It's wonderful to be part of the celebration of the Center which has done such fantastic things in the 25 years of its being.

As I grow older I grow less and less confident about long-term predictions. Who would have guessed 100 years ago that we had in store a century of incredible brutality and in humanity, of diplomatic failures leading to history's two most destructive wars? But I think one thing we might have foreseen was continuing movement toward equality, in particular the notion that treatment by law, basic opportunities in society, and respect for persons shouldn't depend on one’s gender, race, national origin, ethnic background, sexual orientation, and, most important for our purposes today, religion. Of course, the idea of equality that I've sketched coexists with great disparities in wealth, and it has yet to dissolve personal prejudices that fit older notions of unequal status, although I think in respect to even personal attitudes we've come a very long way in my lifetime, which doesn’t extend for a full century.

The movement toward equality owes a great deal to religious understandings. It is centuries old, and despite occasional setbacks, it's going to continue. What it will signify for the law's treatment of religion is harder to say, and this morning I'd like to reflect on some of the conundrums of that topic for the United States, both possibilities and sensible resolutions.

Now, in relation to what we heard last night and what we heard this morning from Professor Berman and what we're going to hear from Cathleen, I've got to say that this is an extremely prosaic talk for I'm going to get much narrower in scope.

The idea of equal respect for persons is complicated for religion. Many people are comfortable with the idea of religious pluralism, believing either that religion basically is a personal matter or that most religions have profound insights into a complex and spiritual truth, that no one religion has got it right. But many people in our country still believe their religion is true. Christians with this view may sincerely accept non-Christians as political and social equals, still respective as human beings, but they think they're fundamentally unenlightened – or they may think that way – like someone who's ignorant about fundamental facts or correct moral views. Now, non-Christians on the receiving end of message that they are lost unless they recognize Jesus as their
savior, often don't feel that they're being regarded as equals, whatever the person with that attitude may think. Now, whatever individuals may feel about the uniqueness of their particular religions it's now widely understood that governments should not endorse the truth of any single religion.

Following reform of our discriminatory immigration policies, a large percentage of our immigrants now come from Asia and that already substantial number of Muslims, Hindus and Buddhists is going to continue to rise. Equality among religions and among citizens of diverse religious origins fits this pluralism well.

This equality of religious points of view, at least for the government, is one facet of broader egalitarian developments in the realm of ideas. According to the modern law of free speech, when a government establishes a public forum it cannot discriminate on the basis of viewpoint. It can't welcome support of keeping troops in Iraq and reject speech urging their withdrawal.

During the last 50 years more complex questions about equality of ideas and of personal convictions have emerged. If people believe they should behave in a certain way, should it matter whether their reasons are religious or not religious? This issue is posed most starkly in the case of conscientious objection. Now, the scope of an exemption matters most during a draft, but it still retains importance as a basis for military personnel who become objectors during their term of service that they've signed up for. Now, during the Vietnam War, the Supreme Court made short work of the statutes requirements that an objection be based on grounds of religion involving belief in a Supreme Being. To oversimplify only a bit, it said that a person who does not believe in a Supreme Being can count as believing in a Supreme Being and that someone who is not religious in any standard sense can count as religious. The courts strained the statute beyond recognition, but I believe the end result was right. Whether young men and women qualify as conscientious objectors should not depend on whether they are religious.

Now, this conclusion raises the broader question whether it should ever matter how individuals are treated by the state, whether their reasons are religious. And should it ever matter whether organizations are religious. And what about messages the state conveys: should religious messages be sharply distinguished from other kinds of messages?

Does a sweeping version of equality -- one that precludes not only distinctions among religions, but also legal distinctions between religion and other categories of connections, ideas and organizations -- does that kind of sweeping version of equality best fit the conditions of religious pluralism, including nonbelief? Some scholars think so. But one wonders whether ceasing to treat religion as distinctive represents the most healthy regime for religious pluralism. I want to explore these questions briefly in terms of some special aspects of the law's treatment of religion.

So, let me start with government speech. When they speak for themselves, American governments may express all sorts of claims about both factual and normative matters. They do so both in public schools and in publications that are aimed at adults. But a government can't make claims about religious truth, and I'm putting aside here the complex question about when an official is speaking for the government. What would treating religious ideas equally with other ideas mean in this context?
Well, one possibility is the government would be able to address religious ideas like other ideas and its power to express religious ideas would greatly increase. All levels of government could opine on religious questions, as they now do on many historical, moral and political questions. Given Christian dominance, this throwback to an earlier era is not likely to benefit minority religions and nonbelievers. A different possibility is that many other areas would be marked off with religion from assertions of truth by government agencies. Now, one obvious candidate for such treatment is a ban on the government praising one political party to the detriment of another political party, but that seems a very limited restriction. Presumably, the government should be able to teach us true, factual claims supported by techniques of science and social science. Should it refrain from broad suggestions about what's a good life or about moral right and wrong? Now, some scholars have suggested that the government should be agnostic about what's a good life, limiting itself to what are just relations among citizens. But separating questions about the good life from ones of justice isn't so simple, and more to the point, it's misguided, I think, in the extreme to suppose that public schools should stop teaching that healthy activity is preferable to indolence, that excessive use of drugs and alcohol can destroy, that an advanced education not only opens up other opportunities, but can be enriching, that art and literature have value. These are messages the government should be able to express in other fora as well. In fact, there is no broader class of ideas in which ideas about religion fall that should be out of bounds for government in the manner of religious ideas. Governments are incompetent in respect to religion, and government support of one set of religious ideas is at odds with an ideal and reality of religious pluralism. In this respect at least religion still warrants special treatment, however hard it may be to say where and how religion differs from some other social phenomena.

Now, closely related to the principle that government shouldn’t involve itself in the truth or falsity of religious claims is an approach that the courts have developed in disputes between factions of churches over property. Building on a 19th century decision, the Supreme Court has consistently said that it's unconstitutional for courts to decide cases on the basis of which group is faithful to church doctrine. Rather, courts must rely on neutral principles – principles based on secular documents that set out the governing authorities – or they have to defer to the highest adjudicative bodies within hierarchical churches and to the majority within churches organized congregationally.

Now, this abstention from resolving disputed instances of doctrine and governance is well suited for religious pluralism. However ill suited most judges are to settles who's faithful to various Christian traditions, they're going to be even less able to resolve similar disputes among Muslims or Buddhists. Groups are much better off having to get their own affairs in order according to secular documents than trusting the civil courts to sort things out. A second point is a bit more arguable. In respect to most other groups that are engaged in internal disputes over the control of property or resources – say, trusts created to support modern art or cancer research – courts may play a more active role in deciding if one faction or a set of leaders has deviated too far from underlying purposes. Again, religion should be regarded as distinctive.

One way to accommodate religious exercise is to allow people with religious reasons certain liberties that most other people are denied. During Prohibition Roman Catholics and some other Christians wanted, needed to use wine for communion; members of the Native American Church
have needed to ingest peyote during worship in order to practice their religion; some Amish communities have wished to withdraw their children early from standard schooling; and some Muslim parents have wanted their children free to pray vocally at some time during the school day.

Granting legal concessions to religious practice can benefit minority groups, but there are some serious concerns: concerns about tests of honesty, about assessments of burden on religion and of public need, and about unfairness to nonreligious citizens who have similar claims. First honesty. If officials try to figure out whether someone's telling the truth, won't this work against unfamiliar, minority religions? Members of a draft board may more easily understand a young Quaker who says he cannot fight than a member of an unfamiliar Eastern religion. The worry about honesty is not serious if a privilege is sought for all participants in a group activity or is one that few people would be tempted to lie about. Wine for communion qualifies on both counts. Only participants in a service get the wine, and no outsider I think would bother to participate in order to get that small sip. But when it comes to avoiding being sent away from one's home to a dangerous war one believed the country should have never embroiled itself in in the first place – this has no reference to present conditions – people may lie. Some test of sincerity is needed. Any such test may work somewhat to the disadvantage of the unfamiliar, but what's the alternative?

In 1990 the Supreme Court abandoned an approach to religious exercise it had adopted 27 years earlier—the so-called compelling interest test. The Court announced that the Free Exercise Clause of the First Amendment conferred no privilege for special treatment on religious believers. Thus, a state law forbidding the use of peyote could be applied against members of the Native American Church. If religious believers have no privileges to be relieved of legal obligations, well, then no test of sincerity is required, but this alternative is hardly favorable to minority religions.

Congress responded to the Smith case by adopting the Religious Freedom Restoration Act, reinstating the older approach by statute, and some states have adopted similar laws. One might object that any such law is unfair to nonbelievers who also deserve respect, and I agree with this critique up to a point. Indeed, I think that equal treatment of nonreligious, conscientious objectors should be a constitutional requirement, but there are many claims that people are highly unlikely to make for nonreligious reasons. Strong nonreligious convictions that one needs a small sip of wine in a group or that one should withdraw one's children from school after eighth grade or that one must not work on Saturday are very rare. When the likelihood of similar nonreligious claims is very slight or the danger of fraud is great, limiting exemptions to religious claimants makes good sense.

Even more troubling than the questions about honesty are ones about the degree of burden on a religious practice and the strength of the government's interest in not granting an exemption. If the legislature grants a specific privilege, say, to use peyote in worship services, well, then neither executive officials nor the courts have to delve into the practices of religion or try to figure out what the possible government interest in denying an exemption would be. But when courts apply a general standard, like that of RFRA, they do need to make these difficult inquiries.
I'm going to say only a little about the strength of the government's interest. Suppose a tax is imposed and religious citizens claim a right not to pay it, or members of a religion claim they should be able to build a church in an area zoned to be purely residential. If the government's interest and uniform application of the law is very great, as it is with most taxes, refusing to grant an exemption is all right. How the test of government interest should be formulated and applied is difficult, but I'm going to focus instead on the burden for religious individuals or groups.

The government should not have to accommodate every trivial religious claim. If the members' interest in building a church in a forbidden area is that they can purchase property a little more cheaply, that is very different from an Orthodox Jewish congregation wanting to build near residences because their members must walk to worship services. How can administrators and courts possibly decide how important any particular activity is to a religious individual or congregation? And if officials make such judgments isn't that likely to work to the disadvantage of misunderstood minority religions? Yes, it is very difficult, and minority religions may suffer by comparison. But again, what's the alternative?

If courts make such judgments, judges should not decide which religious activities are really important or how any particular religion should really be understood. They must judge importance as it's taken to be by members of the religion itself. If the legal issue involves a claim of a particular individual, say, of a Jehovah's Witness not to work in a factory making war materials, a court should focus on the convictions of that individual, and that's what the Supreme Court has done. If the claim is that a group should engage in activity, a court must do the best it can to discern how important the practice is for the members as a group. It should demand that an important religious practice be frustrated or that someone have a strong religious conviction that he perform an act that the government is discouraging.

Now, just stating this inquiry shows how debatable the answer is going to be in many cases. Will it be harder for members of minorities to make their claims? Probably. A distaste for the unfamiliar may cause judges and other officials to underrate claims of burdens on religions they regard as bizarre.

The obvious alternative is for courts and administrators not to make judgments about importance. This could mean rewarding any religious reasons, however trivial, but that's not a likely scenario that every trivial religious reason is going to get legal protection. Not making any accommodations to religion is far more likely – the result the Smith decision reaches about the First Amendment. That regime would be worse for members of minority religions than a preliminary investigation about burden.

But wait, there is yet another alternative – looking to see if a refusal to exempt involves discrimination. According to this view, the inquiry in a case like Smith should be whether members of the Native American Church suffered discrimination from the law that forbade use of peyote and did not make an exception for them. Now, one claimed advantage of this approach is precisely that it avoids questions of importance and government interest. You just look to see if there's discrimination. But unless the category of what counts as discrimination is very limited, this approach admits through the backdoor what it shuts out in front. Here is what I mean.
When the law itself is neutral on its face, allowing no one to use peyote, we could limit the idea of discrimination to circumstances in which the lawmakers intend to harm a religion or treat its members worse than other citizens. In that event, the Native American Church would lose unless it could show that state legislators had a wish, a purpose to treat their church badly. Now, that's usually a hard showing to make. The protection against discrimination would become robust only if it included what we might call reckless or negligent disregard of the interests of a religion. If legislators know that a law will impinge badly on a religious minority but don’t care -- don’t care in a way they would care about the effect on a more popular religious -- that would be reckless disregard. Negligent disregard is when legislators are unaware of such an affect, although they should be. Thus, the Native American Church could argue that legislators would never have adopted a law with such drastic, negative effects on a mainstream religion.

Using a broad notion of discrimination is, I think, a promising method to give effect to ideals of equality. But we'd be fooling ourselves if we thought this was a way to avoid judgments either about burdens on religious practices or about the strength of government interests. Such judgments are implicated in the very process of accessing possible discrimination.

Judges will rarely know exactly what legislators were thinking when they did not make an exception from some general prohibition. So, judges will need to think about what reasonable legislators would have had in mind. If the religious activity was trivial or the government interest in stopping the activity across the board was very strong, a reasonable legislator would not write an exception into the statute. If the religious activity was very important and the government interest in stopping that particular manifestation of the prohibited action was slight, an astute, fair legislator would make an exception. Now, that's just what I believe is true about the use of peyote, which is the center of the worship service of the Native American Church. But we can see that it's just our judgments about the importance to the religion and about the government interest that now underlie our judgment about discrimination. That's how these inquiries enter in the backdoor.

I've thus far neglected a final topic that concerns the treatment of religion--deciding what counts as religious. If a religion is going to receive special treatment, whether it is receiving a benefit or being subject to special restrictions, courts must be able to say whether a practice or a claim is religious or not. Now, in most cases that's going to be an easy decision, but sometimes it isn't. A definition of religion might itself work to the disadvantage of the unfamiliar. That would be obvious for the old definition in terms of relating to a Supreme Being which the Supreme Court used a long time ago. My own view is that rather than starting from a typical definition, courts should identify characteristics of what are undoubtedly religions in the world and ask whether the disputed incidence shares many of the same characteristics. Instead of stating necessary and sufficient conditions, this approach -- an approach used by Arlin Adams in a case deciding that a course in Transcendental Meditation could not be taught in New Jersey's public schools -- this approach understands religion in the way that Ludwig Wittgenstein understood the category of games, for those of you who are familiar with that writing. To be sure, even this approach may be applied in a way that could be disadvantageous to the unfamiliar. But again, what is the alternative? There can be no concessions to religious claims and religious groups as such unless courts are able to say, "What is religious?" Now, the law's method of categorization must be one
that lawyers can feasibly use. This means it must be more or less close to how the boundaries of religion are understood in other disciplines. It may not track what the other disciplines treat as the boundaries of religion because the needs of the law may be somewhat different.

Now, in conclusion, the general lessons that I draw from these inquiries are the following. First, the special treatment of religion in comparison with other subjects is, on balance, often usually beneficial to minority religions. Second, the law must often settle for something less than an ideal. Legal standards of all sorts are applied to favor dominant groups to the disadvantage of outsiders. Increase of about sincerity, importance and the boundaries of religion may work to the disadvantage of minority religious movements within a pluralist religious culture, but the alternative of not engaging these inquiries will leave members of these groups worse off. Some likely disadvantage in application is preferable, I've argued, to not using the standards at all. Third, one endeavor of the Center, this wonderful Center, in the next decade may be to study just when the law should treat religion as distinctive and how the necessary legal inquiries may be undertaken as consistently as is humanly possible with ideals of equality. Thank you.