating that “religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for their children mixed with secular, by the terms of our Constitution the price is greater than for others.”).

77 See Lemon, 403 U.S. at 612 (positioning religion as uniquely threatening to the political process).


79 Sherbert v. Verner, 374 U.S. 398, 410 (1963) (while declining to formally address the status of religious identity under the Fourteenth Amendment equal protection clause, the Court noted that a longstanding principle of its Establishment Clause jurisprudence is that “no State may ‘exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation’” (quoting Everson,
would allow a government to represent the values and interests of both secular and religious majorities, while also ensuring that both were prohibited from discriminating on the basis of religious identity. In such a regime, the protection of minority religious identities and secular identities would lie, not in the piecemeal abrogation of the rights and political gains of successful religious coalitions, but in the equal protection principles of the Constitution. If the Equal Protection Clause indeed stands as a bulwark against tyranny, nothing else is required, for it cannot be the case that the guarantee of equal protection is enough to prevent tyranny by all majority groups except those comprised of religious coalitions. Moreover, as the Court has repeatedly denied any intent to treat religion less favorably than non-religion, Equal Protection analysis is an appropriate way to reconcile the Court’s actions with its rhetoric.

V. APPLYING THE EQUAL PROTECTION TEST TO PASSIVE RELIGIOUS DISPLAYS

Application of the Equal Protection analysis to passive display cases would begin the way all equal protection analyses begin, by evaluating whether there has been differential treatment of similarly situated individuals on the basis of a proscribed classification, in this instance, religious identity. A key question would be whether a state’s action in displaying the crèche (or the Ten Commandments) imposes different benefits and burdens upon citizens depending upon their religious identity. In the passive display context, the answer to this first question must always be “no,” because of the psychic nature of the harm.

330 U.S. at 16), which is a clear articulation of a non-discrimination principle based on religious identity as inherent in the Establishment Clause).

80 See Lynch, 465 U.S. at 688 (noting that the Establishment Clause is violated under the endorsement test when the government sends a message to adherents that they are “outsiders, not full members of the political community”). See also Van Orden v. Perry, 545 U.S. 677, 683-84 (2005) (denying that the Establishment Clause requires the government to “evince a hostility to religion by disabling the government from ... recognizing our religious heritage”).
The psychic nature of the harm means that the constitutional violation lies not in differences in an individual’s treatment, but in an individual’s response to the display’s “message.” As such, a psychic equal protection violation on the basis of religion must rest on the assumption that all Jews have the same subjective response to the displays, as do all Christians, as do all atheists, as do all Catholics. For, to win an equal protection claim, one must show that all other things being equal, had this one aspect of identity been different, the benefit or burden would have been different. Thus, all else being equal, had this individual been Black, she would have been accepted to the University of Michigan. All else being equal, had this individual been a man, she would have been accepted into the Virginia Military Institute. All else being equal, had this individual been a Christian, he would have gotten the job. Does equal protection analysis really have the capacity to say, all else being equal, had this individual not been a member of this religion, he would have felt this way?

Religious identity alone does not drive how one feels about government religious displays any more than racial identity alone determines how one feels about affirmative action. As an empirical matter, one can try to show that individuals are treated differently based on race and religion, but purporting to show that individuals feel and act differently based solely on race or religion incorporates into the equal protection analysis the very stereotypes it was written to eradicate, and reduces the breadth of human individuality to discrete categories of difference. People simply do not feel differently about issues solely as a function of their religious identity, and if the psychic harm a person feels as a result of a religious display is attributable to a variety of factors, it cannot simultaneously be attributable solely to their religious or nonreligious identity. There can be no coherent violation of equal protection when the connection between the differential treatment and membership in a suspect class is unclear and attenuated. Moreover, a rule that the Equal Protection clause is violated whenever an individual feels discriminated against would be unenforceable for vagueness, as there is no way to know in advance how all Black people, or all women, or all non-Christians will feel about a given action. Thus, neither general
equal protection analysis, nor this article’s proposed equal protection test, recognizes psychic harms as capable of constituting differential treatment under the equal protection clause.

Applying this test to passive displays would eliminate Supreme Court oversight of local holiday and commemorative displays, unless those displays had a non-psychic impact. In the absence of non-psychic impact, the question of the role of religion in governance and the degree of religious sentiment appropriate in the public square would be left to the discretion of individual communities, the temperament of the majority of the people, and the ballot box. For some, this is a cause for immediate outcry, because a person seeing a crèche on the courthouse steps or the Ten Commandments on the wall of the courthouse may feel that they are political outsiders,81 may worry that they will face discrimination from the government,82 or may feel disparaged. Many Republicans felt that way when Obama was elected president. Many Democrats felt that way when Bush was re-elected. Many independents have always felt that way. Almost everyone who has ever had their side lose in an election has been made to feel that the winners were the “political insiders” and the losers were the political outsiders, and almost every minority in America has felt disparaged and feared unequal treatment when a political party insensitive to their perspective has taken office.

This is the reality of life in a diverse democracy; people with whom we disagree nevertheless have the right to vote, and sometimes, (for minorities, most of the time) they win. It is far from intuitive that the Constitution should provide a remedy beyond the Fourteenth Amendment’s guarantee of equal treatment when this happens. More importantly, neither law nor logic justifies limiting the right to this remedy to nonreligious minorities when other minorities in this country, who have much longer and more tragic

81 See Lynch, 465 U.S. at 688 (suggesting that being made to feel like a political outsider because of religion is a core violation of the Establishment Clause).
82 See Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1121 (10th Cir. 2010) (suggesting that religious symbols on police vehicles may cause non-adherents to fear unequal treatment by police).
histories of political exclusion, are denied a similar remedy.\textsuperscript{83} If the Court plans, at this late date, to enforce group based anti-subordination principles, the intractability of racial discrimination in America suggests that racial minorities, rather than non-religious minorities, should be first in line.

Moreover, given the muddled history of the Establishment Clause, the constitutional infirmity of the principle of secularity and the religious diversity of this nation, equal protection seems to be the only clear route through the mire. This is not to deny that religion is different, but to suggest that that difference must be defined in ways that are compatible with our traditions and our aspirations. While we have long accorded great weight to religious freedom, we have also long rejected fear and distrust as a valid excuse for group discrimination. It is past time for the Supreme Court to recall that religion holds no monopoly on discrimination and intolerance, and it is these, not religion, that are the true enemies of democracy. Current Establishment Clause jurisprudence threatens to reify in law the very things it claims to denounce by protecting secularity at the expense of diversity and equality.

VI. CONCLUSION

“(W)hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon the exercise of our own power is our own sense of self restraint.”\textsuperscript{84}

“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself.”\textsuperscript{85}

\textsuperscript{83} See NAACP, v. Hunt, 891 F.2d 1555, 1562 (11th Cir. 1990) (finding no violation of equal protection for African-Americans when the confederate flag is flown from the state capital, though it sent a message to African-Americans that the state endorsed racial discrimination and that African-Americans were political outsiders).

\textsuperscript{84} U.S. v. Butler, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting).

\textsuperscript{85} THE FEDERALIST NO. 51, at 247 (Lawrence Goldman ed., 2008) (Kindle ed.).
Some things are not constitutional issues that can be settled for all time for all people. The incoherence of the Establishment Clause tests suggests that defining an acceptable level of religiosity for the entire nation is one of those things. The fact that the Court has the power to make constitutional proclamations in this field does not mean that such proclamations are either truly constitutional or proclamations that should be made. In times past, the Court has won much praise for flying in the face of convention to protect minorities from tangible harms. At other times, the Court has incurred much criticism by continuing down erroneous paths in the name of protecting its own institutional legitimacy.

Somewhere along the way, as right or wrong the country bowed to its pronouncements, the Court appears to have forgotten that perhaps the most important value it is charged with protecting is democracy. Setting aside democracy because a powerless minority would otherwise suffer tangible harm is one thing. Setting aside democracy because the Court has a different view of the role of religion in public life than certain communities is something else entirely. Abandoning the Lemon and endorsement tests and getting out of the field of passive displays could be the Court’s first step in recalling that if democracy means anything, it must mean that “we the people” are the sovereign. They are the sovereign because they are “we the people,” not because their values are secular.

86 See U.S. Const. pmbl. (“We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).