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Surveys suggest that about twelve percent of Evangelical Christian churches assemble for worship each week in local school buildings. Most of these churches meet Sunday after Sunday without trouble. However, in the last five years, a handful of school districts have banned Christian churches from using their facilities for worship services. Most notoriously, New York City school officials adopted a policy denying access to anyone seeking to use school space as a "house of worship." Some of the churches faced with these bans have responded with legal action. They and their attorneys maintain that these worship bans violate the First Amendment doctrine of equal access—the notion that once the government opens its facilities, it must extend access to religious and nonreligious groups alike.

But this argument is shortsighted. Equal access is rooted in a principle of equal protection—that the speech proposed by the religious group is "similarly situated" to the nonreligious speech already permitted by the government. That means for churches to leverage equal access they must analogize their weekly worship services to secular speech activities, like pep rallies and political speeches. Churches certainly can stretch religious worship to make these comparisons, but, in the process, they strip worship of its distinct spiritual character. The Swiss theologian, Karl Barth, described Christian worship as "the most momentous, the most urgent, the most glorious action that can take place in human life." No matter how exciting the football game or how compelling the political candidate, secular expression will never rise to the level of "momentous," "urgent," and "glorious." For churches to argue otherwise degrades religious worship.

A far better solution is for churches to challenge worship bans under the Free Exercise Clause. The Free Exercise Clause, by its very nature,

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recognizes religious worship as special—a sui generis form of expression. The clause, thus, imposes no requirement on churches to equate worship with any other type of expression. Churches can seek to vindicate their rights while at the same time preserving the unique character of worship.

INTRODUCTION

The film *Jurassic Park* tells the story of John Hammond, a well-heeled entrepreneur who brings dinosaurs back to life to use as theme park attractions.[1] The film warns against the haphazard use of science. Is it right to resurrect dangerous creatures that went extinct sixty-five million years ago for the purpose of entertainment?

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[1] *See* JURASSIC PARK (Universal Pictures 1993). For those who are interested, the book, *Jurassic Park*, by Michael Crichton, is significantly better than the movie. *See* MICHAEL CRICHTON, JURASSIC PARK: A NOVEL (Random House 1990).

Dr. Ian Malcolm, an oft-obnoxious mathematician, played by Jeff Goldblum, is the film's doomsayer.[2] He points out to Hammond:

> I'll tell you the problem with the scientific power that you're using here, it didn't require any discipline to attain it. You read what others had done and you took the next step. You didn't earn the knowledge for yourselves, so you don't take any responsibility for it. You stood on the shoulders of geniuses to accomplish something as fast as you could, and before you even knew what you had, you patented it, and packaged it, and slapped it on a plastic lunchbox, and now you're selling it, you wanna sell it.[3]

When Hammond pushes back with the assertion that his scientists "have done things which nobody's ever done before," Dr. Malcolm cuts in with, "Yeah, yeah, but your scientists were so preoccupied with whether or not they *could* that they didn't stop to think if they *should*."[4]

The same could be said of the Christian legal movement. Lawyers from the likes of the Eagle Forum and the American Family Association too often bring lawsuits or make legal arguments because they can without stopping to think whether they should. They argue that private colleges should face liability under state anti-discrimination laws for disfavoring Christian student groups, without considering that the majority of private colleges that want to discriminate are their own religious institutions.[5] They argue that public high schools do not violate the Equal Access Act when they deny classrooms to gay and lesbian student groups, without consider-

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2. *See Jurassic Park, Full Cast and Crew*, INTERNET MOVIE DATABASE, perma.cc/76W8-PRJJ (last visited Sept. 13, 2015).

3. *Jurassic Park, Quotes*, INTERNET MOVIE DATABASE, perma.cc/7DLF-PS8A (last visited Sept. 13, 2015).

4. *Id.* (emphasis added). Ian Malcolm has a similar discourse in the book. He says:

> Scientists are actually preoccupied with accomplishment. So they are focused on whether they can do something. They never stop to ask if they *should* do something. They conveniently define such considerations as pointless. If they don't do it, someone else will. Discovery, they believe, is inevitable. So they just try to do it first. That's the game in science.

MICHAEL CRICHTON, JURASSIC PARK: A NOVEL 284 (Random House 1990) (emphasis in original).

5. *See, e.g.*, Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 159-64 (2010).

ing that the biggest beneficiaries of the Act are their own religious student groups.[6]

Or, more recently, Christian lawyers pushed for sectarian prayer at state and local legislatures.[7] But they failed to consider that they denigrated prayer in the process. To make legislative prayer constitutionally palatable, they described it as a mere "civic acknowledgment[] of religious belief" or a token recognition of our "religious heritage."[8] Legislative prayer, the lawyers said, has "the beneficial effects of 'solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.'"[9] The lawyers ignored the traditional Christian understanding of prayer: "the raising of one's mind and heart to God or the requesting of good things from God."[10]

Their arguments worked. The Court held that sectarian, legislative prayer is fine so long as its purpose is merely "to lend gravity to the occasion and reflect values long part of the Nation's heritage[;] . . . [or to] invite[] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing."[11] And that "lawmakers themselves," rather than God, are the "principal audience for these invocations."[12] The lawyers, thus, gutted prayer of its spiritual character to get it to pass muster under the Establishment Clause.

For the believing Christian, prayer is no small thing. Prayer is "a meeting with God and not merely the performance of some religious exercise."[13] "[P]rayer," said Reuben Archer Torrey, the one-time superintendent of the Moody Bible Institute, "[is] having an audience with God, actually coming into the presence of God and asking and getting things from him."[14] It is more than a tip of the hat to a good ol' American tradition, like apple pie and baseball. Yes, the lawyers succeeded in legalizing legislative prayer but what is left can hardly be considered prayer at all. What is left may look like prayer, but it has none of the substance of prayer. The lawyers made the argument because they *could*, without considering whether they *should*.

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6. *See, e.g.*, Erik Eckholm, *In Isolated Utah City, New Clubs for Gay Students*, N.Y. TIMES (Jan. 1, 2011), perma.cc/CD72-ZDM6.

7. *See* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

8. Brief for Petitioner at 46, 57, Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 3935899, at *46, *57.

9. *Id.* at *56 (quoting Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)).

10. POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH 2559 (Libreria Editrice, 2d ed. Vatican 1994), perma.cc/DYM6-7WJN.

11. *Galloway*, 134 S. Ct. at 1823.

12. *Id.* at 1825.

13. JAMES MONTGOMERY BOICE, FOUNDATIONS OF THE CHRISTIAN FAITH 455 (Intervarsity Press 1986).

14. REUBEN ARCHER TORREY, THE POWER OF PRAYER 77 (Eerdmans 1955).

Christian lawyers have been just as careless with their handling of religious worship. Public libraries and schools have increasingly barred churches from renting space for Sunday morning, worship services.[15] The trend is significant because access to public space matters for many churches in the United States. The North American Mission Board and LifeWay Research report that about twelve percent of Protestant churches meet in public schools, and another eight percent meet in community halls, such as public libraries.[16]

Christian lawyers have responded to these denials of access with charges of discrimination.[17] The libraries and schools, the lawyers allege, discriminate by allowing nonreligious groups, like the booster club or the Young Republicans, to hold rallies but prohibit churches from holding worship services. The thrust of their argument is that the First Amendment mandates that the government give churches equal access—i.e., the same access to classrooms, corkboards, and money that the nonreligious community groups receive.

What the lawyers fail to acknowledge is that by arguing equal access, they necessarily equate a worship service with the everyday, secular speech already permitted by the government. Equal access requires proof that the government already plays host to "equivalent secular speech."[18] Lawyers

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15. *See, e.g.*, Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30 (2d Cir. 2011), [hereinafter *Bronx Household IV*] (school district denying church meeting space for Sunday morning worship service); Badger Catholic, Inc. v. Walsh, 620 F.3d 775 (7th Cir. 2010) (university denying Catholic student group funding for items related religious worship); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891 (9th Cir. 2006), (public library denying church meeting space for Sunday morning worship service).

16. *See* Ed Stetzer & Phillip Connor, *Research Report*, *Church Plant Survivability and Health Study 2007*, CTR FOR MISSIONAL RESEARCH, 7 (Feb. 2007), perma.cc/WED9-DZRY. Other studies suggest that it is rare for a Roman Catholic Church to meet at a public school building. *See National Congregations Study, Panel Data Set*, ASS'N OF RELIGION DATA ARCHIVES (1998 and 2006-2007), perma.cc/73YC-M3A9 (reporting that 0% of Catholic Churches responded that they met in a school).

17. *See Bronx Household of Faith IV*, 650 F.3d at 33 ("Plaintiffs brought suit, contending that the Board's denial of Bronx Household's application constituted viewpoint discrimination in violation of the Free Speech Clause of the First Amendment."); *Faith Ctr.*, 480 F.3d at 904 ("Faith Center argued that the County discriminated against Faith Center on the basis of the church's viewpoint when it enforced its old policy prohibiting access to the meeting room for 'religious purposes . . . .'"); *Badger Catholic*, 620 F.3d at 778 (Catholic student group contended that a public university "withholding support of religious speech when equivalent secular speech is funded is a form of forbidden viewpoint discrimination.").

18. *Badger Catholic*, 620 F.3d at 778 (citing Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 828-30 (1995)). *See also* University's Distribution of Activity Fees to Student Group Engaging in Religious Speech, Walsh v. Badger Catholic, Inc., U.S. SUP. CT. ACTIONS 8 No. 10-731 (Mar. 18, 2011) (observing that "withholding support of religious speech, when *equivalent secular speech* was funded, would be a form of forbidden viewpoint discrimination") (emphasis added).

for a Catholic student group at the University of Wisconsin, for instance, argued that since the school funded the meetings of "a group [that] self-identifies as 'worshipping' the Yankees," the school also had to support Catholic masses.[19] Fan club meetings, according to the lawyers, were the "secular equivalent" of a Catholic mass. But analogizing Sunday morning worship with cheering for a sports team devalues and degrades worship. It ignores the distinct, spiritual character of what makes worship, worship.

The U.S. Supreme Court has indeed held that the Free Speech Clause of the First Amendment obligates the government to grant religious groups "equal access" to government-run facilities.[20] So if the school board allows the Boy Scouts to hold meetings on a Tuesday evening to teach boys about character and patriotism, then the Free Speech Clause mandates that the board also allow religious groups access to do the same from a religious perspective. But in these equal access cases, the Supreme Court only required schools to give religious groups use of public facilities to talk about an already permitted subject matter. Schools allowing community groups to discuss childrearing must allow religious groups to show films discussing the same subject matter from a religious perspective.[21] And schools allowing students to meet for an after-school book club must allow religious groups to host Bible studies—essentially a book study from a religious perspective.[22]

Undergirding these religious equal access decisions is the Court's reliance on a principle of equal protection—that the speech proposed by the religious group is "similarly situated" to the nonreligious speech already

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19. *Badger Catholic*, 620 F.3d at 785.

20. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (holding that university must provide religious student group equal access to school facilities); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that school district must provide church equal access to show religious film series in school classrooms); Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that university must provide religious news publication equal access to student activity fee funding); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that school must provide Christian after-school club equal access to school facilities).

21. *See Lamb's Chapel*, 508 U.S. at 394 ("The film series involved here no doubt dealt with a subject otherwise permissible . . . . and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.").

22. *See Good News Club*, 533 U.S. at 108 ("Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. . . . [But] because Milford found the Club's activities to be religious in nature—'the equivalent of religious instruction itself,'—it excluded the Club from use of its facilities.") (citation omitted).

permitted by the government.[23] That the religious group's speech furthers the government's purpose (e.g., promoting the welfare of the community or fostering a robust, academic debate on a college campus) to the same extent as the nonreligious groups' speech already permitted by the government.

But the Court has never said that the government must open its facilities to religious worship. Indeed, it seems to imply the opposite. "[M]ere religious worship, divorced from any teaching of moral values," the Court suggests, may be excluded because there is no secular analog to worship.[24] The "secular equivalent speech" necessary for an equal access claim does not exist. Worship is not just a religious perspective on character or childrearing. It is wholly different—"similarly situated" to no secular activities. "Prayer and worship services are not religious viewpoints on the subjects addressed in Boy Scout Rituals or in Elks Club ceremonies. Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false."[25]

Christians view the Lord's Day, and Sunday morning worship in particular, as "separate and unique."[26] "The Lord's Day is set apart from the rest of the week, so the acts of worship are hallowed, or set apart from the rest of activities of life."[27] God alone is worshipped. "The only true and

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23. The Supreme Court in *Police Dept. of the City of Chi. v. Mosley*, 408 U.S. 92 (1972), analyzed the effect of a Chicago ordinance that barred all forms of picketing except for laboring picketing. The Court explained:

> Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests; the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing.

Id. at 94-95 (footnote omitted). *See also Carey v. Brown*, 447 U.S. 455, 463 (1980) (analyzing almost identical picketing statute and stating, "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

24. *See Good News Club*, 533 U.S. at 112 n.4 ("[W]e conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values."); *Rosenberger*, 515 U.S. at 840 (distinguishing between a news publication taking a religious editorial viewpoint, which the First Amendment requires a university to fund, and "religious organizations . . . whose purpose is to practice a devotion to an acknowledged ultimate reality or deity," which the First Amendment perhaps allows a university to fund but does not require it.).

25. Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89, 102 (2d Cir. 2007) (Calabresi, J., concurring) [hereinafter *Bronx Household III*].

26. D.G. HART & JOHN R. MUETHER, WITH REVERENCE AND AWE 67-68 (P&R Publishing 2002).

27. *Id.*

acceptable worship is worship directed to him. If not directed to him, it is not worship no matter how decorous or impressive the ceremony."[28] Religious worship, thus, sits in a class by itself.

Christian lawyers could, and in fact already have, equate Sunday morning worship with secular, speech-related activities to squeeze it into the mold of the Court's equal access cases, but it is not what they should do. Casting worship as simply a religious version of a pep rally comes at a price. It cheapens worship, and strips worship of its spiritual meaning. The argument is convenient, and perhaps even successful,[29] but it should be offensive to Christian believers.

Instead, churches and their lawyers should consider suing under the Free Exercise Clause of the First Amendment, rather than the Free Speech Clause. A worship service is the paradigmatic example of religious exercise. The U.S. Supreme Court specifically recognized in *Employment Division v. Smith* that "the 'exercise of religion'" includes "assembling with others for a worship service."[30]

Unlike an equal access claim, a free exercise claim requires no proof that religious worship is "similarly situated" to any other expression. It is no longer necessary to scrounge around looking for "equivalent secular speech" or to resort to strained analogies to tailgate parties or political rallies. The Free Exercise Clause protects religion alone. As Justice Scalia put it, the clause provides "discriminatory protection of freedom of religion."[31] It recognizes religion as special, deserving of constitutional protection regardless of the similarity between religious activity and any nonreligious activities permitted by the government.[32] With a free exercise claim, a church can protect worship, without degrading it in the process.

The government violates the Free Exercise Clause when it "in a selective manner impose[s] burdens only on conduct motivated by religious belief."[33] The typical use policy in these cases burdens only religious worship. For instance, the New York Board of Education's policy authorizes the use

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28. JAMES MONTGOMERY BOICE, FOUNDATIONS OF THE CHRISTIAN FAITH 587 (Intervarsity Press 1987).

29. *See* Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 781 (7th Cir. 2010) (holding that university's refusal to fund student group's religious worship while funding "equivalent secular speech" violated principle of equal access).

30. Emp't Div. v. Smith, 494 U.S. 872, 877-78 (1990).

31. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 30 (1989) (Scalia, J., dissenting).

32. *See* Thomas v. Rev. Bd., 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.").

33. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993). *See also Emp't Div.,* 494 U.S. at 877 (noting that the Free Exercise Clause forbids the government from "impos[ing] special disabilities on the basis of religious views or religious status").

of school facilities for holding "social, civic, and recreational meetings and entertainment, and other uses pertaining to the welfare of the community," but provides that "[n]o permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship."[34] Likewise, the Contra Costa County Library in California makes its rooms generally available to the public for "educational, cultural and community related meetings, programs and activities," but mandates that the rooms "shall not be used for religious services."[35] The policies single out religious worship for exclusion, which is precisely what the Free Exercise Clause forbids. If churches are to pursue religious worship claims at all, they should do so under the Free Exercise Clause rather than the Free Speech Clause.

Part I of this Article breaks down the basic principles of equal protection, in particular, the threshold requirement that the individuals or groups alleged to have been treated differently are "similarly situated with respect to the purpose of the law."[36] Part II considers how the Supreme Court has predicated the free speech doctrine of equal access on these principles. Part III shows how equal protection has become the dominant mode by which the Court analyzes religious speech claims. Part IV surveys the lower, federal court cases where Christian lawyers have argued that religious worship is similarly situated to everyday, secular speech in an effort to secure access to government facilities. Part V warns of the dangers of correlating religious worship with secular, nonreligious speech, like cheering for a sports team or idolizing a movie star. Finally, Part VI suggests, if churches opt to challenge the government's exclusion of religious worship, their lawyers should use the Free Exercise Clause. The Free Exercise Clause, unlike the Free Speech Clause, maintains the distinct, spiritual character of worship, since it uniquely applies to religious activity and does not require analogizing religious worship to secular activity.

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34. Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 33 (2d Cir. 2011) (Bronx Household IV).

35. Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 895 (9th Cir. 2007).

36. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346 (1949). *See also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike."); Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)) ("The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'"); 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2(a) (2013). ("Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same.").

I. THE ABC'S OF EQUAL PROTECTION

Christian lawyers must recognize that pushing religious worship under the rubric of equal access necessarily entails a claim that worship is "similarly situated" to everyday, secular speech. The principles of equal protection provide the framework by which the U.S. Supreme Court analyzes equal access cases. To understand the difficulty with the lawyers' arguments about religious worship, it is, thus, imperative to grasp the fundamentals of equal protection.

A. THE GENERAL PRINCIPLES OF EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[37] Though nothing in the Constitution's text imposes a similar restriction on the federal government, the U.S. Supreme Court has construed the Fifth Amendment Due Process Clause as "contain[ing] an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."[38] Under most circumstances, the Amendments afford the same protections.

The Equal Protection Clause does not prohibit government from discriminating in all circumstances. It "guarantees that similar individuals will be dealt with in a similar manner by the government. It does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws."[39] All laws classify people at some level. They impose burdens or confer benefits on a selective basis, singling out some people or activities for treatment different from that accorded to other people or activities. A police officer who enforces a speed limit pulls over fast drivers and allows other drivers to pass by unchecked. A law regulating child labor treats employers who hire ten-year-olds differently from those who hire twenty-five-year-olds. The government discriminates in both instances; yet no court would hold that the government has run afoul of the Equal Protection Clause.

The Equal Protection Clause, thus, aims only at prohibiting arbitrary or invidious discrimination—i.e., from employing classifications that cannot be justified on the basis of a legitimate government interest or that are adopted merely for the sake of harming a particular group of persons.[40] The

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37. U.S. CONST. amend. XIV §1.

38. Washington v. Davis, 426 U.S. 229, 239 (1976).

39. 3 ROTUNDA & NOWAK, *supra* note 36.

40. *See* Loving v. Virginia, 388 U.S. 1, 10 (1967) ("[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.").

government, for instance, violates equal protection when it offers public education to whites but not to blacks[41] or permits women to drink at age eighteen, but forces men to wait until age twenty-one.[42] Someone's race is irrelevant to whether they deserve a public education, and someone's gender has no bearing on the risk they present when drunk driving. But when government, for example, excludes persons with no athletic ability from playing for the state university's football team, the government no doubt discriminates, but it can hardly be called arbitrary or invidious.[43] Someone's athletic prowess has everything to do with their ability to meaningfully contribute on the football field.

B. THE THRESHOLD REQUIREMENT OF BEING "SIMILARLY SITUATED"

The prerequisite to any equal protection claim is proof that the individuals or groups alleged to have been treated differently are "similarly situated with respect to the purpose of the law."[44] "[T]here is," said the U.S. Supreme Court, "a threshold question whether the [individuals or groups] are indeed similarly situated for constitutional purposes."[45] The Court has said the same as far back as 1884, just sixteen years after the ratification of the Equal Protection Clause of the Fourteenth Amendment. Government action, said the Court, which in "its operation . . . affects alike all persons *similarly situated*, is not within the amendment."[46]

For instance, in *United States v. Armstrong*,[47] the Supreme Court considered a selective prosecution claim by a group of criminal defendants. The defendants alleged that the government brought drug charges against them only because they were black, and that the government failed to prosecute people of other races for the same crimes. "The requirements for a selective-prosecution claim," said the Court, "draw 'on ordinary equal protection standards.'"[48] The defendants must make a threshold showing that

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41. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

42. *See* Craig v. Boren, 429 U.S. 190 (1976).

43. *See* Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L.171, 205 (2005) (noting that "athletic ability, alumni connections, etc. are not subject to equal protection analysis, these components of diversity programs will always be upheld unless they are proven to be a cover for intentional discrimination against a protected group").

44. Joseph Tussman & Jacobus tenBroek, *supra* note 36.

45. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997).

46. Barbier v. Connolly, 113 U.S. 27, 32 (1884) (emphasis added); *see also* David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases,* 41 WM. & MARY L. REV. 211, 234-36 (1999).

47. United States v. Armstrong, 517 U.S. 456 (1996).

48. *Id.* at 465 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).

"similarly situated individuals of a different race were not prosecuted."[49] Because the defendants "failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted," they could not move forward with their claim.[50] The defendants' equal protection claims, thus, stumbled out of the gate because of their inability to make a threshold showing of similarly situated individuals.

But what does it mean to be "similarly situated"? The Court measures whether individuals or groups are "similarly situated" relative to the "purpose of the law" being challenged. Every law has a purpose, either to prevent a societal evil or to promote a societal good. A law forbidding murder, for instance, seeks to prevent the societal evil of killing. Whereas, a law providing tax breaks for charitable contributions seeks to promote the societal good of philanthropy. The Court deems individuals or groups to be "similarly situated" when they present the same evil the government seeks to prevent or present the same good that the government seeks to promote.[51] And when the government nonetheless treats these similarly situated individuals or groups differently, it runs afoul of equal protection.

Think back to the drinking-age example above. The legislature's purpose in passing the law was to combat the evil of drunk driving. The legislature chose to accomplish that purpose by raising the drinking age for men but not for women. The legislature's decision to discriminate against men in favor of women violates equal protection. It does so not simply because the law distinguishes between men and women, but rather, because the law treats men and women differently even though they are "similarly situated with respect to the purpose of the law."[52] Both men and women present the same evil the legislature is trying to prevent—hazardous driving while drunk—and yet the legislature treats them unevenly by penalizing men but not women.[53]

The outcome would be different if the legislature had credible evidence that men are more likely than women to drink and drive. In that case, men and women would no longer be "similarly situated with respect to the purpose of the law." Men would present the evil of drunk driving to a greater degree than women. The legislature could then distinguish between men and women without transgressing the Equal Protection Clause.

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49. *Id.*

50. *Id.* at 470.

51. *See* Joseph Tussman & Jacobus tenBroek, *supra* note 36, at 346 ("The purpose of a law may be either the elimination of a public 'mischief' or the achievement of some positive public good.").

52. *Id.*at 336.

53. *See* Craig v. Boren, 429 U.S. 190, 199-204 (1976).

Consider the *Armstrong*[54] case again. What thwarted the defendants' selective prosecution claim was their failure to show that the other individuals they had identified presented the same evil—distributing crack cocaine through an organized drug ring—as they did. In the defendants' case:

> [T]here was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring; . . . there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; . . . and several of the defendants had criminal histories including narcotics and firearms violations.[55]

The other individuals the defendants identified had engaged in drug trafficking, but not at the same volume and level of sophistication as the defendants. These individuals did not present the same evil as the defendants and, thus, could not be considered similarly situated. The government could prosecute the defendants more severely than these individuals without violating equal protection.

The Court employed a similar equal protection analysis in *Michael M. v. Superior Court*.[56] The defendant challenged California's statutory rape law as violative of equal protection. He claimed that the law unlawfully discriminated on the basis of gender because it made men, but not women, criminally liable for sexual intercourse with minors.[57] The Court rejected the defendant's contention, since he could not make a threshold showing that men and women were "similarly situated with respect to the purpose of the law."

> We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the

54. United States v. Armstrong, 517 U.S. 456 (1996).

55. *Id.* at 460 (quoting Assistant United States Attorney Aff. at 81).

56. Michael M. v. Superior Court, 450 U.S. 464 (1981).

57. *See id.* at 466; *see also id.* at 476 (Stewart, J., concurring) ("The petitioner contends that this state law, which punishes only males for the conduct in question, violates his Fourteenth Amendment right to the equal protection of the law.").

> profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.[58]

Federal and state courts have routinely called upon claimants in same-sex marriage cases to prove that they are "similarly situated" to opposite-sex couples with respect to the purpose of marriage laws.[59] For example, in *Varnum v. Brien*,[60] the Iowa Supreme Court considered the argument that "the plaintiffs are not similarly situated to heterosexuals."[61] "Under this threshold test," said the court, "if plaintiffs cannot show as a preliminary matter that they are similarly situated, [we will] not further consider whether their different treatment under a statute is permitted under the equal protection clause."[62]

To determine whether they are similarly situated, the court said, "[t]he purposes of the law must be referenced."[63] The purpose of Iowa's marriage law, according to the court, was to "provid[e] an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society."[64] The court held that, "with respect to the subject and purposes of Iowa's marriage laws, we find that the plaintiffs are similarly situated compared to heterosexual persons. . . . [O]fficial recognition of their status provides an institutional basis for defining their fundamental relational rights and responsibilities, just as it does for heterosexual couples."[65]

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58. *Id.* at 471-72.

59. *See In re* Marriage Cases, 183 P.3d 384, 435 n.54 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* Strauss v. Horton, 207 P.3d 48 (Cal. 2009), *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 423-24 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 882 (Iowa 2009); *see also* Courtney Megan Cahill, *Celebrating the Differences That Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality*, 70 OHIO ST. L.J. 943, 964 (2009) (noting that marriage equality opponents in California and Iowa had "tried to argue, again unsuccessfully, that the '[same sex couple] plaintiffs are not similarly situated to opposite-sex couples so as to necessitate further equal protection analysis because the plaintiffs cannot 'procreate naturally'" (alteration in original) (quoting *Varnum*, 763 N.W.2d at 882)).

60. *Varnum*, 763 N.W.2d 862.

61. *Id.* at 882.

62. *Id.*

63. *Id.* at 883. *See also* Tussman & tenBroek, *supra* note 37, at 347 (It is "impossible to pass judgment on the reasonableness of a [legislative] classification without taking into consideration, or identifying, the purpose of the law.").

64. *Varnum*, 763 N.W.2d at 883.

65. *Id.*

The prerequisite then to every equal protection claim is a showing that the individuals or groups alleged to have been treated differently are "similarly situated." The Supreme Court has imposed this same preliminary hurdle to equal access claims under the Free Speech Clause. The claimants' proposed speech must be "similarly situated" to the speech already permitted by the government.

II. THE CONNECTION BETWEEN EQUAL PROTECTION AND FREE SPEECH

"In adjudicating first amendment issues of freedom of speech and expression," Michael Paulsen points out, "the Supreme Court has borrowed freely from the conceptual apparatus of its equal protection doctrine."[66] Kenneth Karst said the same. "[T]he principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the content of speech."[67]

The Supreme Court itself has said that free speech "intersects with" and "closely intertwines with" the "guarantee of equal protection."[68] Equal protection, said the Court, is "fused [into] the First Amendment."[69] The Free Speech Clause of the First Amendment guarantees that the government will treat the expression of viewpoints and ideas evenhandedly.

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.[70]

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66. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 327 (1986).

67. Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975). *See also* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2426 (2003) ("[T]he First Amendment frowns on laws that draw express viewpoint-based distinctions.").

68. Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972); *see also* Carey v. Brown, 447 U.S. 455, 462-63 (1980).

69. R.A.V. v. City of St. Paul, 505 U.S. 377, 384 n.4 (1992).

70. *Mosely*, 408 U.S. at 96; *see also Carey*, 447 U.S. at 462-63 (same).

Thus, as Paulsen observes, "[T]his first amendment equality principle is clearly the core element in cases of a purported 'public forum.'"[71]

A. THE SUPREME COURT'S HISTORICAL RELIANCE ON EQUAL PROTECTION ANALYSIS IN ITS FREE SPEECH CASES

The U.S. Supreme Court, for instance, struck down a City of Chicago ordinance that prohibited picketing outside of Chicago public schools except for "peaceful picketing of any school involved in a labor dispute."[72] Earl Mosley, a city resident, sought to walk "the public sidewalk adjoining [Jones Commercial High School], carrying a sign that read: 'Jones High School practices black discrimination. Jones High School has a black quota.'"[73] The City's picketing ordinance barred Mosley from protesting racial discrimination outside of the high school, but allowed teachers' unions to protest low wages outside the very same high school.[74] Because of the government's uneven treatment of these protests—First Amendment free speech—the Court said, "denied [Mosley] equal protection of the law in violation of the First and Fourteenth Amendments."[75]

The Court's reasoning hinged on Mosley's desired speech being "similarly situated" to the speech the City of Chicago already permitted.[76] Mosley wanted to picket just like the teachers' unions could picket. The city claimed it passed the ordinance to combat the evil of "school disruption."[77] Mosley and the teachers' unions were "similarly situated" with regard to this evil. Protests by both created the same risk of interfering with school activities.[78] Yet the City of Chicago permitted labor protests by teachers' unions but not a civil rights protest by Mosely.[79] "Such unequal treatment,"

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71. Paulsen, *supra* note 66, at 328. Professor William Van Alstyne considered the application of this First Amendment equality principle in the context of public universities barring Communist speakers from their "auditorium, amphitheater, or student union—campus places traditionally thought to be proper forums for discussion of heterodox ideas and political issues." William Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 11 U. PA. L. REV. 321, 321 (1963). He said, "[I]n regulating the use of its facilities, a state university may not discriminate among speakers on the bases either of their affiliation, or the controversial or allegedly disreputable nature of their opinions. The problem is, at heart, . . . a function of the equal protection clause." *Id.* at 338.

72. *Mosley*, 408 U.S. at 93.

73. *Id.*

74. *Id.* at 93-94.

75. *Id.* at 94-98.

76. *Id.* at 99-102.

77. Police Dept. of Chi. v. Mosley, 408 U.S. 92, 99-100 (1972).

78. *Id.* at 100.

79. *Id.* at 100-102.

said the Court, "is exactly what was condemned" by the principle of equal protection.[80]

Now if Mosley had wanted to hold a rock concert outside of Jones Commercial High School, that would have been a different case. A rock concert is not "similarly situated" to a peaceful labor protest. It creates a much greater risk of school disruption than a peaceful protest. One is a noisy, musical performance while the other is a quiet demonstration. Because Mosley's rock concert would not be "similarly situated" to the speech already permitted by the City of Chicago—the peaceful, labor picketing—the city could prohibit the rock concert while allowing the protest without any concern for running afoul of the Equal Protection Clause. The *Mosley* court put it this way: The City of Chicago could prohibit Mosley's speech if it was "clearly more disruptive than the picketing Chicago already permits."[81] But that was not the case.

The Court employed the same equal protection analysis in *Carey v. Brown*, the facts of which largely paralleled those of *Mosley*.[82] Members of a civil rights organization called the Committee Against Racism "participated in a peaceful demonstration on the public sidewalk in front of the home of Michael Bilandic, then Mayor of Chicago, protesting his alleged failure to support the busing of schoolchildren to achieve racial integration."[83] They were arrested and charged under an antipicketing ordinance, which prohibited picketing in residential neighborhoods, except for "peaceful picketing of a place of employment involved in a labor dispute."[84] The legislature passed the residential picketing ban, according to the City of

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80. *Id*. at 100-01. The Court invalidated a nearly identical antipicketing ordinance in *Grayned v. City of Rockford*, 408 U.S 104 (1972). There, Richard Grayned was convicted for participating in a demonstration in front of West Senior High School in Rockford, Illinois. He, along with about 200 others, carried signs calling for equal rights for black students—"Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." The ordinance, like the one in *Mosley*, prohibited all picketing outside a public school building except for "peaceful picketing of any school involved in a labor dispute." The Court said:

> This ordinance is identical to the Chicago disorderly conduct ordinance we have today considered in Police Department of Chicago v. Mosley . . . . For the reasons given in Mosley, we . . . hold that [the ordinance] violates the Equal Protection Clause of the Fourteenth Amendment. Appellant's conviction under this invalid ordinance must be reversed.

Id. at 107. The Court again used an equal protection mode of analysis to a free speech claim.

81. *Id.* at 100.

82. Carey v. Brown, 447 U.S. 455 (1980).

83. *Id.* at 457.

84. *Id.*

Chicago, to prevent the evil of "intrud[ing] on the tranquility of the home."[85]

The Court found the ordinance "constitutionally indistinguishable from the ordinance invalidated in *Mosley*."[86] "There can be no doubt," said the Court, "that in prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve."[87] The Court ruled that labor and nonlabor picketing were "equally likely to intrude on the tranquility of the home."[88] "[N]othing inherent in the nature of peaceful labor picketing . . . make[s] it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern."[89] Thus, both types of picketing were "similarly situated with respect to the purpose of the law." For the City to treat them differently was "[in]consistent with the command of the Equal Protection Clause."[90]

Just as in *Mosley*, if the City had had evidence that the Committee Against Racism's picketing was more disruptive than the already allowed labor picketing, the Court presumably would have reached the opposite result. No longer would the Committee's speech be "similarly situated with respect to the purpose of the law." The Committee's picketing would present the evil of "intrud[ing] on the tranquility of the home" to a greater degree than labor picketing, and the City could constitutionally forbid the Committee's speech while at the same time allowing labor picketing.[91]

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85. *Id.* at 462.

86. *Id.* at 460. Indeed, the Court "discern[ed] no principled basis for distinguishing the Illinois statute from a similar picketing prohibition invalidated in *Police Department of Chicago v. Mosley*." Carey v. Brown, 447 U.S. 455, 458 (1980) (citations omitted).

87. *Id.* at 460.

88. *Id.* at 462.

89. *Id.* at 465.

90. *Id.* at 471. Justice Stewart makes clear in his concurrence that while the Court speaks in terms of equal protection, "what was actually at stake in *Mosley*, and is at stake here, is the basic meaning of the constitutional protection of free speech." Carey v. Brown, 447 U.S. 455, 471(1980) (Stewart, J., concurring). In other words, while the Court used the language of equal protection, it was in fact addressing a free speech claim.

91. *See also* Cox v. Louisiana, 379 U.S. 559, 581 (1965) (Black, J., concurring and dissenting). In *Cox,* the Court considered the constitutionality of a Louisiana breach of peace statute that prohibited picketing on a public street or sidewalk, but "expressly provide[d] that the statute shall not bar picketing and assembly by labor unions protesting unfair treatment of union members." *Id.* at 580. The law was applied to convict a group of civil rights protestors. Justice Black found the law "to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." He said, "[T]o deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 581.

B. THE SUPREME COURT'S ONGOING RELIANCE ON EQUAL PROTECTION ANALYSIS IN ITS FREE SPEECH CASES

The Supreme Court continues to apply an equal protection mode of analysis to its free speech cases. But the Court generally employs the language of free speech—using terms such as "viewpoint," "subject matter," and "speech forum"—rather than the language of equal protection used by the Court in cases like *Mosley* and *Carey*.[92]

When the government opens up its property, such as a library meeting room or a school classroom, for members of the public to hold meetings, or to engage in other expressive activities, the government creates what the Court has called a "speech forum." The government must generally regulate access to a speech forum in an evenhanded manner. It cannot favor some speech or viewpoints over others. For instance, if it allows the local Crisis Pregnancy Center to hold a meeting about pregnancy and the joys of motherhood, it must also allow the local chapter of Planned Parenthood to hold meetings about contraception and abortion.

But the Supreme Court has recognized that "[the government], no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[93] It can thus exclude speech to ensure it is properly "limiting the use of its property to its intended purpose."[94] If a speaker "wishes to address a topic not encompassed within the purpose of the forum," the government may exclude the speaker with impunity.[95]

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92. For instance, in *Burson v. Freeman*, 504 U.S. 191 (1992), Mary Rebecca Freeman, the treasurer for a state political campaign, challenged Tennessee statutes that prohibited the solicitation of votes and the display of campaign materials within 100 feet of the entrance to a polling place. *See id.* at 193-95. The Court held that the statutes were "content-based restrictions." *Id.* at 198. "Whether individuals may exercise their free speech rights near polling places," said the Court, "depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display." *Id.* at 197. Although the Court employed the language of free speech, discussing "content discrimination" and "content-neutral time, place, or manner restriction[s]," the Court ruled that the statute "raise[d] Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech." *Id.* at 197 n.3. *See also* Members of City Council of L.A. v. Vincent, 466 U.S. 789, 816 (1984) (relying on *Mosley* and *Carey* to hold that creating an exception for certain political signs but not others would run afoul of the First and Fourteenth Amendments. "To create an exception for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination.").

93. Greer v. Spock, 424 U.S. 828, 836 (1976).

94. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985).

95. *Id.* at 806.

So, just as under the Court's equal protection analysis in *Mosley* and *Carey*, the prerequisite to a successful speech claim is a showing that the proposed speech is "similarly situated" with respect to the purpose of the forum. In *Cornelius v. NAACP Legal Defense and Educational Fund*,[96] for example, the purpose of the government's charitable campaign was "to provide a means for traditional health and welfare charities to solicit contributions in the federal workplace."[97] The government could exclude the likes of the NAACP and the Sierra Club because their focus was not on serving the poor, but on "political activity, advocacy, lobbying, [and] litigation."[98] They sought to "address a topic not encompassed within the purpose of the forum."[99] The Court concluded: "[T]he President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy."[100] Including the NAACP and Sierra Club would "hinder [the charitable campaign's] effectiveness for its intended purpose."[101] The government could thus exclude these advocacy groups without fear of transgressing the Constitution.[102]

To put it in equal protection terms, the proposed speech of the NAACP and the Sierra Club was not "similarly situated" to the speech already allowed in the campaign. The groups presently in the campaign were soliciting money to "provide direct health and welfare services to needy persons."[103] They fit squarely within the purpose of the campaign—"to provide a means for traditional health and welfare charities to solicit contributions in the federal workplace."[104] The political activism of the NAACP and Sierra Club did not fit with this purpose in the same way. Their speech was not "similarly situated with respect to the purpose" of the forum. The government could thus leave the advocacy groups out of the campaign without contravening the Constitution. The Court in *Cornelius* applied this same mode of analysis, but used the language of free speech, rather than the language of equal protection.

The Court's language has changed, but its methodology has not. It still considers whether a claimant's proposed speech is "similarly situated" to

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96. *Cornelius*, 473 U.S. 788.

97. *Id.* at 806.

98. *Id.* at 793.

99. *Id.* at 806.

100. *Id.* at 809.

101. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 811 (1985).

102. In contrast, the purpose of a speech forum, like a sidewalk, street, or park, according to the Court, is "the free exchange of ideas." *Id.* at 800. The forum is wide open. Pretty much any proposed speech will be considered "within the purpose of the forum." *Id.* at 806. Any exclusion of speech, thus, will likely run afoul of the Constitution.

103. *Id.* at 812.

104. *Id.* at 806.

the speech already allowed by the government. Does the claimant's proposed speech square with the government's purpose to the same degree that the speech already permitted by the government does? But the Court no longer makes this consideration by using the phrase "similarly situated." Instead, the Court asks whether a claimant "wishes to address a topic not encompassed within the purpose of the forum."[105] If a claimant cannot clear this initial hurdle, it will not prevail on a claim of impermissible discrimination.

III. THE APPLICATION OF EQUAL PROTECTION TO RELIGIOUS SPEECH

The Court has made frequent recourse to this equal protection methodology, in particular, when considering the government regulation of *religious* speech. In fact, Justice Harlan famously said that the application of the First Amendment to religion "*requires* an equal protection mode of analysis."[106]

Niemotko v. Maryland[107] and *Fowler v. Rhode Island*[108] offer early examples of the Court's reliance on equal protection to analyze claims involving religious speech. In *Niemotko*, a city denied a group of Jehovah's Witnesses a permit to use a municipal park for Bible talks.[109] The city regularly allowed other groups to use the park for events such as picnics and Flag Day ceremonies.[110] The city claimed that the Jehovah's Witnesses' meetings were different because they were more likely to be "detrimental to the public peace or order."[111] The Supreme Court disagreed. The Jehovah's Witnesses' talks, according to the Court, were "similarly situated" to the other "organizations and individuals desiring to use [the park] for meetings and celebrations," which the city had approved.[112] The Jehovah's Witnesses were no more likely than the Order of Elks or the Sunday-school picnics to interfere with the park being "a sanctuary for peace and quiet."[113]

The city's uneven treatment of the Jehovah's Witnesses, the Court said, violated "[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments."[114] Justice Frankfurter put it, "[t]o allow expression of reli-

105. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985).
106. Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring) (emphasis added).
107. Niemotko v. Maryland, 340 U.S. 268 (1951).
108. Fowler v. Rhode Island, 345 U.S. 67 (1953).
109. *See Niemotko*, 340 U.S. at 272-73.
110. *See id.*
111. *Id.* at 271.
112. *Id.* at 269, 272-73.
113. *Id.* at 273.
114. Niemotko v. Maryland, 340 U.S. 268, 272 (1951).

gious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."[115]

The Court relied heavily on *Niemotko* in *Fowler*,[116] where again the Jehovah's Witnesses were refused permission to conduct religious services in a city park.[117] The Court found that the Jehovah's Witnesses' services were "similarly situated" to the other religious services already allowed in the park. Their services were "quiet, orderly meeting[s] with no disturbances or breaches of the peace," just the same as those of other religious sects.[118] "Catholics could hold mass in Slater Park and Protestants could conduct their church services there without violating the ordinance."[119] The *Niemotko* case, the Court said, was "on all fours with this one."[120] It determined that the ordinance "as so construed and applied violated the First and the Fourteenth Amendments of the Constitution."[121] For the park to allow "all religious groups" except for Jehovah's Witnesses, was "discrimination" barred by the Free Speech and Equal Protection Clauses.[122]

Equal protection became the dominant method by which the Supreme Court analyzed religious speech claims starting with *Widmar v. Vincent*[123] in 1981. In *Widmar*, the Court relied on equal protection cases like *Mosley*, *Carey*, and *Fowler*, to hold that "if a university permits students and others to use its property for secular purposes, it must also furnish facilities to religious groups for the purposes of worship and the practice of their religion."[124] The University said, "[t]he overall goal [of its student activities program was] to develop social and cultural awareness as well as intellectual curiosity."[125] The provision of University facilities to a religious student group, Cornerstone, according to the Court, furthered this goal just as much as giving access to secular student groups, like the Students for a Democratic Society and the Young Socialist Alliance. They were, thus, "similarly situated" with regard to this goal. So by opening school facilities to secular

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115. *Id.* at 284 (Frankfurter, J., concurring).
116. Fowler v. Rhode Island, 345 U.S. 67 (1953).
117. *See id.* at 68.
118. *Id.*
119. *Id.* at 69.
120. *Id.*
121. Fowler v. Rhode Island, 345 U.S. 67, 68-69 (1953).
122. *Id.* at 69-70. *See also id.* at 69 ("For it plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one.").
123. Widmar v. Vincent, 454 U.S. 263 (1981).
124. *Id.* at 289 (White, J., dissenting).
125. Chess v. Widmar, 635 F.2d 1310, 1312 n.1 (8th Cir. 1980) (quoting from the University bulletin's description of the student activities program), *aff'd sub nom.*, Widmar v. Vincent, 454 U.S. 263, 277 (1981).

student groups, but denying those same facilities to religious student groups, the University violated "equal protection and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States."[126] The principle of equal protection embedded in the Court's free speech jurisprudence mandated that the University provide religious speakers use of school facilities "on equal terms with others."[127] This basic principle became known as "equal access."[128]

The Court repeatedly reaffirmed the principle of equal access over the next thirty years. Whether the Court considered a religious group's access to classrooms,[129] its use of school corkboards,[130] its receipt of government money,[131] its use of a city plaza to display religious symbols,[132] or even its complaints about having to fund distasteful student groups,[133] the Court relied on equal access—this rule of equal protection ingrained in the Free Speech Clause.

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126. *Widmar*, 454 U.S. at 266.

127. *Id.* at 272 n.12.

128. *See* Alliance Defending Freedom, *Equal Access: Frequently Asked Questions*, ALLIANCE DEFENDING FREEDOM BLOG, perma.cc/75L9-BR5P. The Alliance Defending Freedom helpfully explains "equal access" in its FAQ as follows:

> The term "equal access" refers to the constitutional principle that whenever the government creates a forum for private expression, religious groups and individuals have the right to use that forum under the same terms and conditions as everyone else. The government may not impose special restrictions on religious speech. A forum could be anything that is intended to allow for private expression. Places such as parks, sidewalks, meeting facilities (like community centers, public school buildings, library meeting rooms, etc.), and advertising spaces (like bulletin boards) are just a few of the most common examples.

Id.

129. *See Widmar*, 454 U.S. at 263; (considering university's provision of "facilities for the meetings of registered organizations"); *see also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 387-88 (1993) (considering church's application "for permission to use school facilities to show a six-part film series containing lectures by Doctor James Dobson"); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001) (considering school board's "regulations governing the use of . . . school facilities").

130. *See* Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 247 (1990) (considering religious student group's "access to the school newspaper, bulletin boards, public address system, and the annual Club Fair").

131. *See* Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 826-27 (1995) (considering religious student publication's application for student activity fees).

132. *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (First Amendment required city to permit group to display cross in public square open to broad spectrum of groups).

133. *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 230 (2002) (examining First Amendment rights of "complaining students . . . being required to pay fees which are subsidies for speech they find objectionable, even offensive").

As with speech forum cases more generally, the Court often discussed equal access in terms of free speech—referring to permissible subject matters and viewpoint discrimination—rather than in terms of equal protection. But its rationale remained rooted in equal protection. The Court consistently considered whether the proposed religious speech was "similarly situated" to the secular speech already allowed by the government. Did the religious group's proposed speech raise the same evils and promote the same goods as the speech presently allowed by the government?

The Court affirmed that when religious speech was *not* "similarly situated," the government could exclude it without penalty. "The necessities of confining a forum to the limited and legitimate purposes for which it was created," the Court said, "may justify the State in reserving it for certain groups or for the discussion of certain topics."[134] The government may exclude religious speech where it does not further the purpose of its forum to the same extent as the speech already permitted by the government.

But the opposite is just as true. When the proposed religious speech *is* "similarly situated" to the speech already allowed by the government, the government must allow the religious speech. To do otherwise would violate the Constitution. For instance, in *Lamb's Chapel v. Center Moriches Union Free School District*,[135] the Court held that the First Amendment required a New York school district to provide meeting space for a church to show Christian films about child rearing.[136] The Court's reasoning turned on the fact that the church's proposed speech—showing the films—and the speech already permitted by the district were "similarly situated" with respect to the purpose of the forum. The district opened its facilities to community groups for the purpose of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community."[137] The district permitted lectures and films "about child rearing and family

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134. *Rosenberger*, 515 U.S. at 829. *See also Widmar*, 454 U.S. at 281 (Stevens, J., concurring) ("[T]he University may exercise a measure of control over the agenda for student use of school facilities, preferring some subjects over others, without needing to identify so-called 'compelling state interests.'"); *Lamb's Chapel*, 508 U.S. at 390 ("There is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated."); *Good News Club*, 533 U.S. at 106 ("When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified in reserving its forum for certain groups or for the discussion of certain topics.").

135. *Lamb's Chapel*, 508 U.S. 384.

136. *See id.* at 394 (quoting City Council of L.A. v. Vincent, 466 U.S. 789, 804 (1984)) ("The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' That principle applies in the circumstances of this case.").

137. *Id.* at 386.

values."[138] "That subject matter," the Court said, "[was] not one that the District [had] placed off limits to any and all speakers."[139] Both the church's films and the speech allowed by other groups promoted the same good—"the welfare of the community." The only difference being that the church's films did so from a religious perspective.[140]

In *Rosenberger v. Rectors and Visitors of the University of Virginia*,[141] the Court again applied an equal protection mode of analysis to vindicate the free speech rights of a religious group. The Court held that the First Amendment required the University of Virginia to fund a religious student newspaper, called Wide Awake, out of the Student Activity Fund (the SAF).[142] "The purpose of the SAF," said the Court, "is to support a broad range of extracurricular student activities that are related to the educational purpose of the University."[143] The University funded a wide gamut of student groups out of the SAF, including "student news, information, opinion, entertainment, or academic communications media groups."[144] Just as in *Lamb's Chapel*, the Court's decision rested on the parity between Wide Awake's proposed religious speech and the secular speech already permitted by the University. Wide Awake's speech was "similarly situated" with respect to "the educational purpose" of the SAF. The "subjects discussed" by Wide Awake, said the Court, "were otherwise within the approved category of publications."[145] Wide Awake simply sought to address the subjects from a religious perspective.

The Court once more relied on equal protection in *Good News Club v. Milford Central School District*[146] to analyze a religious speech claim. The Court held that the First Amendment required a New York school district to give classroom space to a Good News Club for its after-school meetings.[147]

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138. *Id.* at 393.

139. *Id.*

140. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) ("The film series involved here no doubt dealt with a subject otherwise permissible under [the District's rules], and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.").

141. Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819 (1995).

142. *See id.* at 837, 845-46 ("The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion.").

143. *Id.* at 824.

144. *Id.* at 825.

145. *Id.* at 831.

146. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

147. *See id.* at 107 ("Concluding that Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases [that is

The school district opened classrooms to community groups for the purpose of promoting the "welfare of the community."[148] The district allowed groups, like the Boy Scouts and the 4H Club, to meet to "teach morals and character development to children,"[149] but denied meeting space to the Good News Club to teach the same subjects from a religious perspective.[150] The Court once again rooted its decision in the similarity between the Good News Club's proposed speech and the speech of the Boy Scouts and the 4H Club already permitted by the district. "What matters for purposes of the Free Speech Clause," said the Court, "is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."[151] The Club's speech was "similarly situated" to the already allowed speech—both furthered the district's objective of promoting the "welfare of the community."

Yet the Court has not always found that religious speech is "similarly situated" to nonreligious speech. Most recently, the Court held in *Christian Legal Society v. Martinez*[152] that Hastings College of the Law could deny classroom space, bulletin boards, and money to a religious student group, a chapter of the Christian Legal Society (CLS), without transgressing the Constitution.[153] CLS required that voting members and leaders—the students who control the group—affirm their commitment to the group's core beliefs by signing a Statement of Faith.[154] That was a problem for Hastings. Hastings insisted that all student groups seeking recognition and its accompanying benefits must maintain an all-comers policy with regard to membership and leadership.[155] "[I]n order to be a registered organization," the school said, "you have to allow all of our students to be members and full participants if they want to."[156]

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the cases of *Lamb's Chapel* and *Rosenberger*], we hold that the exclusion constitutes viewpoint discrimination.").

148. *Id.* at 102 (observing that "the school is available for social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.").

149. *Id.* at 108.

150. *See id.* ("Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children.").

151. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001).

152. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

153. *See id.* at 2978 ("[W]e reject CLS's First Amendment challenge . . . [and] we hold, Hastings did not transgress constitutional limitations.").

154. *See id.* at 2980.

155. *See id.* at 2979.

156. *Id.*

The purpose of the all-comers policy, according to Hastings, was to "ensure that leadership, educational, and social opportunities afforded by registered student groups are available to all students."[157] The nonreligious student groups already recognized by Hastings complied with the policy. They had agreed to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [the student's] status or beliefs."[158] CLS had not. It "exclude[d] students who [held] religious convictions different from those in the Statement of Faith."[159] It could not claim to be "similarly situated" to the already-recognized groups "with respect to the purpose of the law."[160] It did not make its "opportunities . . . available to all students."[161] Thus, as the Court put it, CLS's "argument stumble[d] from its first step."[162]

Equal protection principles undergirded each of the Court's "equal access" decisions. The central question—although cast in free speech terms—was whether the proposed religious speech was "similarly situated" to the speech already permitted by the government.

IV. THE RELIGIOUS WORSHIP CASES

An estimated 24,000 churches meet in public and charter school spaces for Sunday morning worship.[163] And all ten of the largest school districts in the country report they grant "permits for religious congregations to hold weekend worship."[164] Most of these churches meet week after week without problem. However, in the last five to ten years, a handful of school districts have refused to continue renting space to churches. Most notably, in 2012, New York City Public Schools evicted about 160 congregations that used school buildings for worship services.[165]

Churches and their lawyers challenged these evictions as denials of equal access. As established above, equal access is at root an equal protection argument—that because the proposed religious speech is "similarly situated" to the nonreligious speech already allowed by the government, the government should treat the religious speech in a like manner. That is, that

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157. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3014 (2010).

158. *Id.* at 2979.

159. *Id.* at 2980.

160. *See id.* at 2994 ("An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.").

161. *Id.* at 3014.

162. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3014 (2010).

163. *See* Cathy Lynn Grossman & Natalie DiBlasio, *"Instant Churches" Convert Public Schools to Worship Spaces*, USA TODAY, perma.cc/L44L-52JU.

164. *Id.*

165. *See* Sharon Otterman, *Churches to Lose Use of School Space After a Legal Push Fails*, N.Y. TIMES, December 6, 2011, at A20.

the government should extend religious speakers the same access to benefits, such as classrooms, corkboards, and money that it already extends to nonreligious speakers.

That means that for the churches' equal access argument to work, they must prove that the government already plays host to "equivalent secular speech."[166] In fact, a church's equal access argument does not even get out of the gate unless it can prove that its worship service is "similarly situated" to the secular speech the government presently allows. And that is the trouble. "Christian worship," said the noted Swiss theologian Karl Barth, "is the most momentous, the most urgent, the most glorious action that can take place in human life."[167] Christian worship is singular; it has no "secular equivalent." It cannot be forced into the mold of equal access.

The U.S. Supreme Court has yet to consider the constitutionality of the government's decision to deny school space to churches and their congregants to assemble for worship. But three lower federal courts—the Second, the Seventh, and the Ninth Circuits—have already taken up the issue. None have been particularly receptive to the churches' equal access argument.

A. *BRONX HOUSEHOLD OF FAITH V. BOARD OF EDUCATION*

The most high profile case happened in New York City.[168] The dispute involved the Bronx Household of Faith—an evangelical Christian church seeking to use public school space for its Sunday morning worship services. The church said in its application to the school board that it planned to use the facilities "for its Sunday morning 'church service[s].'"[169] According to the church, its services included "singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, and sharing of testimonies."[170] The city turned the church down based on its policy that prohibited the use of school space for

166. Badger Catholic, Inc., v. Walsh, 620 F.3d 775,778 (2010) (citing Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 828-30 (1995)). *See also* University's Distribution of Activity Fees to Student Group Engaging in Religious Speech, Walsh v. Badger Catholic, Inc., U.S. SUP. CT. ACTIONS 8 No. 10-731 (Mar. 18, 2011) (observing that "withholding support of religious speech, when *equivalent secular speech* was funded, would be a form of forbidden viewpoint discrimination") (emphasis added).

167. JOHN GAGE ALLEE, WEBSTER'S ENCYCLOPEDIA OF DICTIONARIES 432 (Ottenheimer Publishers 1958).

168. *See*. Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 32-34 (2d Cir. 2011) (Bronx Household IV).

169. *Id.* at 33 (alteration in original).

170. *Id.*

"religious worship services, or otherwise using a school as a house of worship."[171]

The church sued and argued that the school board's rejection violated the First Amendment principle of equal access.[172] It claimed that the school board having opened its facilities to "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" had to also open up its facilities to Christian worship.[173] The school board allowed secular groups, like the Scouts and the Legionnaire Cadets, to use school space to teach morals and character, so the board must allow the church to do the same.[174] The church contended that these "secular groups did all the same expressive activities that the church did in its Sunday morning meetings, such as singing, teaching, and including a secular version of ceremony and ritual for the same purposes, to teach morals and character."[175] Thus, argued the church, for the school board to deny the church's application to use school facilities for religious worship constituted impermissible "viewpoint discrimination."[176]

The Second Circuit Court of Appeals disagreed. The court distinguished the Supreme Court's equal access precedents, such as *Lamb's Chapel*, *Good News Club*, and *Rosenberger*,[177] as resting on the fact that the proposed religious speech was "similarly situated" to the speech already

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171. *Id.* at 34-35. The full text of the city's policy on use of school space for religious worship says:

> No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

Id. at 35 n.4 (quoting NEW YORK CITY PUBLIC SCHOOLS STANDARD OPERATING PROCEDURE § 5.11).

172. Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 33 (2d Cir. 2011) (Bronx Household IV).

173. *Id.* at 33, 38-39 (considering argument that "because the [City's] rule prohibits use of facilities for "religious worship services," it excludes religious worship services while permitting non-religious worship services.").

174. *See* Brief for Appellees at 25, Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30 (2d Cir. 2011) (No. 07–5291), 2008 WL 8605839, at *25.

175. *See id.*

176. *See id.* at *24 ("The Board engages in viewpoint discrimination that the Supreme Court declared unconstitutional in *Good News Club* by allowing groups to meet to teach morals and character, as long as it they do not do so from a religious perspective.").

177. *See Bronx Household IV*, 650 F.3d at 39 ("The application of [the Board's policy] to deny Bronx Household's request to use school facilities for worship services is thus in no way incompatible with the Supreme Court's decisions in *Good News Club*, *Lamb's Chapel*, and *Rosenberger*.").

allowed by the schools.[178] The religious groups' expressions were in every way equivalent to the speech already permitted by the government, except for the groups' religious viewpoint.

In *Lamb's Chapel*, for instance, a church seeking to show a Christian film series on childrearing was "similarly situated" to the community groups already discussing childrearing. All that distinguished it from these community groups was its religious perspective.[179] *In Good News Club*, the club was "similarly situated" to the groups, like the Boy Scouts and 4H Club, which taught children about character and patriotism. The only difference was the club's religious perspective.[180] In *Rosenberger*, Wide Awake magazine was "similarly situated" to the other school-funded publications. Like the other magazines and newspapers, it sought to address current political and social issues. It simply sought to do so from a religious perspective.[181]

The Second Circuit said:

> Here, by contrast, there is no restraint on the free expression of any point of view. Expression of all points of view is permitted. The exclusion applies only to the conduct of a certain type of activity—the conduct of worship services—and not to the free expression of religious views associated with it.[182]

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178. *See id.* at 38 ("Nor is this rule of exclusion vulnerable on the ground that the activity excluded [religious worship] has some similarities to another activity that is allowed. … [W]e reject the suggestion that because a religious worship service shares some features with activities such as a Boy Scout meeting, no meaningful distinction can be drawn between the two types of activities.").

179. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) ("The film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.").

180. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 108 (2011) ("Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. . . . Nonetheless, because Milford found the Club's activities to be religious in nature, . . . it excluded the Club from use of its facilities.").

181. *See* Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 831 (1995) ("By the very terms of the SAF prohibition, the University . . . selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective . . . resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.").

182. *Bronx Household IV*, 650 F.3d at 39.

Bronx Household's religious worship, thus, was different. It was not just a religious perspective on the teaching, singing, and ritual already being done by the Scouts and the Legionnaire. "There is no real secular analogue to religious 'services,' such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism."[183] To argue that the church's worship services were "similarly situated" to a supposed category of "non-religious worship services," the court said, was a "canard."[184]

> There is no difference in usage between a "worship service" and a "religious worship service;" both refer to a service of religious worship. We think, with confidence, that if 100 randomly selected people were polled as to whether they attend "worship services," all of them would understand the questioner to be inquiring whether they attended services of religious worship. While it is true that the word "worship" is occasionally used in nonreligious contexts, such as to describe a miser, who is said to "worship" money, or a fan who "worships" a movie star, the term "worship services" has no similar use; meetings of a celebrity's fan club are not described as "worship services." Worship services are religious; the rule describes the entire category of activity excluded. The meaning of the rule's exclusion of "religious worship services" would be no different if it identified the excluded activity as "worship services."[185]

A worship service is *sui generis*. "It is," as Judge Calabresi put it, "something entirely different."[186] New York City's exclusion of worship services, said the court, "does not constitute viewpoint discrimination."[187] Unlike *Lamb's Chapel*, *Good News Club*, and *Rosenberger*, the exclusion applies only to the conduct of a certain type of activity—the conduct of religious worship services—and not to the free expression of religious

183. *Id.* at 38 (quoting Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 221 (2d Cir. 1997) (Cabranes, J., concurring in part and dissenting in part) [hereinafter *Bronx Household I*]).

184. *Id.*

185. *Id*.

186. *Id.* at 51 (Calabresi, J., concurring).

187. Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 39-40 (2d Cir. 2011) (*Bronx Household IV*).

views on an otherwise secular subject.[188] A worship service by its very nature is not "similarly situated" to any other speech allowed by the city.

B. *FAITH CENTER CHURCH EVANGELISTIC MINISTRIES V. GLOVER*

The factual setup in *Faith Center Church*[189] parallels that of *Bronx Household of Faith*. It too involved "an evangelical Christian church seeking access to [government facilities] to conduct . . . religious worship services."[190] The Antioch Branch Library in Contra Costa County, California opened its "meeting rooms for educational, cultural and community related meetings, programs and activities."[191] The Faith Center Church submitted applications "requesting to use the . . . Antioch Branch Library meeting room."[192] In its applications, the church described the purpose of its meetings as "prayer, praise, and worship."[193] The library approved the church's application to use a meeting room for a seminar on learning to pray, but denied its application to hold a formal worship service.[194] The library relied on a "Religious Use" policy, which prohibited "religious services" from being conducted in library meeting rooms.[195]

The church sued and argued that the library must provide it "equal access to use library meeting rooms."[196] According to the church, its worship services were no different than meetings already allowed by the library. Every part of its worship service, the church contended, had a "secular equivalent" the library had previously okayed.[197] The church's hymns and praise songs were no different than the Boy Scouts "singing a secular song," like "America, the Beautiful" or "Home on the Range."[198] The sermons preached by the church's pastor were no different than "the Demo-

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188. *See id.* at 39.

189. Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891 (9th Cir. 2006).

190. *Id.* at 902.

191. *Id.*

192. *Id.* at 903.

193. *Id.* at 906. The church's pastor described "the purpose of Faith Center's meetings as 'Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build up Community.'" *Id.* at 903 (quoting Faith Center's building use applications).

194. *See* Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 904 (9th Cir. 2006).

195. *Id.*

196. *See* Brief for Appellees at 12, Faith Center Church v. Glover, 480 F.3d 891 (9th Cir. 2006) (No. 05–16132), 2005 WL 4155339, at *12.

197. *Id.* at *20.

198. *Id.*

cratic Club discussing community issues in a political speech."[199] And even its prayers, the church argued, were no different than Narcotics Anonymous pleading with addicts to stop taking drugs.[200]

The Ninth Circuit took issue. "[W]e disagree that prohibiting religious worship services in the Antioch Library meeting room constitutes viewpoint discrimination."[201] The equal access cases, like *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, turned on the fact "the government ha[d] excluded a perspective on a subject matter otherwise permitted in the forum."[202] The government had prohibited speech that, other than being spoken from a religious perspective, was similarly situated to the speech it already allowed. "[T]he focus," said the court, "was on whether some other group had been permitted to engage in the same kind of speech activity from a perspective other than the prohibited [religious] one."[203]

That kind of discrimination, according to the court, was *not* what the Antioch Branch Library had done. "[R]eligious worship," the court said, "is not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter."[204]

> Religious worship . . . is not a viewpoint but a category of discussion within which many different religious perspectives abound. If the County had, for example, excluded from its forum religious worship services by Mennonites, then we would conclude that the County had engaged in unlawful viewpoint discrimination against the Mennonite religion. But a blanket exclusion of religious worship services from the forum is one based on the content of speech.[205]

The Antioch Library excluded Faith Center's worship service because worship "was too tenuously associated to the forum's purpose."[206] Faith Center sought to "occup[y] the Antioch forum expressly for 'praise and

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199. *Id.*

200. Brief for Appellees at 20, Faith Center Church v. Glover, 480 F.3d 891 (9th Cir. 2006) (No. 05–16132), 2005 WL 4155339, at *20.

201. Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 914 (9th Cir. 2006).

202. *Id. See also id.* at 912 ("The test is whether the government has excluded perspectives on a subject matter otherwise permitted by the forum.").

203. *Id.* at 913.

204. *Id.* at 915.

205. Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 915 (9th Cir. 2006).

206. *Id.* at 915 n.14.

worship' and in doing so Faith Center exceeded the boundaries of the library's limited forum."[207] The church's worship did not further the forum's purpose—"to encourage the use of library meeting rooms for educational, cultural and community related meetings, programs and activities"—in the same manner as the speech already allowed by the library.[208] It was not similarly situated with regard to the purpose of the forum. The Democratic Club's political speeches, the Narcotics Anonymous's recovery meetings, and the Boy Scouts' pack meetings were inapposite.[209] Religious worship, as Judge Karlton put it, "is categorically different."[210]

C. *BADGER CATHOLIC V. WALSH*

The Seventh Circuit in *Badger Catholic v. Walsh*[211] reached an opposite result to that of the Second and Ninth Circuits. The University of Wisconsin at Madison regularly doled out money to student groups to promote their activities.[212] Badger Catholic, a religious student group, applied to the University for money to cover expenses related to hosting Catholic masses and "praise and worship programs."[213] The University refused to reimburse the group's expenses based on a policy of not "pay[ing] for three categories

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207. *Id.* at 915.

208. *Id.* at 902, 915.

209. *See id.* at 914-15.

210. Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 919 (9th Cir. 2006) (Karlton, J., concurring). The Ninth Circuit also concluded that the Antioch Library's exclusion of Faith Center's worship services was reasonable. The court said:

> By the same token, the County's decision to exclude Faith Center's religious worship services from the meeting room is reasonable in light of the library policy so that the Antioch forum is not transformed into an occasional house of worship. Faith Center acknowledges that it seeks to reach out to those individuals who might not enter a traditional church building, and to bring the evangelical church experience to them. We see nothing wrong with the County excluding certain subject matter or activities that it deems inconsistent with the forum's purpose, so long as the County does not discriminate against a speaker's viewpoint. To conclude that the County's exclusion of religious worship services from its government buildings is unreasonable would result in the "remarkable proposition that any public building opened for civic meetings must be opened for use as a church, synagogue, or mosque."

Id. at 910-11 (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 139 (2011) (Souter, J., dissenting)).

211. Badger Catholic, Inc. v. Walsh, 620 F.3d 775 (7th Cir. 2010).

212. *See id.* at 776.

213. *See id.* at 776-77; *see also Roman Catholic Found. v. Regents of the Univ. of Wis. Sys.*, 590 F. Supp. 2d 1083, 1088-89 (W.D. Wis. 2008) (listing the student group's events for which the University denied funding).

of speech: worship, proselytizing, and religious instruction."[214] Badger Catholic sued and argued equal access—"that the University must reimburse Badger Catholic's activities on the same basis as it reimburses other student groups."[215] The University violated equal access when it gave money to a student group aimed at "worshiping the New York Yankees," but refused to give money "if you're worshiping God."[216] In other words, because Badger Catholic's religious worship was similarly situated to other forms of so-called "worship," like cheering for a sports team, the University had to treat Badger Catholic's masses and worship programs equally.

The Seventh Circuit sided with Badger Catholic. "[W]ithholding support of religious speech when equivalent secular speech is funded," the court said, "is a form of forbidden viewpoint discrimination."[217] It is the very definition of treating similarly situated speech differently. But the court said that, under other circumstances, the University likely *could* exclude the category of "worship" from funding. "[C]ontent discrimination," said the court, "can be part of a lawful system of allocating limited funds; . . . if the content of the speech would place it outside the scope of the program."[218] But the dilemma here was that the University could not meaningfully separate out which of Badger Catholic's activities constituted "worship" without impermissibly entangling itself in religion in violation of the Establishment Clause.[219] "The problem . . . with excluding worship as a category of speech from its forum would lie in how the University and its fund administrators decide which activities constitute 'purely religious activity' and which activities use a religious perspective to approach a more generally accessible purpose."[220] Such University scrutiny of the Badger Catholic's activities, the court said, raised the "specter of inevitable government entanglement."[221]

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214. *See id.* at 777.

215. *Id.*

216. Transcript of Oral Argument, Badger Catholic v. Walsh, 620 F.3d 775 (7th Cir. 2010) (No. 09-1102), 2009 WL 3762863.

217. *Badger Catholic*, 620 F.3d at 778. The court held that the U.S. Supreme Court's equal access line of cases—in particular, *Widmar* and *Rosenberger*—"dispose[d] of the University's contention that, in refusing to fund Badger Catholic's proposed activities, it did not engage in "viewpoint discrimination." *Id.* at 779.

218. *Id.* The court said "one example" would be "[a] university can decline to pay for an art historian to address a conference devoted to public transit, because the art historian's perspective is outside the scope of the conference."'*Id.*

219. *See id.* at 777 (stating that Badger Catholic's worship activities could not meaningfully be distinguished "from the categories of 'dialog, discussion or debate from a religious perspective' funded by the University.").

220. Badger Catholic v. Walsh, 620 F.3d 775, 787 (7th Cir. 2010) (Williams, J., dissenting).

221. *Id.* (citing Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 918 n.18 (9th Cir. 2006)).

The Seventh Circuit's entanglement concerns are consistent with the U.S. Supreme Court's analysis in *Widmar v. Vincent*.[222] There, the Court considered that "religious worship" might not be "speech generally protected by the 'free speech' guarantee of the First Amendment and the 'equal protection' guarantee of the Fourteenth Amendment."[223] It reasoned that "[i]f religious worship were protected speech, . . . the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech."[224] But the Court thought the University of Missouri at Kansas City lacked the constitutional competence to distinguish between which of Cornerstone's activities were "religious worship" and which were simply speech tackling issues and debates from a religious perspective.[225]

> Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.[226]

The Supreme Court thus recognized that the government might in certain cases permissibly segregate out worship.[227] But *Widmar* was not that case. The University could not determine which of Cornerstone's activities constituted worship without an unacceptable risk of entanglement.[228]

The same risk of entanglement existed in *Badger Catholic*. The student group's masses and worship programs were just small portions of larger activities hosted by the group—"four-day retreats," "leadership training," "spiritual mentoring/counseling," and the like.[229] When Badger Catholic applied to the University for funding, it did not parse out which part of its activities were religious worship and which were simply speech with a religious perspective.[230] The onus was on the University to make that determination. But just as in *Widmar*, for the University to make such a judgment

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222. Widmar v. Vincent, 454 U.S. 263 (1981).
223. *Id.* at 269 n.6.
224. *Id.*
225. *See id.* at 272 n.11.
226. *Id.* at 269 n.6.
227. Widmar v. Vincent, 454 U.S. 263, 269-70 (1981).
228. *Id.* at 273.
229. Badger Catholic v. Walsh, 620 F.3d 775, 777 (7th Cir. 2010).
230. *See id.*

"would tend inevitably to entangle the State with religion in a manner forbidden by [the Supreme Court's] cases."[231]

In contrast, in *Bronx Household* and *Faith Center Church*, the churches themselves identified their activities as religious worship in their rental applications.[232] Neither the City of New York nor the Antioch County Library had to scrutinize and categorize the churches' activities. They took the churches at their word and, thus, avoided meddling with the churches' religious beliefs and practices in a manner that inevitably would have entangled them with religion.

The Second Circuit in *Bronx Household*[233] specifically considered the argument that "any attempt by the Board to distinguish between religious activity that falls under the exclusion of 'worship services,' and religious activity that does not, necessarily places the Board in violation of the duty imposed by *Lemon* to avoid 'excessive government entanglement with religion.'"[234] The court acknowledged that, "without doubt, there are circumstances where a government official's involvement in matters of religious doctrine constitutes excessive government entanglement."[235] But the City's refusal to allow Bronx Household to use a school as a house of worship was not such a circumstance. "[W]hatever merit this argument may have in other types of cases, we do not see what application it has here. Bronx Household does not contest that it conducts religious worship services. To the contrary, it applied for a permit to conduct 'Christian worship services,' and the evidence suggests no reason to question its own characterization of its activities."[236]

The Ninth Circuit reasoned similarly in *Faith Center Church*.[237] The court considered the church's argument that "religious worship cannot be distinguished from other permissible forms of religious speech. According to Faith Center, to enforce such a distinction, would entangle the government with religion in a manner forbidden by the Establishment Clause."[238] The court conceded that "[t]he distinction to be drawn here . . . —one be-

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231. *See id.* at 779; *Widmar*, 454 U.S. at 269 n.6.

232. Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 35 (2d Cir. 2011) ("Bronx Household applied to use [school facilities] under the new rule, stating in its application that it planned to use the facilities for 'Christian worship services,' and the Board denied the application."); *see also* Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 903 (9th Cir. 2006) ("In each application, Pastor Hopkins described the purpose of Faith Center's meetings as 'Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build up Community.'").

233. *Bronx Household IV*, 650 F.3d 30.

234. *Id.* at 46.

235. *Id.* at 47.

236. *Id.*

237. Faith Ctr. Church Evangelistic Ministries, 480 F.3d 891 (9th Cir. 2006).

238. *Id.* at 916.

tween religious worship and virtually all other forms of religious speech—[is] one that the government and the courts are not competent to make."[239] But, according to the court, the library did not have to make the distinction. "That distinction . . . was already made by Faith Center itself when it separated its afternoon religious worship service from its morning activities. Faith Center admits that it occupied the Antioch forum in the afternoon of May 29, 2004 expressly for 'praise and worship.'"[240] The court concluded that "[t]he County may not be able to identify whether Faith Center has engaged in pure religious worship, but Faith Center can and did."[241]

These religious worship cases are consistent with the equal protection underpinnings of the First Amendment doctrine of equal access. The cases recognize that, while the government has a general obligation to treat religious and nonreligious speech evenhandedly, it can exclude speech that is not "similarly situated" to the speech already being allowed by the government. The Second, Ninth, and Seventh Circuits all held that religious worship fell within this exception. Worship could be excluded by the government, because it was not "similarly situated" to any other speech. It had no "secular equivalent."

The Seventh Circuit in *Badger Catholic* nonetheless held that the University of Wisconsin ran afoul of the First Amendment by denying a Catholic group funding for activities that included a worship component.[242] But the court did so, only because the University could not separate out the group's worship activities without impermissibly entangling itself with religion.[243] In the typical religious worship case, like *Faith Center Church* or *Bronx Household*, there is no real threat of entanglement.[244] The churches themselves identify their activities as worship. The government merely accepts the churches' own classification of its activities.

V. WHY DOES ANY OF THIS MATTER?

Christian lawyers continue to push the notion of "a church's right to have equal access to government facilities."[245] "From the very beginning of the United States," they argue, "churches have used government facilities

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239. *Id.* at 918.

240. *Id.*

241. *Id.*

242. *See* Badger Catholic v. Walsh, 620 F.3d 775, 780-81 (7th Cir. 2010).

243. *See id.*

244. *See* Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 903 (9th Cir. 2006); Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 35 (2d Cir. 2011) (*Bronx Household IV*).

245. Erik Stanley, *Churches and Government Facilities: A Battleground for the Gospel*, ALLIANCE DEFENDING FREEDOM BLOG (April 28, 2014), perma.cc/P592-XZ9F.

for worship services."[246] But such an argument ignores the equal protection roots of the First Amendment doctrine of equal access. By arguing religious worship cases under the rubric of "equal access," Christian lawyers necessarily equate religious worship with the secular speech already allowed by the government. That is problematic for three reasons: (1) it guts worship of its distinct, spiritual character, (2) it weakens churches' ability to rely on the specialness of religion as a reason for constitutional protection in the future, and (3) it lacks integrity.

A. GUTTING RELIGIOUS WORSHIP

Framing religious worship cases as equal access cases may work in the short term. It did in *Badger Catholic*.[247] But long term, it will hurt religious worship. Worship does not fit the mold of *Lamb's Chapel*, *Good News Club*, and *Rosenberger*. Each of those cases depended on the proposed religious speech—whether showing a video series from a religious perspective, teaching character from religious perspective, or publishing a newspaper from a religious perspective—being "similarly situated" to the secular speech already permitted by the government. The government already allowed speakers to use classroom space to speak on childrearing, character, and current events. Endeavors to speak on those subjects from religious groups were "similarly situated" in every sense except for their religious perspectives. The religious groups' speech in these cases furthered the government's purpose—promoting the welfare of the community, fostering academic debate on campus, etc.—just the same as the nonreligious groups' speech. It brought a religious perspective on a subject the government had already chosen for discussion.

But the same cannot be said of religious worship. It is not just a religious perspective on a subject already allowed by the government. Nor does it further the purpose of why the government rents out its facilities in the first place. The purpose of a religious worship service is not to promote the community welfare or to foster academic debate. Rather, when the church gathers for worship, it "blesses the Father by her worship, praise, and thanksgiving and begs him for the gift of his Son and the Holy Spirit."[248] The aim of worship is transcendent. It is nothing less than to glorify God.

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246. *Id.*

247. But recall that it worked only because the University of Wisconsin lacked the constitutional competence to dissect the religious student group's activities. It could not determine what portion of its activities constituted worship and what portion constituted mere speech from a religious a perspective without impermissibly entangling itself with religion. *See Badger Catholic*, 620 F.3d at 787 (Williams, J., dissenting).

248. COMPENDIUM OF THE CATECHISM OF THE CATHOLIC CHURCH, 67, Q. 221 (2009).

The character of true, Christian worship is such that it can never be deemed "similarly situated" to any form of secular speech. As the Second Circuit said, worship has no "secular analogue."[249] It is a personal encounter with God, which no secular activity could ever claim to be.

> Worship is a love affair! It is the most thrilling and heartwarming activity of the mind and heart that can be conceived: the personal encounter of the creature with its Creator, the soul with its Savior, the man with his Master. Worship is the renewing of a daily kinship and fellowship with Jesus Christ. . . . When we worship we mend and straighten our spiritual fences; we lift our lives up the very Light of Light. Worship is a blessing, refreshing interchange between a man and his Lord.[250]

Religious worship is nonsense to the unbeliever. The Apostle Paul says it is "folly to those who are perishing."[251] "The natural person," said Paul, "does not accept the things of the Spirit of God, for they are folly to him, and he is not able to understand them because they are spiritually discerned."[252] Christian worship then is foreign and perhaps even odd to the watching world.

It is true that in some sense the school booster club "worships" the basketball team, the school cheerleaders "worship" the football team, or the marching band "worships" at the school pep rally. But this so-called "worship" is in no sense "similarly situated" to Christian worship. When the Prophet Isaiah came into the presence of the Almighty God and worshipped, he fell on his face and cried, "Woe is me! For I am lost; for I am a man of unclean lips, and I dwell in the midst of a people of unclean lips; for my eyes have seen the King, the Lord of hosts!"[253] Rarely is anyone so

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249. Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 38 (2d Cir. 2011) (*Bronx Household IV*).

250. SHERWOOD WIRT, A THIRST FOR GOD 130 (Zondervan 1980). A.W. Tozer put it this way:

> To worship is to feel in your heart and express in some appropriate manner a humbling but delightful sense of admiring awe and astonished wonder and overpowering love in the presence of that most ancient Mystery, that Majesty which philosophers call the First Cause, but which we call Our Father Which Art in Heaven.

James Snyder, *A.W. Tozer: A Heart to Worship*, A.W. TOZER CLASSICS, http://www.awtozerclassics.com/articles/article/4891846/86018.htm.

251. 1 *Corinthians* 1:18 (English Standard).

252. 1 *Corinthians* 2:14 (English Standard).

253. *Isaiah* 6:5 (English Standard).

"lost" and anguished by the local high school football team—no matter how dreamy the quarterback may be. The sacredness of the worship of God, the Creator of the Universe, cannot with any sincerity and right reverence, be equated to cheering for the school football team.

When the local church body comes together for worship, it is joined to the action of Christ, "the high point both of the action by which God sanctifies the world in Christ and of the worship that the human race offers to the Father, adoring him through Christ, the Son of God, in the Holy Spirit."[254]

> When the church assembles for worship she is not at all like the world. She invokes the name of Christ. She prays and sings to a God who cannot be seen. She hears words said by a man commissioned by Christ that become, by the work of the Holy Spirit, the power of God unto salvation. She eats a holy meal whose portions are tiny, but which, by the blessing of Christ, nourishes God's people for eternal life. In these ways the church at worship is different from the world. All elements of worship look weak and foolish to those outside the house of God. But to God's people they are manna that sustains for eternal life.[255]

Stripping worship of its spiritual character may be pragmatic; it may even help churches gain access to public school buildings. But at what cost? Without the spiritual trappings, perhaps churches will have an easier time equating worship with the everyday, nonreligious speech already allowed in government-run facilities. But what is left can hardly be called worship. Ultimately, is worship really worship at all if it lacks any sense of coming into the presence of the transcendent God of the Universe?

In the past, Christians roundly criticized attempts to "secularize" Christianity as a mere tool to get from point A to point B. In the mid-1800s, for instance, Horace Mann, Alexander Campbell, and William Ruffner pushed the teaching of a stripped down concept of Christianity in public schools as a means to create a virtuous citizenry for "easy" governing. Churches protested the government "turn[ing] the Jesus of [the] faith into a model citizen, a figure several steps removed from the revered second person of the [t]rinity."[256]

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254. United States Conference of Catholic Bishops, *General Instructions of the Roman Missal*, no. 16, perma.cc/7U3N-FKVE.

255. D.G. HART AND JOHN R. MUETHER, WITH REVERENCE AND AWE 34 (P & R Publishing 2002).

256. D. G. HART, A SECULAR FAITH 77-83 (2006).

In particular, when Boston public schools called for students to recite the Ten Commandments as part of their daily religious instruction, the local Roman Catholic Bishop objected that Catholic students could not "present [themselves] before the Divine presence in what would be for [Catholics] a merely simulated union of prayer and adoration."[257] In other words, "what for Boston's public school officials and teachers was simply a generic, unobjectionable reading from an age-old source of Christian morality, to Roman Catholics was an act of religious devotion that needed to be performed in a setting properly reserved for worship."[258] The Church would not stand for separating Christian morality from Christian spirituality in the hope of teaching Americans "the morality necessary for a republican form of government."[259]

The temptation even now to divorce the Christian faith from Christian spirituality in the name of expediency remains the same. It would certainly be easier to rent space for Sunday morning worship in government-run buildings by just downplaying the unique, spiritual elements of Christianity. But Christians rejected such a utilitarian approach to religion in the past; they should do so again. Christians cannot call religious worship "similarly situated" to everyday, ordinary speech without quelling what makes it distinct and sacred. That frankly would not be worship at all.

B. UNDERVALUING THE SPECIALNESS OF RELIGION

The churches' equal access argument, as the name itself suggests, emphasizes the "equality" of religious worship to the nonreligious speech already allowed by the government. But it does so, at the expenses of the "specialness" of worship. It maintains that religious worship is protected because of its sameness, rather than because of its uniqueness. That praying the Lord's Prayer is a religious version of the Scout Oath. That singing hymns and spiritual songs is a spiritualized school cheer. That preaching the Word of God is a churchly political speech. The religious and nonreligious expression, the argument goes, are equal and for the government to treat them differently is impermissible discrimination.

But here is the rub. Sometimes religious expression cannot be protected based on an equality rationale. Under an equality rationale, what happens to the Amish family who does not want to send their kids to public school?[260] Equality means the Amish family complies with compulsory

257. *Id.* at 82.
258. *Id.* at 83-84.
259. *Id.* at 78.
260. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (considering whether the State of Wisconsin could compel Amish families to send their children to public high school contrary to their religious beliefs).

school attendance laws just like any other family. Or what about the Christian business owner who does not want to pay for abortifacients?[261] Equality means the business owner pays for abortifacients like any other business owner in the United States. Or the Seventh-Day Adventist who needs unemployment benefits but does not want to work on the Sabbath?[262] Equality means they only qualify for unemployment benefits if they are willing to work on Saturdays like every other applicant for benefits. Or the Jehovah's Witness who does not want to salute the American flag?[263] Equality means she pays homage to the flag just like any other public school student. In each case, the equality rationale fails to protect the religious expression.

Only an acknowledgement of the specialness of religion justifies protecting religious expression in these cases. That unlike the political beliefs and social values of groups like the Sierra Club or the Federalist Society, the religious beliefs of churches and their adherents "involve[] something transcendent, objective, normative, and exclusive."[264] Religion makes claims on its adherents that supersede those of the government. When the claims of religion and the laws of government conflict, the government generally must yield.

> The reality of God . . . was an essential premise underlying the arguments for religious freedom during the colonial and founding periods. . . . Religious freedom only made sense because God exists: God makes claims on human beings; these claims are prior to and superior to the claims of the state; the individual's response to God's claims, to be genuine, must be voluntary and not coerced; the state must not attempt to define or regulate the relationship between God and the individual and ordinarily must yield to the claims of God as articulated by the sincere believer.[265]

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261. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (considering whether Christian-owned businesses must provide health insurance coverage of abortifacients contrary to their religious beliefs).

262. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (considering whether Seventh Day Adventist must agree to work on the Sabbath contrary to her religious beliefs to qualify for unemployment benefits).

263. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (considering whether Jehovah's Witness students must pledge allegiance to the American flag contrary to their religious beliefs).

264. E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 491 (2009).

265. *Id.* at 491-92.

In other words, it is only the "specialness" of religion—that unlike any other type of belief, religious beliefs are rooted in the transcendent reality of a higher power—that justifies protecting religious expression when an equality rationale will not.

Thus, the Supreme Court exempted the Amish from Wisconsin's compulsory school attendance laws because their decision to take their children out of public school was "not merely a matter of personal preference, but one of deep religious conviction."[266] The Court exempted the owners of Hobby Lobby and Conestoga Wood Specialties from having to pay for abortifacients for their employees because "the HHS mandate demands that they engage in conduct that seriously violates" their "sincere religious belief that life begins at conception," rather than just "the challengers' views on a secular issue."[267] The Court exempted the Seventh-Day Adventist from the requirement that she be willing to work on Saturdays as a condition of receiving unemployment benefits, because the requirement interfered with her "religious convictions respecting the day of rest"[268] and not merely her "indolence" or "compulsive desire to watch the Saturday television programs."[269] The Court exempted the Jehovah's Witnesses from the flag ceremony because their objection stemmed from a religious belief that saluting flags constitutes worshipping a "graven image" in contravention of the Second Commandment[270] and not from "any desire to show disrespect for either the flag or the country."[271]

In each case, it was the religious nature of the beliefs that justified extending constitutional protections. Because the beliefs were rooted in religion—and therefore "superior to that of laws enacted by temporal government"[272]—they were worthy of protection. It had nothing to do with the similarity or dissimilarity of the religious beliefs to any secular social beliefs.

Pushing religious worship cases like *Bronx Household*, *Faith Center Church*, and *Badger Catholic* as equal access cases downplays the specialness of religion. The churches argue that their religious worship should be protected not because of its specialness but because of the exact opposite—its sameness to the secular expression already allowed by the government.

The equal access line of cases on which the churches rely epitomizes the equality rationale for protection of religious expression. From the very inception of equal access, the Supreme Court rejected the specialness of

266. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).
267. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2755, 2775, 2779 (2014).
268. Sherbert v. Verner, 374 U.S. 398, 410 (1963).
269. *Id.* at 415 (Stewart, J., concurring).
270. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943).
271. *Id.* at 643 (Black, J., concurring).
272. *Id.* at 629.

religion as the ground on which to protect religious student groups. In *Widmar*,[273] the religious student group, Cornerstone, argued that the University's denial of access "violated their rights to free exercise of religion."[274] But the Supreme Court declined to "inquire into the extent, if any, to which free exercise interests are infringed by the challenged University regulation."[275] Rather, the Court ruled for Cornerstone based on "the right of religious speakers to use public forums on equal terms with others."[276] The Court very purposely adopted an equality rationale over a specialness rationale for protection of religious expression. In *Lamb's Chapel*,[277] the Court reasoned similarly. Like Cornerstone, the church raised a free exercise claim.[278] The Court ignored this claim and considered only "whether [the school district] discriminates on the basis of viewpoint to permit [its] property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."[279] The Court held that the school district had to give the religious viewpoint equal treatment. The Court again chose the equality rationale over the specialness rationale. The Court followed the same rationale in *Rosenberger*.[280] The students "alleged that refusal to authorize payment of the printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated," among other things, "their rights . . . to the free exercise of religion."[281] The Court ignored this claim and considered only whether the University of Virginia was "allowing religious adherents to participate on equal terms" with the other student publications in its funding program.[282] The equivalency of religion to other viewpoints, not its specialness, controlled. "[T]he neutrality commanded of the State by the separate Clauses of the First Amendment," the Court concluded, "was compromised by the University's course of action."[283] Thus, by its very

273. Widmar v. Vincent, 454 U.S. 263 (1981).

274. *Id.* at 266 (the student group also argued that the university's actions ran afoul of the group's equal protection, free speech, and associational rights).

275. *Id.* 273 n.13 ("Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case.").

276. *Id.* at 272 n.12.

277. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

278. *See id.* at 389.

279. *Id.* at 393.

280. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

281. *Id.* at 827.

282. *Id.* at 852-53 (Thomas, J., concurring). *See also id.* at 839 (admonishing that the First Amendment mandates that the government must, "following neutral criteria and even-handed policies, extend[] benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.").

283. *Id.* at 845.

nature, an equal access claim emphasizes equality at the expense of specialness.

Over time, this continued emphasis on equality will make it more difficult for churches to argue the specialness of religion as a ground for providing constitutional protection. The more churches argue that they should have access to public spaces for worship services because of the similarity of their worship to secular expression, the harder it will be to argue later their dissimilarity. The more churches insist that worshipping God is just like cheering for the Yankees, the harder it will be to argue that worship is distinct and different. Churches cannot argue the "transcendence" of worship when all along they have equated worship with the earthly pleasures of pep rallies and football games. And that is problematic, because, as illustrated above, sometimes the equality of religion to secular expression does not suffice to provide constitutional protection.

Religious individuals and institutions are already reaping the consequences of an overreliance on an equality argument. Look no further than *Employment Division v. Smith*.[284] There, the Court held, as Doug Laycock describes, "that neutral and generally applicable criminal prohibitions on worship service[s] raise no issue under the Free Exercise Clause."[285] "A law that burdens religious exercise—however substantially and however core the religious practice—requires no special justification under the Federal Free Exercise Clause if it is"[286] "a general law not aimed at the promotion or restriction of religious beliefs."[287] So long as religious beliefs receive equal treatment under the law, it does not matter that the law burdens religious exercise.

A public university, for instance, can force a graduate student to counsel GLBT couples contrary to her religious beliefs as a condition to obtaining her master's degree.[288] The school's curricular requirement, said the Eleventh Circuit, "is neutral and generally applicable."[289] According to the court, "In seeking to evade the curricular requirement . . . , [the student] is looking for preferential, not equal, treatment."[290] Likewise, a city can pass a zoning ordinance to shut down a church's homeless shelter even when the court conceded that "sheltering the homeless is an essential aspect of the

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284. Employment Div. v. Smith, 494 U.S. 872 (1990).

285. Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 767 n.37 (1999) (citing *Smith*, 494 U.S. at 879).

286. *Id.* at 767.

287. *Smith*, 494 U.S. at 879 (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594-95 (1940)).

288. *See* Keeton v. Anderson-Wiley, 664 F.3d 865, 880 (11th Cir. 2011).

289. *Id.*

290. *Id.*

Christian religion."[291] "This ordinance, as passed," said the court, "zones an entire residential area . . . . It is neutral on its face and is of general applicability."[292]

For churches to argue equal access is expedient. It is the easiest avenue of attacking the current crunch imposed by cities and counties on church worship services. After all, it has worked for the almost thirty-five years since *Widmar*. But in the long run the equal access argument will make life harder for churches. The time will come when only the specialness of religious worship will justify its constitutional protection. And then it will be too late. The churches gave it up for a mess of pottage.[293]

C. LACKING INTEGRITY

For churches to say one thing and do another lacks integrity. The churches know what they are doing when they gather for worship. They gather to engage with God—to meet with Him on His terms. When churches represent in litigation that they do anything less, simply put, they are lying. Lying means "intending or serving to convey a false impression."[294] The churches in cases like *Bronx Household* and *Faith Center Church* are intentionally conveying the impression that their worship services are no different than any other community meeting, just with a religious twist. That is untrue.

Sure, the churches can justify the lie as a litigation tactic. Likening religious worship to secular speech from fan clubs and political associations is the only way to scrunch worship into the mold of equal access. The churches are just making the argument they need to make to secure meeting space and then they can carry on being as religious as they want to be. It is all very user-friendly. But it is not living up to the "high calling" God places on the church.[295]

Jesus says, "You therefore must be perfect, as your heavenly Father is perfect."[296] The Apostle Paul seconds this. He writes to the church at Philippi: "[B]e blameless and innocent, children of God without blemish in the midst of a crooked and twisted generation, among whom you shine as lights in the world."[297] Obviously, as the Apostle James said: "[W]e all stumble in

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291. First Assembly of God v. Collier Cnty., 20 F.3d 419, 422-23 (11th Cir. 1994).

292. *Id.* at 423.

293. *See Genesis* 25:29-34 (King James) (Essua sells his birthright to Jacob for a "pottage of lentils").

294. *Lie*, DICTIONARY.COM UNABRIDGED, perma.cc/JU3S-RSSG.

295. *Philippians* 3:14 (King James) (Apostle Paul writes, "I press toward the mark for the prize of the high calling of God in Christ Jesus.").

296. *Matthew* 5:48 (English Standard).

297. *Philippians* 2:15 (English Standard).

many ways."[298] That is why Christians need the Gospel—the good news that "[a] holy God sends his righteous Son to die for unrighteous sinners so we can be holy and live happily with God forever."[299] But that does not diminish the high calling of the church.

The Ninth Commandment says, "You shall not bear false witness against your neighbor."[300] The Westminster Larger Catechism elaborates. The commandment includes any "speaking untruth, lying, slandering, backbiting, detracting, tale bearing, whispering, scoffing, reviling, rash, harsh, and partial censuring; misconstruing intentions, words, and actions."[301] The demands of the law are clear. Churches should not flout them for the sake of securing a place to meet. It is pragmatic but not in line with the church's high calling.

VI. WHERE TO GO FROM HERE?

The Free Exercise Clause provides an easy response to these critiques of the equal access argument.[302] First, the Free Exercise Clause obviates the need for churches to denigrate religious worship to claim constitutional protection. A church can assert a successful free exercise claim without needing to show its religious worship is "similarly situated" to any secular speech allowed by the government. The church need only prove that the government's denial of access has "in a selective manner impose[d] burdens . . . on conduct motivated by religious belief."[303] Gone are the strained comparisons of a worship service to a political rally or a sporting event. Second, free exercise maintains the specialness of religion. "[T]he Free Exercise Clause . . . , by its terms, gives special protection to the exercise of religion."[304] By its very nature, free exercise is rooted in the distinctiveness of religion, rather than its alleged similarity to secular expression. The

298. *James* 3:2 (English Standard).

299. *What's the Message of the Bible in One Sentence?*, STRAWBERRY-RHUBARB THEOLOGY Jan. 12, 2011, perma.cc/FAX4-XY9D (quoting Kevin DeYoung).

300. *Exodus* 20:16 (English Standard).

301. CTR. FOR REFORMED THEOLOGY AND APOLOGETICS, *Westminster Larger Catechism, Q. 145*, perma.cc/7WMB-BYKC.

302. The idea of arguing equal access cases as free exercise cases is nothing new. Many of the early cases in which religious groups challenged a school's denial of access were brought as free exercise cases. *See*, *e.g.*, Keegan v. Univ. of Del., 349 A.2d 14 (Del. 1975).

303. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993). *See also id.* at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

304. Thomas v. Review Bd., 450 U.S. 707, 713 (1981). *See also* Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C., 132 S. Ct. 694, 706 (2012) ("[T]he First Amendment itself . . . gives special solicitude to the rights of religious organizations.").

clause protects religion because religion alone makes claims on its adherents that supersede those of the government. Finally, free exercise allows churches to be honest about what they are doing. They can present worship as what it is—a meeting with God—rather than presenting it as a fan club with a religious spin.

To prove a free exercise claim, churches must show that the government's imposition of restrictions is either "not neutral (i.e., if it discriminates against religiously motivated conduct) or is not generally applicable (i.e., if it proscribes particular conduct only or primarily when religiously motivated)."[305] This is not difficult to prove in most cases where the government bans religious worship. The government's policies on building use frequently target religious worship for exclusion.

The school district's policy in *Bronx Household*, for instance, permitted school facilities to be "used during after-school hours for a broad range of purposes, including 'social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community.'"[306] But the policy flatly excluded religious worship. "No permit shall be granted for the purpose of holding religious worship services, or otherwise using a school as a house of worship."[307] Likewise, the library's policy in *Faith Center Church* provided that "[n]on-profit and civic organizations, for-profit organizations, schools and governmental organizations" may use the meeting room space for "meetings, programs, or activities of educational, cultural or community interest."[308] But the library's use policy singled out religious worship services: "the library meeting room 'shall not be used for religious services.'"[309] The policies give community groups access to meeting space for virtually any use except for religious worship. That is precisely the kind of targeting of religion that the Free Exercise Clause forbids.

The free exercise analysis is straightforward. But there are some catches. First, it is questionable whether denying churches permission to

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305. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir. 2002). *See also Lukumi*, 508 U.S. at 531-32 ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.") (internal citations omitted).

306. Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89, 92 (2d Cir. 2007) (quoting N.Y. Educ. Code § 414(1)(c) (McKinney 2006)) (*Bronx Household III*).

307. *Id.* at 94.

308. Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 902 (9th Cir. 2006).

309. *Id.* at 903.

worship in a public building actually imposes a substantial burden on their free exercise of religion. The Second Circuit, the lone appellate court to consider the question, said no. The school district's exclusion, the Second Circuit said, "represents only a decision by the Board not to subsidize religious worship services by providing rent-free school facilities in which to conduct them."[310] The court concluded that the Board's policy "imposes no burden on any religion, leaving all free to conduct worship services wherever they choose other than the Board's schools."[311]

The Second Circuit's analysis is consistent with the Supreme Court's recent treatment of access to meeting space for religious student organizations and community groups as a government subsidy rather than as a right. In these circumstances, the Supreme Court said, the government "is dangling the carrot of subsidy, not wielding the stick of prohibition."[312] The groups are free to speak, worship, and associate however they choose. They simply must "forgo[] the benefits of official recognition."[313] Similarly, it could be argued, the churches being denied meeting space are free to worship however they want. They simply must do it somewhere other than the local school building or library meeting room.[314]

The dilemma with this free exercise analysis is that meeting space is not fungible for churches. Pastors and denominations choose locations for churches because they want to serve the people of that particular community. Telling a church it can hold a worship service across town is not an adequate substitute. It defeats the purpose for why the location was chosen in the first instance. Moreover, as Erik Stanley from the Alliance Defending Freedom notes: "This approach disregards the many startup churches who can only afford to rent government school facilities. It also ignores that in places like Hawaii and New York City, property is at a premium with fre-

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310. Bronx Household of Faith v. Bd. of Educ., 750 F.3d 184, 192 (2d Cir. 2014) [hereinafter *Bronx Household V*], *cert. denied*, 135 S.Ct. 1730 (2015) (Mem.).

311. *Id.* at 200.

312. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2975 (2010).

313. *Id.* at 682.

314. The Second Circuit's analysis also squares with how courts have addressed free exercises challenges by churches denied zoning permits. *See*, *e.g.*, Messiah Baptist Church v. Cty. of Jefferson, 859 F.2d 820, 823 (10th Cir. 1998) ("Church has not been denied a right to exercise a religious preference. Rather, the church has been denied a building permit, and may not construct its house of worship where it please."); Lakewood Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983) (stating that building place of worship "has no religious or ritualistic significance," and is a "purely secular act of building," "at most . . . tangentially related" to freedom to worship); International Church of the Foursquare Gospel v. City of Chi. Heights, 955 F. Supp. 878, 880 (N.D. Ill. 1996) ("The impact is not upon the content of religious practices but only upon where that religion may be practiced. Having a church facility is important to the Church, but specific location is not.").

quently nowhere for churches to meet other than public buildings."[315] For a court, like the Second Circuit, to rule that a church's free exercise rights are not burdened by the denial of meeting space is divorced from the reality of how and why churches choose to rent space from the government.

The second concern is the Establishment Clause—the concern that, by hosting and subsidizing religious worship services, the government would appear to endorse religion. That concern is largely unfounded because churches generally are seeking access to facilities that the government has already made available to other groups. The Supreme Court ruled way back in *Widmar* that "the Establishment Clause" does not "bar a policy of equal access, in which facilities are open to groups and speakers of all kinds"—both secular and religious.[316] The hang-up may be "cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause."[317] The Supreme Court has suggested that these cases would be "different," but has not explained why.[318]

Thus, both concerns—the lack of a burden on free exercise rights and the impermissible endorsement of religion—are more hypothetical than realistic. Practically, churches choose locations for meetings with the intent of reaching particular neighborhoods. The possibility of meeting in some other location does nothing to alleviate the burden of being denied the ability to meet in the intended neighborhood. Churches are also not seeking to rent government spaces that are closed to other groups. They want to rent spaces that local school boards and libraries have already made available for community use. Neither concern should pose a real obstacle to a church's free exercise claim.

All that being said, the better solution is for churches to just walk away. Forgo the urge to claim their "rights." Persecution (if we can even call a denial of meeting space that) is normal for Christians. "All who desire to live a godly life in Christ Jesus will be persecuted."[319] "Beloved, do not be surprised at the fiery trial when it comes upon you to test you, as though something strange were happening to you."[320] "Through many tribulations we must enter the kingdom of God."[321]

The Christian's response to such persecution should be joy, not legal action. "We rejoice in our sufferings, knowing that suffering produces en-

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315. Erik Stanley, *Churches and Government Facilities: A Battleground for the Gospel*, ALLIANCE DEFENDING FREEDOM BLOG (Apr. 28, 2014), perma.cc/3SFJ-PWKA.

316. Widmar v. Vincent, 454 U.S. 263, 267 (1981).

317. *Id.* at 273 n.13.

318. *See id.*

319. 2 *Timothy* 3:12 (English Standard).

320. 1 *Peter* 4:12 (English Standard).

321. *Acts* 14:22 (English Standard).

durance."[322] "Blessed are you when others . . . persecute you . . . . Rejoice and be glad, for your reward is great in heaven."[323] "Count it all joy, my brothers, when you meet trials of various kinds, for your know that the testing of your faith produces steadfastness."[324] "[T]hey left the presence of the council, rejoicing that they were counted worthy to suffer dishonor for the name."[325]

Do not misunderstand. The source of the Christian's joy is not a Pollyanna worldview, naively ignoring the difficulties of this world. Nor is it somehow ginning up joy by sheer force of will. Rather the Christian has joy because she recognizes that "[t]his world is not my home, I'm just a-passing through."[326] Christians, the Apostle Peter said, are "sojourners and exiles."[327]

The Apostle Paul says of the Christian that her "citizenship is in heaven."[328] The author of Hebrews put it this way: "[Y]ou had compassion on those in prison, and you joyfully accepted the plundering of your property, since you knew that you yourselves had a better possession and an abiding one."[329]

The Christian can have joy when the government treats her poorly because she is sure that, whatever this world may dish out, she has "an inheritance that is imperishable, undefiled, and unfading, kept in heaven for [her]."[330] She has a "deep, unshakeable confidence that the joy [she has] tasted in fellowship with Christ will not disappoint [her] in death."[331]

Jesus provides the example. "For the joy that was set before him [he] endured the cross."[332] He endured the cross though he unquestionably "had an inalienable right not to be nailed to one."[333] Should not His followers be willing to do the same with their rights?

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322. *Romans* 5:3 (English Standard).
323. *Matthew* 5:11-12 (English Standard).
324. *James* 1:2-3 (English Standard).
325. *Acts* 5:41 (English Standard).
326. J.R. BAXTER, JR., THIS WORLD IS NOT MY HOME (Stamps-Baxter Music & Prtg. Co. 1946), perma.cc/44ZJ-C266.
327. 1 *Peter* 2:11 (English Standard).
328. *Philippians* 3:20 (English Standard).
329. *Hebrews* 10:34 (English Standard).
330. 1 *Peter* 1:4 (English Standard).
331. JOHN PIPER, WHEN I DON'T DESIRE GOD 21 (Crossway Books 2004).
332. *Hebrews* 12:2 (English Standard).
333. JASON J. STELLMAN, DUAL CITIZENS: WORSHIP AND LIFE BETWEEN THE ALREADY AND THE NOT YET 163 (Reformation Trust Publishing 2009).

CONCLUSION

When churches and their lawyers force worship into the mold of equal access, they do a disservice. They harm not only themselves but also the broader cause of religious liberty. Equal access has always been rooted in principles of equal protection. The argument obligates churches to show that their religious worship is "similarly situated" to the secular expression already allowed by the government. That cannot be done without demeaning the sacredness of religious worship. Such disparagement will inevitably make it harder for churches and their congregants to claim constitutional protection when only the specialness of religion will justify affording that protection. The Free Exercise Clause offers an alternative argument that sidesteps the problems of equal access. In the worship cases that have arisen thus far, the government has singled out religious worship for exclusion. That kind of targeting cannot stand up under the Free Exercise Clause. But perhaps it would be best if churches just went along and not bothered. Christian believers have a far greater inheritance in Christ than a classroom, a meeting room, or a cafeteria. "Therefore let us go to him outside the camp and bear the reproach he endured. For here we have no lasting city, but we seek the city that is to come."[334]

334. *Hebrews* 13:13-14 (English Standard).