RESPONSE TO STEVE CALABRESI AND ABE SALANDER

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I am pleased to respond to the astute and provocative essay by Steven Calabresi and Abe Salander. We agree that some violations of religious freedom are best understood as violations of equality.1 We also share the view that the Fourteenth Amendment should protect citizens against religious discrimination. However, I argue that it is important to narrow the kinds of claims that can be brought under an equal protection framework.2 There is a free speech right of religions to express discriminatory views free from government bans or coercion. But discriminatory practices, even if religious in nature, should not be entitled to exemption from general laws as a matter of equal protection.

The Fourteenth Amendment appropriately protects against discrimination that views a religion as a “caste” or inferior group. The rule against caste-based discrimination presumptively prohibits using race, ethnicity or national origin as a basis for distinctions between people. Like Calabresi and Salander, I believe that the rule against caste-based discrimination can also extend to religion. Discrimination against religious groups can take the form of a status distinction. For example, banning Jews or Muslims from entering a public building would be just as odious from the perspective of the Equal Protection Clause as prohibitions against entrance by blacks. Such a ban would treat Jews and Muslims as having an inferior status as citizens.

Calabresi and Salander, however, go beyond criticizing caste-based discrimination against religion. They argue, much more broadly, that the state’s impact on specific religious beliefs should be subject to strict scrutiny by the courts.3 On their view, citizens should have an equal protection claim to be exempted from an otherwise general law, if it adversely impacts their specific religious practices or beliefs. For example, in the Christian Legal Society case, a law school had a general policy of not actively funding discriminatory student groups. Following this policy, the law school did not grant funding to the Christian Legal Society (CLS), since it discriminated against gays. Calabresi and Salander would treat the law school’s policy as having an adverse impact on the Christian Legal Society’s religious beliefs regarding gays. They would allow the CLS to claim an exemption from the school’s funding policy under the Equal

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Protection Clause. This interpretation of equal protection would wrongly bring back a version of the “accommodationist” jurisprudence rejected by the Court in *Smith*. In their view, like the Court’s pre-Smith religious jurisprudence, the adverse impact of general laws on specific religious beliefs to give rise to a constitutional claim. The general laws, even those aimed at ending caste-based discrimination, would then be subject to strict scrutiny.

In my view, equal protection appropriately applies to cases in which religion is treated as a proxy for caste. A policy barring state agencies from hiring Muslims, for instance, would be a paradigmatic violation of equal protection. As Calabresi and Salander rightly suggest, the actions by the town council of Hialeah in *Lukumi* also violated equal protection. In the *Lukumi* case, the town of Hialeah’s ban on animal “sacrifice” targeted the Santeria religion as a caste or inferior group.4

However, I argue that we need to distinguish between caste-based religious discrimination and the adverse impact of general laws. Prohibiting the government from having any adverse impact on particular religious beliefs or practices, even discriminatory ones, would excessively limit its ability to rectify discrimination based on religion. Allowing the impact on all religious beliefs and practices to trigger an equal protection claim would risk undermining the state’s obligation to oppose discrimination and thus would risk undermining the very core of the Equal Protection Clause.

The expression of discriminatory religious beliefs should be protected as a matter of free speech. It would be unconstitutional to prohibit those beliefs. But under Calabresi’s and Salander’s analysis, discriminatory religious beliefs would enjoy additional constitutional protection under the Equal Protection Clause. General laws could not have any adverse effect on them. However, the state often has good reason to combat various forms of discrimination, including discrimination that is religiously motivated. For example, the state should be free to refrain from funding discriminatory religious student groups. Discriminatory religious beliefs should not be given constitutional protection as a matter of equal protection, because the Constitution prioritizes opposition to arbitrary discrimination, whether grounded in religion or not.

Sometimes the protection of religious freedom mandates that religious-and caste-based laws be struck down. Paradigmatically, a law based in Hindu-inspired belief in castes that discriminated based on family lineage would be unconstitutional. Even though striking down a law would limit the religious practices intertwined with the caste system, the prohibition on caste requires that we choose non-discrimination over preventing the government from impacting particular religious practices.5

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Calabresi and Salander find that the litigants’ claims in *Yoder* trigger an equal protection claim, but I think the case might instead be viewed, as in the caste system example, as a religious practice that is at odds with a commitment to equal status under law. In *Yoder*, the Amish practice of religious education was adversely impacted, but only as the result of a mandate that advanced the equal interests of all students. Finding that the Amish should not be exempt from the requirement that children receive a standard education might have adversely impacted particular Amish religious practices. But this impact is not an instance of caste-based discrimination. To the contrary, the policy sought to ensure that Amish children had the ability to function as equal citizens. It aimed to avoid these children becoming part of an uneducated inferior caste. As Justice Douglas’ dissent argued, to raise children as equal citizens requires public schooling, and parents may not shield their children from basic education. Since this requirement does not treat the Amish as a caste, *Yoder* should not be seen as analogous to *Lukumi*. For similar reasons I dissent from Calabresi’s and Salander’s contention that the equal protection clause is violated by public education systems that do not fund religious schools. Even if certain religions, like the Amish, view non-religious education as conflicting with their religious commitments, these groups are not subject to status or caste based discrimination. Rather their religious beliefs are adversely impacted by a system that aims to secure equal status for all children. In my view, this should not give rise to an equal protection claim.

The case for not applying equal protection analysis to general policies that adversely impact religious beliefs can be seen clearly in the case of Christian Legal Society (CLS). In this case, Hastings College of the Law denied official recognition and funding to a religious organization that discriminated against gays in leadership positions. The case would have been ripe for equal protection review according to Calabresi and Salander. They would decide the case in favor of granting official funding to the discriminatory religious student groups, and exempting them from the school’s rules for receiving active financial support. But in my view, the organization was not being discriminated against as a caste. To the contrary, Hastings’ non-discrimination policy aimed at preventing caste-based discrimination against gays. Even if the policy adversely affects the beliefs of members of the CLS, the policy serves to prevent caste-based discrimination. This is not a violation of the Equal Protection Clause. It is an advancement of the same value of non-discrimination that underlies the Equal Protection Clause itself.

8. See COREY BREITSCHEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? 54
Yoder and CLS are not cases in which religion is treated as a caste. They are instances in which religious beliefs are adversely affected by generally justifiable laws. Indeed, both cases are instances of the state trying to pursue equality-based policies, even though they have an adverse impact on certain inegalitarian religious beliefs.

It is clear then that my analysis breaks with Calabresi and Salander in a fundamental way. While I agree that the Equal Protection Clause is relevant in preventing religions from being treated as an inferior caste, I think it crucial to distinguish between such discrimination and general policies that adversely impact religious belief. Indeed, the very idea of religious tolerance has its origin in transforming intolerant religious beliefs. For religious tolerance would not be possible if religiously motivated discrimination or hatred spread throughout a society. It should not be surprising then that the concern to preserve equal protection and to prevent discrimination might impact discriminatory religious beliefs. A commitment to equal protection itself can require affecting religious beliefs and practices.