RELIGIOUS LIBERTY, RACIAL JUSTICE, AND DISCRIMINATORY IMPACTS: WHY THE EQUAL PROTECTION CLAUSE SHOULD BE APPLIED AT LEAST AS STRICTLY AS THE FREE EXERCISE CLAUSE

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ABSTRACT

This Article offers a critical comparative analysis of the Supreme Court's jurisprudence under the Free Exercise Clause and the Equal Protection Clause. In a number of recent cases, the Court has shown increasing solicitude for the rights of religious objectors and has upheld claims for exemptions from various laws—even in the absence of an intent by the government to discriminate against religion. This stands in stark contrast to the Court's approach in cases involving claims of racial discrimination. Despite the harsh light that the COVID-19 pandemic, the Black Lives Matter movement, and other events have cast on the systemic inequalities that persist throughout American society, the Court has remained staunchly unmoved by the law's disparate impacts on BIPOC communities and has insisted that claimants prove a discriminatory purpose in order to prevail. As a result, religious groups have greater rights to engage in some forms of discrimination than racialized minorities do to combat the effects of discrimination. This doctrinal dichotomy is untenable. As a matter of constitutional history, text, and structure, racial equality is an equal if not dominant value relative to religious liberty. Any move to strengthen the Free Exercise Clause by recognizing disparate impact liability for religious objectors must therefore be accompanied by a corresponding move to recognize such liability for BIPOC individuals under the Equal Protection Clause.

INTRODUCTION

The years 2020 through 2021 brought massive disruptions to many areas of American life. The COVID-19 pandemic reached the United States in January of 2020,[1] and public officials began to recommend or impose limitations on interpersonal activities shortly thereafter.[2] The Centers for Disease Control advised in mid-March that gatherings of fifty or more people should not be held for the next eight weeks, while many state and local governments issued guidelines of their own.[3] Major cities like New York, Los Angeles, and Boston

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1. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), https://www.nytimes.com/article/coronavirus-timeline.html [https://perma.cc/P57Q-4PL3].

2. *See id*.

3. *C.D.C. Gives New Guidelines, New York to Close Restaurants and Schools and Italian Deaths Rise*, N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/15/world/coronavirus-

closed their public schools for in-person instruction and transitioned to online learning.[4] Governors across the country issued more stringent and sweeping closure orders that allowed only essential businesses and services to remain open.[5]

Predictably, disputes arose as to the scope of the term "essential."[6] Churches did not meet the definition in some jurisdictions, meaning that they were not exempt from closure orders or limitations on gathering sizes.[7] Former President Donald Trump soon threatened to "override" state governors who refused to allow houses of worship to reopen,[8] and several religious groups challenged the orders on Free Exercise grounds.[9] The Supreme Court turned away the first such challenge to come before it in *South Bay United Pentecostal Church v. Newsom*.[10] There, the petitioners sought to enjoin enforcement of an order issued by the Governor of California limiting attendance at places of worship to the lesser of 100 persons or 25 percent of building capacity.[11] Chief Justice Roberts joined the majority in denying the application for injunctive relief, and wrote separately to emphasize that the governor's order appeared to be consistent with the Free Exercise Clause because it was neutral with respect to religion: "Similar or more severe restrictions apply to comparable secular gatherings . . . . And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in

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live.html [https://perma.cc/JS5S-7M89].

4. Eliza Shapiro, *New York City Public Schools to Close to Slow Spread of Coronavirus*, N.Y. TIMES (Mar. 15, 2020), https://www.nytimes.com/2020/03/15/nyregion/nyc-schools-closed.html [https://perma.cc/4FNA-AHDM]; Howard Blume et al., *Millions Affected as Schools Across U.S. Close to Combat Spread of Coronavirus*, L.A. TIMES (Mar. 14, 2020), https://www.latimes.com/california/story/2020-03-14/schools-close-coronavirus [https://perma.cc/DL7R-YMS3]; Katie Johnston & Bianca Vázquez Toness, *Boston Gears Up for School Shutdown*, BOSTON GLOBE (Mar. 17, 2020), https://www.bostonglobe.com/2020/03/15/nation/bps-providing-students-with-chromebooks-while-schools-are-closed-due-coronavirus/ [https://perma.cc/LW6U-XBPE].

5. *See* Patrick McGeehan & Matthew Haag, *These Stores are 'Essential' in the Pandemic. Not Everyone Agrees.*, N.Y. TIMES (Apr. 14, 2020), https://www.nytimes.com/2020/03/27/nyregion/coronavirus-essential-workers.html [https://perma.cc/WR9Z-4MXE]; Joan E. Greve et al., *US State Governors Impose Tighter Restrictions to Slow Coronavirus Spread*, GUARDIAN (Mar. 20, 2020), https://www.theguardian.com/us-news/2020/mar/20/new-york-coronavirus-andrew-cuomo-non-essential-workers-businesses [https://perma.cc/TZR8-T5FY].

6. McGeehan & Haag, *supra* note 5.

7. Peter Baker, *Firing a Salvo in Culture Wars, Trump Pushes for Churches to Reopen*, N.Y. TIMES (May 22, 2020), https://www.nytimes.com/2020/05/22/us/politics/trump-churches-coronavirus.html [https://perma.cc/88GQ-SRX9].

8. *Id*.

9. Adam Liptak, *Supreme Court, in 5-4 Decision, Rejects Church's Challenge to Shutdown Order*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/05/30/us/supreme-court-churches-coronavirus.html [https://perma.cc/D893-R8D9].

10. 140 S. Ct. 1613 (2020).

11. *Id*. (Roberts, C.J., concurring).

large groups nor remain in close proximity for extended periods."[12]

Yet just a few months later, the Chief Justice found himself in the minority when the Court granted an injunction against enforcement of an analogous order issued by the Governor of New York. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the order capped attendance at religious services at ten persons in designated "red zones" and twenty-five persons in "orange zones."[13] This time, the Court held that the order was not religiously-neutral insofar as it imposed no similar admissions caps on many secular businesses and services that had been deemed essential.[14] In other words, "the regulations [could not] be viewed as neutral because they single[d] out houses of worship for especially harsh treatment."[15] Justice Sotomayor noted in dissent that the New York order did in fact apply similar attendance restrictions to comparable secular gatherings such as concerts and movie showings.[16] As for the exempted businesses and services, public health experts had concluded that these did not pose the same health risks as religious services and other sizeable events because they did not involve "large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time."[17] There was therefore no issue of religious discrimination in her view, since religious activities were being treated at least as favorably as comparable secular activities.[18]

The dispute amongst the Justices in these cases is consistent with larger divisions about the state of Free Exercise Clause jurisprudence. Ever since *Employment Division v. Smith*[19] was decided in 1990, the rule has been that neutral laws of general applicability do not violate the Free Exercise Clause or trigger strict scrutiny merely because they impose burdens on religious practice.[20] In *South Bay United Pentecostal Church* and *Diocese of Brooklyn*, much of the disagreement between the majority and dissenting opinions focuses on what it means for a law to be "neutral" and "generally applicable" for purposes of the *Smith* rule.[21] But in other cases, the issue seems to be whether the *Smith* rule should continue to endure at all.[22] Indeed, that very question was directly posed to the Justices during the October 2020 term in *Fulton v. City of Philadelphia*.[23] Although the *Fulton* case itself did not arise out of closure orders issued during

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12. *Id*.
13. 141 S. Ct. 63 (2020) (per curiam).
14. *Id*. at 66-67.
15. *Id*. at 66.
16. *Id*. at 79 (Sotomayor, J., dissenting).
17. *Id*.
18. *See id*.
19. 494 U.S. 872 (1990).
20. *Id*. at 878-79, 882-89.
21. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614-15; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 63, 75-82.
22. *See, e.g.*, Fulton v. Philadelphia, 141 S. Ct. 1868, 1876 (2021).
23. *Id*.

the pandemic, it is a natural culmination of many of the arguments about the scope of religious liberty that have been brought to the fore during the COVID-19 era.[24] This Article will analyze the Court's resolution of those arguments in *Fulton* and assess the implications of the decision for Free Exercise jurisprudence.

At the same time, this Article will also analyze the implications of *Fulton* and other recent Free Exercise cases for a separate area of jurisprudence—namely, the Equal Protection Clause. For if the events of 2020-2021 have accentuated the challenges posed to religious freedom under existing legal frameworks, they have highlighted even more starkly the disparities that Black Americans and members of other BIPOC[25] communities continue to face in so many areas of American life. The COVID-19 pandemic itself is an illustrative example. Studies consistently show that Black and Latinx people have been disproportionately affected by the coronavirus—ranging from higher rates of infection to lower rates of vaccination.[26] Other studies suggest that these differences are attributable to "structural determinants—including inequality in housing, access to care, differential employment opportunities, and poverty—that remain pervasive in Black and Hispanic communities."[27] These determinants themselves have their origins in a long history of discrimination sanctioned or imposed by law.[28]

The Black Lives Matter protests that took place contemporaneously with the coronavirus crisis likewise have brought renewed attention to structural inequalities that BIPOC individuals face in the criminal justice system and in

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24. *Id.* at 1874-76.

25. "BIPOC" is an acronym for Black, Indigenous, and People of Color. It is intended to be an inclusive term, but it has attracted its own share of criticism when used in ways that fail to account for the different experiences of different communities. *See* Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/article/what-is-bipoc.html [https://perma.cc/BDH5-F3EZ].

26. *See COVID-19 Racial and Ethnic Health Disparities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/increased-risk-illness.html [https://perma.cc/XHP4-2V3J]; Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequality of Coronavirus*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html [https://perma.cc/243U-FVTT]; Amy Schoendfeld Walker et al., *Pandemic's Racial Disparities Persist in Vaccine Rollout*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/interactive/2021/03/05/us/vaccine-racial-disparities.html [https://perma.cc/KN9H-32SS].

27. Gbenga Ogedegbe et al., *Assessment of Racial/Ethnic Disparities in Hospitalization and Mortality in Patients with COVID-19 in New York City*, JAMA NETWORK OPEN (Dec. 4, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2773538 [https://perma.cc/GY26-K38M]; *see also* Gina Kolata, *Social Inequities Explain Racial Gaps in Pandemic, Studies Find*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/2020/12/09/health/coronavirus-black-hispanic.html [https://perma.cc/N45T-ZKTP].

28. *See infra* Part II.

American society more broadly.[29] Again, these inequalities did not just emerge by happenstance, but rather are traceable to longstanding constitutional rules and doctrines.[30] Some of these doctrines make it extraordinarily difficult to challenge laws and practices that have dramatically disparate impacts on racial and ethnic minorities. Notwithstanding the Fourteenth Amendment's command that no state shall deny any person the equal protection of the laws,[31] the Supreme Court has long interpreted this language to mean only that government may not *intentionally* discriminate on the basis of categories such as race or ethnicity.[32] Thus, in the absence of sufficient proof of discriminatory purpose, the fact that a government practice may have a racially discriminatory impact does not make it unconstitutional.[33]

So what is the link between Free Exercise Clause and Equal Protection Clause jurisprudence? For the past several decades, both doctrinal areas have used similar analytic frameworks: if a facially neutral law does not intentionally discriminate on the basis of religion or a category like race, it does not violate either Clause simply because it imposes burdens on a religious or racial group.[34] Arguments advanced in cases like *Fulton* have destabilized that symmetry by essentially recognizing disparate impact liability with respect to claims of religious discrimination. The core thesis of this Article is that any move to reinterpret the Free Exercise Clause in such a manner must come in tandem with a corresponding move to reinterpret the Equal Protection Clause to recognize disparate impact liability with respect to claims of racial and ethnic discrimination.

The Article develops this thesis in the following way. Part I traces the evolution of Free Exercise Clause jurisprudence from *Smith* to *Fulton*, with particular attention to the doctrinal shifts and realignments that have taken place among liberals and conservatives in the intervening years. Part II analyzes disparate impact jurisprudence under the Equal Protection Clause, drawing upon the lessons of the COVID-19 pandemic and the Black Lives Matter movement to

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29. *See, e.g.*, Audra D.S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Now?* N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html [https://perma.cc/88EB-CM7A]; Jose A. Del Real et al., *How the Black Lives Matter Movement Went Mainstream*, WASH. POST (June 9, 2020), https://www.washingtonpost.com/national/how-the-black-lives-matter-movement-went-mainstream/2020/06/09/201bd6e6-a9c6-11ea-9063-e69bd6520940_story.html [https://perma.cc/WQN8-J78G].

30. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Paul Butler, *The System is Working the Way it is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1470 (2016).

31. U.S. Const. amend XIV, § 1.

32. *See* Washington v. Davis, 426 U.S. 229, 235-36 (1976).

33. *See id.*; *see also* McClesky v. Kemp, 481 U.S. 279 (1987).

34. *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540-41 (1993).

sharpen the critique and highlight the injustices of the current state of the law. Finally, Part III argues that as fundamental as religious liberty surely is in the American constitutional tradition, racial and ethnic equality should be regarded as a dominant constitutional value as a matter of history, text, and structure. Consequently, the Equal Protection Clause should be interpreted and applied with at least as much force as the Free Exercise Clause going forward.

I. THE ROAD TO RELIGIOUS EXEMPTIONS: THERE AND BACK AGAIN?

Even before the question was directly presented in *Fulton*, the possibility of revisiting the *Smith* rule had been raised by some of the Court's conservative Justices in other recent cases.[35] However, support for a constitutional right to religious exemptions from neutral and generally applicable laws was not originally associated with judicial conservatism. To the contrary, the high-water mark in recognizing such exemptions was arguably reached during the Warren Court era—a jurisprudential period widely celebrated by liberal legal scholars and lamented by their conservative counterparts.[36] In *Sherbert v. Verner*, the Supreme Court considered a challenge to a state law that conditioned eligibility for unemployment benefits on the applicant's willingness to accept work when offered.[37] The petitioner was a member of the Seventh Day Adventist church who had religious objections to accepting employment that would require her to work on Saturdays.[38] Justice Brennan's majority opinion held that the law had the practical effect of forcing the petitioner "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[39] The government could put the petitioner to this choice only if it had a compelling interest in doing so—i.e., only if it could satisfy strict scrutiny.[40] This was the first

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35. *See* Masterpiece Cakeshop v. Colo. C. R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) (opining that "*Smith* remains controversial in many quarters"); René Reyes, *Masterpiece Cakeshop and Ashers Baking Company: A Comparative Analysis of Constitutional Confections*, 16 STAN. J. C.R. & C.L. 113, 131 (2020) (discussing Gorsuch's opinion); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 162 (2018) (same)*; see also* Kennedy v. Bremerton School Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in denial of cert.) (characterizing *Smith* as "drastically cut[ting] back on the protection provided by the Free Exercise Clause"); Erwin Chemerinsky, *Symposium: The New Court and Religion*, SCOTUSBLOG (July 26, 2019) (citing Alito's concurrence and predicting that at least four Justices "want to reconsider and overrule" *Smith*), https://www.scotusblog.com/2019/07/symposium-the-new-court-and-religion/ [https://perma.cc/5676-7VFQ].

36. *See* Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CAL. L. REV. 1101, 1103 (2012) ("[L]iberal law professors overwhelmingly sing the Warren Court's praises; conservative law professors, conversely, sing only the blues.").

37. 374 U.S. 398 (1963).

38. *Id*. at 399-400.

39. *Id*. at 404.

40. *See* Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1715 (2000);

time that the Court used strict scrutiny to strike down application of a generally applicable law under the Free Exercise Clause without also invoking other constitutional safeguards.[41]

This strict scrutiny framework and the presumptive right to religious exemptions that emerged in the liberal Warren Court era met their effective demise in the more conservative Rehnquist Court era.[42] Writing for the *Smith* majority, Justice Scalia rejected the Free Exercise claims of two members of the Native American Church who had been fired from their jobs after ingesting peyote for sacramental purposes.[43] They were subsequently denied unemployment compensation because peyote was a controlled substance under state law, and their use of the drug was considered work-related "misconduct."[44] Despite the apparent parallels to *Sherbert*, the Court held that the Free Exercise Clause gave respondents neither a right to unemployment benefits nor to a religious exemption from the state's prohibition on the use of peyote.[45] Instead, the Court concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[46] Nor did the Free Exercise Clause require the state to articulate a compelling government interest before refusing an exemption to religious objectors.[47] The majority held that test to be inapplicable to challenges against "generally applicable prohibitions on socially harmful conduct," concluding that to require the state to provide a compelling interest for refusing religious exemptions would "contradict[] both constitutional tradition and common sense."[48] *Sherbert* itself was not expressly overruled, but was henceforth to be confined to unemployment compensation cases—or more precisely, to those unemployment compensation cases that did not also involve a generally applicable criminal law.[49]

The practical effect of *Smith* was to do away with disparate impact liability

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Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 614 (1995).

41. *See* Choper, *supra* note 40, at 1714.

42. *See, e.g.*, Richard H. Fallon Jr., *The 'Conservative' Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 433 (2002) (arguing that "[i]n some senses of the term, the [Rehnquist] Court is indisputably a conservative one"); Erwin Chemerinsky, *Further Thoughts*, 54 OKLA. L. REV. 59, 61 (2001) (suggesting that several cases decided during the Rehnquist Court era are indicative of "a conservative Court now advancing conservative values").

43. Emp. Div. v. Smith, 494 U.S. at 874.

44. *Id*.

45. *Id.* at 890.

46. *Id*. at 879 (internal quotation marks omitted).

47. *Id*. at 885.

48. *Id*.

49. *Id*. at 883-84*; see also* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 48 (1990) (discussing overlap between unemployment compensation and criminal law cases).

for religious claimants.[50] For under the majority's reasoning, "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[51] Justice Scalia emphasized that this did not mean that religious claimants would necessarily be bereft of legal protection.[52] However, he was also quite explicit in acknowledging that much of this protection would be subject to the vagaries of majoritarian politics and that minority groups might suffer as a result:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[53]

The *Smith* Court thus seemed content to entrench a constitutional framework in which those who hold political power and privilege enjoy a greater measure of rights and freedoms than those who do not. If religious majorities pass generally applicable laws that are more hospitable to their own practices than they are to the practices of Native American or other minority faith traditions, so be it. Stated simply, *Smith* fits comfortably within a long and broad tradition of decisions described by Professor Cheryl Harris as legitimizing "expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination."[54] The main difference in this context is that the privileged majority is not only white, but also Christian.[55]

The state of Free Exercise Clause jurisprudence was subject to robust scholarly criticism in the aftermath of the *Smith* decision. Commentators critiqued the Court for its departures from historical understandings, its dubious characterization of precedent, and its disregard for constitutional values.[56] The

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50. *Smith*, 494 U.S. at 878.

51. *Id.*; *see also* Laycock, *supra* note 49, at 8-9 (quoting and discussing "incidental effect" language); René Reyes, *Common Cause in the Culture Wars?*, 27 J.L. & RELIGION 231, 252 (2012).

52. *Smith*, 494 U.S. at 890.

53. *Id*.

54. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715 (1993).

55. Although the religious demographics of the United States have changed significantly over time, recent surveys show that approximately 65% of American adults still describe themselves as Christian. *See* Pew Research Center, *In U.S., Decline of Christianity Continues at Rapid Pace* (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ [https://perma.cc/GCF2-3RJW].

56. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (arguing that intellectual and constitutional history is consistent with right to religious exemptions); Michael. W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's*

Court remained unmoved by these reactions and showed little interest in revisiting the *Smith* rule.[57] The most that the Court did was to clarify that the rule did not give license to deliberately discriminate against religious practice or to ban certain conduct only when it is engaged in by religious groups.[58] *Smith* itself acknowledged that it would violate the Free Exercise Clause for the government to prohibit "acts or abstentions only when they are engaged in for religious reasons."[59] The subsequent case of *Church of Lukumi Babalu Aye, Inc. v. Hialeah* applied this limiting principal in striking down a municipal ordinance that prohibited certain forms of animal sacrifice.[60] While the Court reiterated 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,"[61] it also emphasized that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[62] The majority concluded that even if the ordinances could be regarded as facially neutral, the circumstances surrounding their adoption indicated that they were designed to target the sacrificial practices of a single African-Caribbean religious tradition known as Santeria.[63] The majority further concluded that the ordinances were not in fact generally applicable, insofar as they contained numerous exceptions for the killing and consumption of animals when undertaken for non-religious reasons.[64] The ordinances therefore enjoyed no presumption of validity and were struck down

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Historical Arguments in City of Boerne v. Flores, 39 WM. & MARY L. REV. 819 (1998); Laycock, *supra* note 49, at 2-3 (maintaining that "the Court's account of its precedents in *Smith* is transparently dishonest"); René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725 (2011) (contending that *Smith* decision offers inadequate protection for rights of conscience); Reyes, *supra* note 51 (same)*; but cf.* Philip A. Hamburger, *A Constitutional Right to Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (calling into question McConnell's historical arguments); Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671 (2011) (arguing that *Smith* was not the radical departure from precedent that many critics have suggested); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (acknowledging problems with *Smith* decision but nevertheless arguing against religious exemptions on substantive grounds).

57. *See* Kendrick & Schwartzman, *supra* note 35, at 162 (noting that "despite early and pervasive opposition to *Smith*, the Court has shown no signs of interest in revisiting its landmark decision").

58. *Smith*, 494 U.S. at 877.

59. *Id.*

60. 508 U.S. 520, 527-28 (1993).

61. *Id*. at 531.

62. *Id*. at 533.

63. *Id*. at 534-42.

64. *Id*. at 543-46.

under strict scrutiny.[65]

Hialeah was surely an important decision for members of the Santeria community, but the broader significance of the case was rather limited.[66] The Court noted that similar instances of such direct religious suppression were difficult to find in the caselaw,[67] and the majority did not cast any doubt on the continuing validity of the *Smith* rule.[68] *Hialeah* thus may have served as a helpful reminder that overt discrimination against a particular faith is unconstitutional, yet it did nothing to question the legitimacy of neutral and generally applicable laws that have the effect of preferencing the interests of the dominant political group. Perhaps as a result, the Free Exercise Clause's doctrinal significance declined to such a degree over the ensuing decades that scholars came to describe the Clause as "redundant"[69] or even "otiose."[70] Indeed, *Hialeah* would prove to be the last time that the Supreme Court relied on the Free Exercise Clause as an independent and sufficient basis for striking down a law burdening religious practice for almost twenty years.[71]

The Free Exercise Clause did not begin to reemerge as a potent source of constitutional protection until after the transition to the Roberts Court. One of the first signs of a shift in doctrinal approach came in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*.[72] In that case, the Court considered a claim brought under the Americans with Disabilities Act ("ADA") against a religious school's decision to terminate a teacher who had been diagnosed with narcolepsy.[73] Because the ADA and other antidiscrimination statutes like Title VII of the Civil Rights Act of 1964 are neutral laws of general applicability, a number of scholars argued that they should apply equally to religious and secular employers alike in accordance with the *Smith* rule.[74] However, the Court dismissed the relevance of *Smith* in a single short paragraph.[75] The Court acknowledged that the ADA provision was "a valid and neutral law of general

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65. *Id*. at 546-47.

66. *See id*. at 520; *see also* Reyes, *supra* note 56, at 731-32 (assessing implications of decision).

67. *See Hialeah,* 508 U.S. at 523.

68. *See id.* at 520; *see* Reyes, *supra* note 56, at 732; Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 892 (1994).

69. *See* Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 73 (2001) ("Contemporary constitutional doctrine may render the Free Exercise Clause redundant.").

70. *See* Reyes, *supra* note 56, at 737 ("In short, the Free Exercise Clause may well have become doctrinally otiose").

71. *See id.* at 732-37 (surveying and analyzing cases).

72. 565 U.S. 171 (2012).

73. *See id*. at 177-80.

74. *See, e.g.,* Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 NW. U. L. REV. COLLOQUY 96, 98-101 (2011–2012); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1981-85 (2007); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1193-96 (2004).

75. *See Hosanna-Tabor*, 565 U.S. at 190.

applicability,"[76] but distinguished *Smith* as involving "government regulation of only outward physical acts"[77]—whereas the instant case "concern[ed] government interference with an internal church decision that affects the faith and mission of the church itself."[78] The Court accordingly found that there was a "ministerial exception" to employment discrimination laws rooted in both the Establishment and Free Exercise Clauses,[79] and concluded that the exception applied to bar the claims of the terminated teacher under the facts of her case.[80]

Recognition of the ministerial exception created a significant dichotomy between the rights of religious individuals and the rights of religious institutions. As summarized by Professor Leslie Griffin, the combined upshot of *Smith* and *Hosanna-Tabor* is that "individuals must obey the law but religious institutions need not."[81] Nor is the preferential treatment enjoyed by institutions over individuals the only notable difference between *Smith* and *Hosanna-Tabor*. The former case involved the rejection of claims brought by members of the Native American Church;[82] the latter involved the vindication of privileges invoked by a large Christian denomination.[83] As further highlighted by Professor Griffin, "the ingestion of peyote is a profound religious ritual with a long American history predating the Constitution. In sharp contrast, the ministerial exception involves cases where employees allege disabilities discrimination, retaliation, pregnancy discrimination, sexual harassment, hostile work environment, unequal pay, race discrimination, gender discrimination, and other civil rights violations."[84] Yet the Court clearly prioritized one set of practices over the other. Moreover, in the course of so doing, the Court seemingly abandoned its commitment to the democratic process as the best mechanism for recognizing any exemptions from neutral and generally applicable laws.[85] Surely majority rule should not be the norm only when the rights of individual members of minority groups are at stake. But like *Smith* before it,[86] *Hosanna-Tabor* falls within a pattern of cases in which the Court's analytic approach shifts along with the identity of the parties involved—often to the benefit of those who have historically held political power and influence.[87]

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76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.* at 188-90.

80. *See id.* at 191-92 (emphasizing "the formal title [of minister] given [her] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church").

81. Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 984 (2013).

82. *See* Emp. Div. v. Smith, 494 U.S. 872 (1990).

83. *See Hosanna-Tabor*, 565 U.S. at 177.

84. Griffin, *supra* note 81, at 993.

85. *See supra* notes 53-55 and accompanying text.

86. *See supra* note 55 and accompanying text.

87. *See* Harris, *supra* note 54, at 1761-77 (exploring ways in which courts have historically

Perhaps unexpectedly, the result in *Hosanna-Tabor* was unanimous and therefore does not lend itself to easy categorization as a conservative effort to redefine Free Exercise Clause jurisprudence.[88] Subsequent cases, however, would reveal a growing ideological divide among the Justices with respect to exemptions for religious objectors.[89] Much of the discourse and division has arisen in the context of religious opposition to same-sex marriage. When the Supreme Court first recognized a constitutional right to marital equality in *Obergefell v. Hodges*[90] in 2015, Chief Justice Roberts observed in his dissent that "[h]ard questions [will] arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage,"[91] and warned that "these and similar questions will soon be before this Court."[92] Justice Thomas likewise judged it to be "all but inevitable that [marital equality and religious liberty] will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."[93] Notably, Thomas also maintained that "[r]eligious liberty is about freedom of action"[94] rather than just about freedom of belief and expression—an implicit retreat from *Smith's* insistence that the Free Exercise Clause primarily protects the latter.[95]

It did not take long for the *Obergefell* dissenters' predictions of conflict to be realized, for disputes soon arose over the applicability of state anti-discrimination laws to vendors who refused to provide goods and services for same-sex weddings.[96] The Supreme Court took up one such case during the October 2017 term. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[97] the Court considered the Free Speech and Free Exercise Clause claims of a bakeshop owner who declined to provide a wedding cake for two men who wished to celebrate their nuptials.[98] The baker rooted his refusal in religious reasons, explaining that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal

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used group identity as an analytic framework to disadvantage racial and ethnic minorities, but have shifted to individual merit as the framework to protect the interest of whites).

88. *See* Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 20 LEWIS & CLARK L. REV. 1265, 1268 (2017).

89. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015).

90. *Id.*

91. *Id.* at 711 (Roberts, C.J., dissenting).

92. *Id.* at 711-12.

93. *Id.* at 734 (Thomas, J., dissenting).

94. *Id.*

95. *See* Smith, 494 U.S. at 877-78 (stating that "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires," and suggesting that to extend that freedom to include a right to act contrary to generally applicable laws would be "to carry the meaning . . . one large step further").

96. *See* Reyes, *supra* note 35, at 133-34 (citing and discussing cases).

97. 138 S. Ct. 1719 (2018).

98. *Id.* at 1724.

endorsement and participation in the ceremony and relationship that [the two men] were entering into."[99] The Colorado Civil Rights Commission concluded that the owner's refusal violated a state statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation and ordered him to "cease and desist from discriminating against . . . same-sex couples."[100]

The Supreme Court reversed the Commission's order on Free Exercise Clause grounds.[101] The majority opinion did not hold that the baker was entitled to an exemption from the antidiscrimination law merely because of his religious objections to same-sex marriage, but it did hold that he was entitled to "the neutral and respectful consideration of his claims in all the circumstances of the case."[102] The Court concluded that the Commission failed to provide such a neutral and respectful hearing, citing several remarks by individual commissioners that "might be seen as inappropriate and dismissive comments showing lack of due consideration for [the baker's] free exercise rights and the dilemma he faced."[103]

The *Masterpiece Cakeshop* decision drew substantial criticism for its analytical ambiguities[104] and has been subject to a range of interpretations.[105] On the one hand, the Court's majority did not directly question the *Smith* rule or indicate that antidiscrimination laws could not be applied to religious objectors in general.[106] But on the other hand, the Court did hold that the state's antidiscrimination law could not be applied to this specific religious objector under the facts of this case in particular.[107] How, then, should the case be understood? Some commentators have read the majority decision favorably from the perspective of LGBTQ rights and antidiscrimination principles more broadly.[108] Professors Douglas NeJaime and Reva Siegel, for example, argue that despite the result in favor of the baker, the case "affirms an approach to public accommodations law that limits religious accommodation to prevent harm to

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99. *Id.*

100. *Id.* at 1726.

101. *Id.* at 1732.

102. *Id.* at 1729.

103. *Id.*; *see also* Reyes, *supra* note 35, at 129-30 (quoting from and discussing Court's analysis on this point).

104. *See, e.g.*, Reyes, *supra* note 35, at 114 (noting the decision's "failure to engage with difficult constitutional questions and . . . its absence of analytical clarity."); Kendrick & Schwartzman, *supra* note 35, at 135 (arguing that the decision "introduced various distortions into the doctrine."); Chad Flanders & Sean Oliveira, *An Incomplete Masterpiece,* 66 UCLA L. REV. DISCOURSE 154, 156 (2019) ("In early commentary . . . the overwhelming sentiment was one of disappointment").

105. *See* Reyes, *supra* note 35, at 130-31 (discussing various interpretations).

106. *See Masterpiece Cakeshop*, 138 S.Ct. at 1719.

107. *See id.*

108. *See, e.g.*, Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L. J. FORUM 201.

other citizens who do not share the objector's beliefs."[109] Professors Lawrence Sager and Nelson Tebbe similarly read the decision to support protections for LGBTQ individuals and members of other politically vulnerable populations.[110] However, Sager and Tebbe also cite and urge vigilance against competing interpretations that "suggest that the basic structure of Colorado's civil rights law . . . was unconstitutionally hostile to religion."[111] Such interpretations may find support in Justice Gorsuch's concurring opinion, which was joined by Justice Alito.[112] Gorsuch begins his concurrence by citing *Smith* for the proposition that "a neutral and generally applicable law will usually survive a constitutional free exercise challenge."[113] But he immediately proceeds to declare that "*Smith* remains controversial in many quarters."[114] Professors Kendrick and Schwartzman describe this as "a rather less than subtle hint" that "at least some of the conservative Justices, who were not on the bench when *Smith* was decided, are unhappy with the Court's interpretation of the Free Exercise Clause and would be open to revisiting it."[115]

At the other end of the Court's ideological spectrum, Justices Ginsburg and Sotomayor dissented from the ruling in favor of the baker.[116] Not only did their dissent express no doubts about the *Smith* rule, but it also rejected the majority's finding of hostility toward religion.[117] The ideological realignment and divide with respect to religious accommodations was thus becoming more apparent. Subsequent cases that arose during the coronavirus pandemic only accentuated this divide.[118] As noted above, these cases involved challenges to state closure orders and limitations on the size of gatherings.[119] And while the Supreme Court denied the first religious request for injunctive relief that it considered by a 5-4 margin in May of 2020,[120] the Court lost one member of this majority when Justice Ginsburg was replaced on the bench by Justice Barrett in October of that year.[121] The Court began to look more favorably on petitions for injunctive relief

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109. *Id.* at 202.

110. Lawrence Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 178 (2019).

111. *Id.* at 172.

112. *See Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring).

113. *Id.*

114. *Id.*

115. Kendrick & Schwartzman, *supra* note 35, at 162.

116. *See Masterpiece Cakeshop*, 138 S. Ct. at 1748 (Ginsburg, J., dissenting).

117. *Id.* at 1748-1752.

118. *See* cases cited *supra* INTRODUCTION.

119. *See* Liptak, *supra* note 9; S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020).

120. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613.

121. *See* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/C9JY-UW2Q].

brought by religious worshippers shortly thereafter.[122] Chief Justice Roberts had previously emphasized the importance of judicial deference to elected officials on matters of public health,[123] and again voted to deny injunctive relief in *Roman Catholic Diocese of Brooklyn v. Cuomo* in November of 2020.[124] However, the rest of his Republican-appointed colleagues formed a new 5-4 majority in favor of granting relief, finding that the orders were not neutral and generally-applicable when they imposed harsher capacity limits on houses of worship than they did on secular businesses.[125]

Up to this point, the COVID-19 era cases did not necessarily break any new ground with respect to Free Exercise jurisprudence. Although the Court's per curiam opinion in *Diocese of Brooklyn* did not expressly cite *Smith*, it continued to invoke the analytic frameworks of neutrality and general applicability for which *Smith* is known.[126] The main point of contention between the majority and the dissent with respect to *Smith* was how to apply its frameworks to the facts before the Court.[127] Justice Kavanaugh's concurring opinion suggested that the proper approach was to ask if the state had created *any* secular exemptions that did not apply equally to religious activity:

> [U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of businesses . . . [it] must justify why houses of worship are excluded from that favored class.[128]

For her part, Justice Sotomayor rejected this interpretation of the caselaw and argued that the relevant precedents "created no such rule" as the one offered by Justice Kavanaugh.[129] The *Diocese of Brooklyn* opinion did not squarely resolve this interpretive debate, leaving the formal jurisprudential contours of the Free Exercise Clause much as they had been for some time.

But the doctrinal landscape would change in a potentially consequential way before long. In *Tandon v. Newsom*, decided in April 2021, the Supreme Court issued another brief per curiam opinion granting an injunction against enforcement of an order limiting the size of religious gatherings in private homes.[130] This time, the Court adopted the position previously taken by Justice

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122. *E.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021).

123. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613-14 (Roberts, C.J., concurring) ("When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad.") (internal quotation marks omitted).

124. 141 S. Ct. at 68-69; *see also S. Bay United Pentecostal Church,* 140 S. Ct. at 1613.

125. *See Diocese of Brooklyn*, 141 S. Ct. at 66-67.

126. *See id*.

127. *See id*.

128. *Id*. at 73 (Kavanaugh, J., concurring).

129. *Id*. at 80 n.2 (Sotomayor, J., dissenting).

130. 141 S. Ct. 1294, 1297 (2021).

Kavanaugh that "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[131] This was the first case in which a majority of the Court adopted this "most-favored-nation" approach to religious exemptions.[132] Some scholars have contended for this interpretation for some time and have argued that it is consistent with *Smith* itself.[133] Douglas Laycock, for example, has argued that under both *Smith* and the Free Exercise Clause cases that have followed, "[t]he question is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated. The constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct."[134]

Significantly, the most-favored-nation theory would not appear to require any evidence of religious hostility or animus. As Professor Laycock has explained, the theory "does not require that the state make an explicit value judgment, or that state officials consciously compare religious and secular conduct and deem the secular conduct more worthy."[135] Other scholars have criticized the theory for this very reason. James Oleske has described the most-favored-nation approach as an "effort to convert *Smith*'s requirement of general applicability into a requirement of uniform or near-uniform applicability, and to constitutionally compel religious exemptions from even modestly underinclusive laws that bear no indicia of discriminatory intent."[136] According to Professor Oleske, such "a broad selective-exemption rule sweeping beyond cases of intentional discrimination would seem doctrinally untenable . . . [and] would largely eviscerate Smith's no-exemptions-required rule."[137] This approach also restores a version of disparate impact liability for religious claimants, insofar as it allows objectors to establish a violation of the Free Exercise Clause without having to demonstrate a discriminatory purpose—a marked difference compared to the burdens faced by

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131. *Id.* at 1296 (citing *Diocese of Brooklyn*, 141 S. Ct. at 67, 73 (Kavanaugh, J., concurring)).

132. *See id.*; *See also* Jim Oleske, *Tandon Steals Fulton's Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021 at 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/ [https://perma.cc/A3QQ-YXHY].

133. *See, e.g.*, Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016) (elaborating on approach and explaining its applicability to cases decided since *Smith*); James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 324-35 (2013) (critiquing approach and arguments offered by Laycock and others); James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 728-39 (2019) (critiquing approach and arguments offered by Laycock and others).

134. Laycock & Collis, *supra* note 133, at 22-23 (emphasis added).

135. *Id.* at 23.

136. Oleske, *Free Exercise (Dis)Honesty*, *supra* note 133, at 729.

137. *Id.* at 730.

racialized claimants seeking to establish a violation of the Equal Protection Clause.[138]

Tandon thus portended possibly important changes in how the *Smith* rule was to be applied. But the *Fulton* case was still pending, and posed the much broader question of whether the *Smith* rule should continue to govern Free Exercise Clause cases at all.[139] Although *Fulton* reached the Supreme Court during the coronavirus pandemic, the facts hearkened back to somewhat earlier cases involving religious objections to same-sex marriage.[140] Specifically, Catholic Social Services ("CSS") refused to certify same-sex married couples as foster parents because of its religious belief that "marriage is a sacred bond between a man and a woman."[141] The City of Philadelphia stopped working with CSS on foster care placements in 2018, citing language in its standard municipal contracts and in a citywide ordinance that "protect[s] its people from discrimination that occurs under the guise of religious freedom."[142] CSS brought suit under the Free Speech and Free Exercise Clauses of the First Amendment.[143]

A six-Justice majority held in favor of CSS on free exercise grounds.[144] Writing for the Court, Chief Justice Roberts noted early in his opinion that there was no need to revisit the *Smith* rule rejecting a right to religious exemptions from neutral and generally applicable laws.[145] Instead, the Court was able to resolve the case on the narrower basis that the *Smith* rule did not apply—for "the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable."[146] Chief Justice Roberts referred all the way back to *Sherbert v. Verner* for the proposition that laws containing a mechanism for individualized exemptions from otherwise governing rules are not, in fact, generally applicable for purposes of *Smith*.[147] In *Sherbert*, the state's unemployment compensation law allowed for exceptions

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138. Indeed, this approach may offer even more protection to religious claimants than disparate impact liability does for racialized minorities, insofar as "[i]t provides relief even against regulations that do not fall particularly heavily on religious actors"—i.e., it applies in settings where "religious actors are regulated proportionately, not disproportionately." Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397 (2021). For further discussion of the requirements to make out a violation of the Equal Protection Clause, see *infra* Part II.

139. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021).

140. *Id.* at 1875-76.

141. *Id.* at 1875 (quoting Joint Appendix Vol. I at 171, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 3006565, at *171).

142. *Id.* (quoting App. to Pet. for Cert. at 147a, *available at* https://www.supremecourt.gov/DocketPDF/19/19123/108931/20190722174050008_Appendix%20FINAL.pdf [https://perma.cc/8DVK-S64U]).

143. *Id.* at 1876.

144. *Id.* at 1868.

145. *See id.* at 1876-77.

146. *Id.* at 1877.

147. *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

from the requirement that applicants accept offered work for "good cause."[148] In *Fulton*, the city's foster care contracts allowed for exceptions from the requirement that providers not discriminate on the basis of sexual orientation if granted by a municipal official "in his/her sole discretion."[149] Both provisions had the effect of "invit[ing]" the government to decide which reasons for not complying with the policy are worthy of solicitude"[150] in a way that allowed for secular reasons to be given more favorable treatment than religious reasons. Thus, according to the Court, neither provision was generally applicable and could not survive a Free Exercise Clause challenge unless it could satisfy strict scrutiny.[151] And while the majority reiterated that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,"[152] it held that even the "weighty" interest in ensuring the equal treatment of gay foster parents could not justify denying a religious exception to CSS under the facts of the case.[153]

But if *Fulton* did not mark the end of the *Smith* rule, it also did not mark the end of debates surrounding the future of the Free Exercise Clause. For example, Justice Barrett fully joined the Court's opinion that left *Smith* undisturbed for the present, but also wrote separately to express the view that "the textual and structural arguments against *Smith* are more compelling."[154] Justices Kavanaugh and Breyer joined her in raising questions about what kind of analytical framework should govern free exercise claims if *Smith* were overruled and in raising doubts as to whether strict scrutiny should apply to all cases involving generally applicable laws that impose incidental burdens on religious conduct.[155] Justice Barrett agreed that it was not necessary to answer those questions in *Fulton* itself, but her concurrence suggests that at least she and Justice Kavanaugh might be open to revisiting them in another case.[156]

A separate concurrence left no doubts whatsoever about the willingness of Justices Alito, Thomas, and Gorsuch to revisit and overrule *Smith*.[157] In a full-throated *cri de coeur* against the existing standard, Justice Alito began his forty-plus page concurring opinion by arguing that the *Smith* decision

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148. *Id.* (quoting *Sherbert*, 374 U.S. at 401).

149. *Id.* at 1878 (quoting Supplemental Appendix to City Respondents' Brief on the Merits at 16-17, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), *available at* https://www.supremecourt.gov/DocketPDF/19/19123/108931/20190722174050008_Appendix%20FINAL.pdf [https://perma.cc/KKU6-37BR]).

150. *Id.* at 1879 (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

151. *Id.* at 1881.

152. *Id.* at 1882 (quoting Masterpiece Cakeshop v. Colo. C. R. Comm'n, 138 S. Ct. 1719, 1727 (2018)).

153. *Id.*

154. *Id.* at 1883 (Barrett, J., concurring).

155. *See id.*

156. *Id.*

157. *See id.* at 1883-1926 (Alito, J., concurring).

> abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.[158]

According to Alito, the Court's unwillingness to engage in this reexamination leaves religious liberty in a precarious state.[159] Even CSS's entitlement to an exemption from Philadelphia's nondiscrimination policy may prove to be short-lived. Alito warns that the majority's "decision might as well be written on the dissolving paper sold in magic shops"—for if the fatal flaw in the City's policy is that it allows for exemptions to be granted at the discretion of a municipal official, all the city need do is to eliminate that discretion and thereby render the prohibition against discrimination on the basis of sexual orientation generally applicable for purposes of *Smith*.[160] Of course, that would simply lead to renewed challenges to the *Smith* rule itself.[161] Why prolong the litigation process in this manner instead of simply confronting *Smith* head-on now?[162] The Court's failure to do so leads Alito to conclude his opinion with the lament that "[t]hose who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I."[163]

The ideological divisions among the Justices that had been suggested in previous cases were thus laid bare in express language in *Fulton*. Several of the conservative Justices on the Roberts Court are calling for a constitutional right to religious exemptions from generally applicable laws to protect "a fundamental freedom"[164]—a complete *volte-face* from the position taken by the conservative Justices on the Rehnquist Court who rejected such a right as a "constitutional anomaly."[165] Along the way, judicial conservatives have forsworn the *Smith* majority's professed confidence in the democratic process as the best way to protect the rights of religious objectors. Justice Alito dismisses this element of *Smith*'s holding as an "oddity" by comparing the Court's approach to religious liberty with its approach to other constitutional rights.[166] One of his key takeaways is that unlike other rights that are properly placed beyond the reach of

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158. *Id.* at 1883.

159. *Id.*

160. *Id.* at 1887; *see also id*. at 1930 (Gorsuch, J., concurring) (noting that municipal lawyers could close various loopholes identified by the majority "with a flick of a pen").

161. *See id*. at 1888 (Alito, J. concurring).

162. *See id*. at 1888.

163. *Id.* at 1926.

164. *Id.* at 1924.

165. Emp. Div. v. Smith, 494 U.S. 872, 886 (1990)).

166. *Fulton*, 141 S. Ct. at 1897 (Alito, J., concurring).

ordinary majority rule, *Smith* "held that protection of religious liberty was better left to the political process than to courts. . . . Under this interpretation, the free exercise of religion does not receive the judicial protection afforded to other, favored rights."[167] Notably, however, Justices Alito and Thomas appear to believe that some conflicts between religious liberty and LGBTQ+ equality *should* be left to the political process—indeed, one of their arguments against recognizing a right to same-sex marriage in *Obergefell* was that it "usurp[ed] the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage."[168] It appears that some rights remain more favored than others under Justice Alito's analytical framework.

It also appears clear that conflicts and jurisprudential questions about religious exemptions are not going away any time soon.[169] In addition to joining Justice Alito's concurrence, Justice Gorsuch wrote a concurring opinion of his own in which he argued that *Smith* was erroneous and that "[t]hese cases will keep coming until the Court musters the fortitude to supply an answer."[170] And even if the Court continues to find ways to avoid revisiting *Smith*, questions are sure to persist about applications of the most-favored-nation approach articulated in *Tandon*.[171] That approach focuses on whether "*any* comparable secular activity" receives more favorable treatment than religious activity.[172] But what does it mean to be a comparable activity? In *Tandon*, the Court concluded that visiting retail stores and movie theaters during the COVID-19 pandemic was comparable in a relevant sense to holding in-home religious meetings with members of other households.[173] The dissenting Justices emphasized that the state had "adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike,"[174] and argued that requiring the state to treat such gatherings equally with trips to retail shops was akin to requiring "that the State equally treat apples and watermelons."[175] What will the relevant comparator be outside of the coronavirus context? Many laws have at least some narrow exceptions,[176] and it remains to be seen if a majority of the Court will be willing to require religious exemptions to all such laws unless the state can satisfy strict scrutiny. Justice Barrett's concurring opinion in *Fulton* suggests that she and Justice Kavanaugh may not be prepared to go that far in every case.[177]

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167. *Id.* at 1917.

168. Obergefell v. Hodges, 576 U.S. 644, 741 (2015) (Alito, J., dissenting) (joined by Justices Scalia and Thomas).

169. *See Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring).

170. *Id.*

171. *See supra* notes 130-38 and accompanying text.

172. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

173. *Id.* at 1297.

174. *Id.* at 1298 (Kagan, J., dissenting).

175. *Id.*

176. *See* Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 B.Y.U.L. REV. 167, 173 (2019).

177. *See supra* notes 155-56 and accompanying text; *see also* Jim Oleske, *Fulton Quiets*

As these debates continue, it will be important to consider how the evolving state of religious liberty jurisprudence compares to other doctrinal areas of constitutional law. Justice Alito offered his take on such comparisons in his concurring opinion in *Fulton*.[178] But strikingly absent from Alito's lengthy concurrence is any comparison between rights under the Free Exercise Clause and rights under the Equal Protection Clause.[179] Such a comparison would reveal that far from being uniquely disfavored among constitutional liberties, the rights of many religious objectors already enjoy highly privileged status compared to the rights of racialized individuals.[180] For instance, as a result of *Tandon*, claimants under the Free Exercise Clause may have regained a right to redress from laws burdening religious practice in the absence of any showing of religious animus.[181] Claimants under the Equal Protection Clause enjoy no parallel privilege.[182] The next Part of this Article endeavors to demonstrate these and other disparities in greater detail. As will be seen, if the COVID-19 pandemic and other recent events have shone new light on longstanding issues in religious freedom, they have demonstrated far more vividly the structural injustices and inequities that persist against BIPOC communities throughout the American legal system.

II. COVID-19, BLACK LIVES MATTER, AND THE PERSISTENCE OF STRUCTURAL RACISM

The Religion Clauses were drafted against the backdrop of some 200 years of religious warfare in Europe.[183] There has been no analogue to this European experience under the American constitutional order. This is not to say that religious conflict and discrimination have not been part of the American experience.[184] Cases like *Smith* and *Hialeah* illustrate the insensitivity and hostility that has often been shown to non-Christian faiths,[185] and historical instances of intra-Christian political bias by Protestants against Catholics have also been amply analyzed.[186] But under the U.S. Constitution, there has been no

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Tandon's Thunder: A Free Exercise Puzzle, SCOTUSBLOG (June 18, 2021, 4:20 PM), https://www.scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle/ [https://perma.cc/V6PB-XWND].

178. *See supra* notes 166-67 and accompanying text.

179. *Id.*

180. *See Tandon*, 141 S. Ct. 1294.

181. *See id.*

182. *See* U.S. CONST. amend. XIV, § 1.

183. *See* Laycock, *supra* note 68, at 883 ("In the wake of the Reformation, for almost 200 years, European Christians killed each other over differences in faith. Obviously, that was a serious problem."); René Reyes, *The Mixed Blessings of (Non-)Establishment*, 80 ALB. L. REV. 405, 407-10 (reviewing historical background of religious establishments and conflicts in England).

184. *See supra* Part I.

185. *See id.*

186. *See, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE *passim* (2002)

legally sanctioned regime of violence or exclusion from citizenship on the basis of religious identity.[187] The same cannot be said with respect to racial and ethnic identity.[188] To the contrary, racial and ethnic discrimination was woven into the warp and woof of the American constitutional fabric from the very beginning.[189] As articulated by Professor Dorothy Roberts, "[t]he constitutional government of the United States was founded on the colonization of Native tribes and the enslavement of Africans. It enshrined the power and freedom of a white male elite, along with the ability of this elite class to restrict the power and freedom of everyone else."[190]

Illustrations of the ways in which racism was built into the constitutional structure of the United States are not difficult to find. Notwithstanding the absence of the word "slavery" from the text, numerous provisions of the original Constitution itself protected and reinforced the practice.[191] Examples include the Three-Fifths Clause,[192] the Fugitive Slave Clause,[193] and the prohibition against banning the importation of additional slaves until at least 1808.[194] Nor did the addition of the Bill of Rights change the condition of the enslaved.[195] Although some abolitionists argued that the Fifth Amendment's guarantee that no person could be "deprived of life, liberty, or property, without due process of law"[196] should be read to prohibit slavery,[197] the argument proved unavailing. Indeed, *Dred Scott v. Sandford*[198] made clear that enslaved Black people were not "persons" whose liberty or property could not be taken from them; rather, they *were* property that could not be taken from white slaveowners.[199]

Scott was an enslaved Black man who had been taken to the free state of

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(discussing links between separationism and anti-Catholic bias); Kent Greenawalt, *History as Ideology: Philip Hamburger's Separation of Church and State*, 93 CALIF. L. REV. 367 (2005) (reviewing and critiquing Hamburger's account); Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667 (2003) (same).

187. *See generally* U.S. CONST.

188. *See* U.S. CONST. art. I, § 2, cl. 3, art. IV, § 2, cl. 3, art. I, § 9, cl. 1.

189. Roberts, *supra* note 30, at 51; *see also* Harris, *supra* note 54, at 1715-23 (discussing racial subordination of Blacks and Native Americans in the founding era); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1789, 1800 (2019) (arguing that slavery and colonialism "are woven in like threads to the fabric of the [Constitution]").

190. Roberts, *supra* note 30, at 51.

191. *See id*. at 52-53.

192. U.S. CONST. art. I, § 2, cl. 3.

193. *Id*. art. IV, § 2, cl. 3.

194. *Id*. art. I, § 9, cl. 1.

195. *See id*. amends. I-X.

196. *Id*. amend. V.

197. Roberts, *supra* note 30, at 56; *see also* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3(1) J. LEGAL ANALYSIS 165, 179–182 (2011).

198. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

199. *Id*. at 452.

Illinois, and subsequently sued for his freedom in federal court in Missouri.[200] The Supreme Court rejected Scott's claim, holding that he lacked the necessary citizenship to support diversity jurisdiction.[201] According to Chief Justice Taney's majority opinion, Black slaves and their descendants

> are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[202]

Furthermore, Congressional attempts to prohibit slavery in territory north of Missouri were themselves invalid—for "the right of property in a slave is distinctly and expressly affirmed in the Constitution,"[203] and no provision "can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description."[204] In sum, *Dred Scott* makes clear that "America's original constitutionalism was staunchly colonial, white supremacist, and proslavery."[205]

Of course, the Reconstruction Amendments effectively overruled *Dred Scott* by abolishing slavery[206] and extending citizenship to all persons born or naturalized in the United States.[207] But just as the Fifth Amendment failed to protect the liberty of Black slaves prior to the Civil War, the Fourteenth Amendment failed to protect the equality of Black citizens after it. This was again the result of interpretive choices made by the Supreme Court. In *Plessy v. Ferguson*,[208] the Court rejected a challenge to a state law requiring railway companies to segregate passengers on the basis of race.[209] Despite the Fourteenth Amendment's command that no state shall "deny to any person within its jurisdiction the equal protection of the laws,"[210] the Court concluded that the clause "could not have been intended to abolish distinctions based upon color, or

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200. *Id*. at 431.
201. *Id*. at 430.
202. *Id*. at 404-05.
203. *Id*. at 451.
204. *Id*. at 452.
205. Roberts, *supra* note 30, at 53.
206. U.S. CONST. amend. XIII, § 1.
207. *Id*. amend. XIV, § 1.
208. 163 U.S. 537 (1896).
209. *Id*. at 540.
210. U.S. CONST. amend. XIV, § 1.

to enforce . . . a commingling of the two races upon terms unsatisfactory to either."[211] The majority went on to identify the "underlying fallacy"[212] of the plaintiff's challenge

> to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act but solely because the colored race chooses to put that construction upon it.[213]

The Court thus placed its imprimatur on the doctrine of "separate but equal" and gave constitutional blessing to the decades of racial segregation under Jim and Jane Crow[214] that were to follow.

The Supreme Court did not begin to dismantle the system of separate but equal for almost sixty years until its landmark decision in *Brown v. Board of Education*.[215] There, the Court rejected *Plessy*'s suggestion that the white supremacist implications of enforced segregation were merely the paranoid imaginings of hypersensitive Black people,[216] and declared that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[217] Yet as important as *Brown* undoubtedly was, its direct effects were limited in important ways. First, instead of declaring racial segregation to be categorically unconstitutional under the Equal Protection Clause, the decision was confined to the context of public schools; invalidation of segregation in other contexts would proceed piecemeal in other cases.[218] Second, even in the context of education, the Court only required desegregation to proceed with "all deliberate speed."[219] The result was innumerable delays and entrenched resistance, with significant progress toward integration not arriving until the 1960s and 1970s.[220]

In addition, subsequent iterations of the Supreme Court would fail to

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211. *Plessy*, 163 U.S. 537 at 544.

212. *Id.* at 551.

213. *Id*.

214. "Jane Crow" is a term first coined by civil rights attorney Pauli Murray that captures the intersections and interconnections between sex discrimination and race discrimination. *See* Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII,* 34 GEO WASH. L. REV. 232 (1965). *See also* Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187 (2006).

215. 347 U.S. 483 (1954).

216. *See id*. at 494-95.

217. *Id*. at 495.

218. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 738-40 (5th ed. 2015) (discussing the Court's incremental approach and criticisms thereof).

219. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294, 301 (1955).

220. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1603 (2003) (citing and discussing rates of integration over time).

capitalize on the promise of the Warren Court's decision in *Brown* and would instead undermine its implications. For example, the Burger Court held in *Milliken v. Bradley* that a desegregation decree involving the busing of students from a majority-white suburban district to a majority-minority urban district was impermissible.[221] Similarly, the Rehnquist Court ruled in *Board of Education v. Dowell* that once a district had complied with a desegregation decree for a "reasonable" period of time, the decree could be lifted even if dramatic de facto segregation in local schools would result.[222] Most recently, the Roberts Court ruled in *Parents Involved in Community Schools v. Seattle School District No. 1* that the district was constitutionally prohibited from taking race into account in school assignment plans—even though the district was aiming to promote racial diversity rather than racial segregation.[223] The consequence of these and other decisions has been the reemergence of schools that are strikingly resegregated in terms of racial composition. Studies estimate that as recently as 2016, more than 40% of Black and Latinx students nationwide were attending schools in which less than 10% of their fellow pupils were white.[224]

The Supreme Court's apparent indifference toward the impacts of these decisions on BIPOC communities stands in stark contrast to the increasing solicitude it has shown toward religious objectors. As discussed above,[225] although a majority of the Court has not yet agreed to overrule *Smith*, it has adopted the most-favored-nation approach to religious exemptions that allows objectors to make out a violation of the Free Exercise Clause in the absence of any showing of an intent to discriminate on the basis of religion. No such option has been made available to BIPOC parents and students in cases like *Milliken*, *Dowell*, and *Parents Involved* who are seeking to combat de facto racial segregation in schools; unless the challengers can demonstrate that segregation is the result of intentional discrimination by the government, they cannot prevail under the Equal Protection Clause. Nor is this requirement of discriminatory intent limited to cases involving education. Rather, the Court has adopted and maintained an interpretation of the Equal Protection Clause that requires a showing of discriminatory purpose across the board.

The leading case for the discriminatory purpose requirement is *Washington*

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221. 418 U.S. 717 (1974).

222. 498 U.S. 237 (1991).

223. 551 U.S. 701 (2007); *see also* Erwin Chemerinsky, *Making Schools More Separate and Unequal*: Parents Involved in Community Schools v. Seattle School District No. 1, 2014 MICH. ST. L. REV. 633 (2014).

224. Erica Frankenberg, Jongyeon Ee, Jennifer B. Ayscue, & Gary Orfield, *Harming our Common Future: America's Segregated Schools 65 Years After* Brown, THE C. R. PROJECT 25-30 (May 10, 2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/ integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf [https://perma.cc/MA62-RZ28].

225. *See supra* notes 130-38 and accompanying text.

v. Davis.[226] The dispute arose out of a requirement imposed by the District of Columbia's Metropolitan Police Department that applicants receive a certain score on a verbal skills test in order to be accepted into the Department and enter its 17-week officer training program.[227] The challenge was based on the fact that the test was one used throughout the civil service in general that had not been shown to be an accurate predictor of job performance as a police officer in particular, and that it had a highly discriminatory racial impact: four times as many Black applicants failed the test as white applicants.[228] The Supreme Court overruled the conclusion of the Court of Appeals that these facts were sufficient to make out a constitutional violation, and rejected the idea "that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [*s*]*olely* because it has a racially disproportionate impact."[229] Instead, the Court declared it to be a "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[230] The Court further held that facially neutral laws with a discriminatory impact would not necessarily even be subject to anything more than the most deferential level of review: "Standing alone, [disparate impact] does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[231] The Court accordingly rejected the challengers' claim without ever questioning the racially disparate impact of the test,[232] and without requiring the government to demonstrate its validity as a predictor of job performance.[233]

There are numerous objections that can be raised to the Court's reasoning and ruling in *Davis*. For one, the requirement that challengers under the Equal Protection Clause establish a discriminatory purpose obviously makes it more difficult to dismantle the legacy of racist lawmaking that goes all the way back to the founding era and beyond.[234] Some difficulties arise from the general challenges associated with establishing the purpose or intent of a collective body like a legislature.[235] Other difficulties arise from the Court's subsequent holding that

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226. 426 U.S. 229 (1976).

227. *See id*. at 234. Because the claim was brought against the federal government rather than a state government, the case was decided under the Fifth Amendment's Due Process Clause, which has been interpreted to contain an equal protection component mirroring that of the Fourteenth Amendment. *See id*. at 239.

228. *See id*. at 235-37.

229. *Id*. at 239 (emphasis added).

230. *Id*. at 240.

231. *Id*. at 242 (internal citation omitted).

232. *See id*. at 248.

233. *See id*. at 249-52.

234. *See* CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES at 743 (highlighting challenges associated with proving intent).

235. *See* Palmer v. Thompson, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.").

under the Equal Protection Clause, the term "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[236] Thus, even if a claimant can show that a legislature knew full well that a law will have a disparate impact on BIPOC communities, such knowledge would not necessarily suffice to establish discriminatory intent. Finally, further difficulties arise from the fact that even in the absence of explicit or conscious racial animus, implicit or unconscious racism remains and often "underlies much of the racially disproportionate impact of governmental policy."[237]

Tellingly, the *Davis* majority did not even bother to dispute the scope of racially-discriminatory impacts under wide swathes of American law. Rather, the Court unabashedly acknowledged that a rule recognizing disparate impact liability under the Equal Protection Clause "would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[238] The Court's position thus does not seem to be that systemic and structural racism do not exist—it is simply that their effects are so extensive that the government couldn't possibly be expected to address them. Apparently, racial inequality is too big to fail.

Moreover, these widespread disparate impacts are not merely the result of private social choices that are beyond the remit of public authorities to correct. The *Davis* decision demonstrates that it is often the government itself that is directly acting to create the racial disparity—i.e., it was the government that was insisting that applicants pass a test that had not been shown to have any predictive value for success as a police officer.[239] Nor can decisions like *Davis* be defended by resorting to the argument that the Equal Protection Clause is about equality of opportunity rather than equality of outcomes.[240] The challengers in *Davis* were not arguing that they were entitled to become police officers regardless of their ability to do the job; they were arguing that they were being denied the opportunity to become police officers through a test that had not been shown to have anything to do with the job.[241]

The government has likewise long acted to create or enable obstacles to equality in the housing context. Local governments were not prohibited from

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236. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

237. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987); *see also* CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES at 743 (citing Lawrence and discussing unconscious racism).

238. *Davis*, 426 U.S. 229 at 248.

239. *Id. at* 234-35.

240. *See* CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES at 742-43 (discussing the opportunities v. outcomes argument).

241. *Davis*, 426 U.S. 229 at 250.

enforcing zoning ordinances that segregated neighborhoods on the basis of race until well into the 20th century when the Supreme Court decided *Buchanan v. Warley*.[242] The *Buchanan* decision is significant for declaring such ordinances unconstitutional, but it is also striking in other respects. For one, it focuses primarily on the rights of a white man to dispose of his property as he sees fit rather than on the injustice of segregation.[243] For another, it distinguishes but does not cast any doubt on the validity of *Plessy v. Ferguson*—to the contrary, the Court approvingly cites language describing *Plessy* as involving nothing more than the requirement that "a member of a class . . . conform to reasonable rules in regard to the separation of the races."[244]

Given the limits and language of *Buchanan*, it is not surprising that many racist public zoning ordinances were simply replaced with racist private restrictive covenants. Enforcement of such private covenants was not declared unconstitutional until 1948 in *Shelley v. Kraemer*.[245] But even after legally-enforced segregation formally ended, the Supreme Court acknowledged in 2015 that "its vestiges remain today, intertwined with the country's economic and social life."[246] The Court further noted that these vestiges are the result not just of private action, but of "various practices [that] were followed, sometimes with governmental support,"[247] including "steering by real-estate agents [that] led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, [that] precluded minority families from purchasing homes in affluent areas."[248] The Court drew upon this history in holding that the federal Fair Housing Act encompasses disparate impact liability,[249] yet it has been unwilling to credit this same history in housing cases brought under the Equal Protection Clause and has insisted that disparate impact is not enough; plaintiffs must also establish discriminatory intent.[250]

Thus, challengers seeking to invoke the Fourteenth Amendment to combat racial inequality face significant obstacles in practically every social context—ranging from education to employment to housing. Crucially, public health scholars have identified the entrenched racial disparities that exist in these and related areas as key drivers of racial inequality in health outcomes.[251] For instance, Professor David Chae and his colleagues have emphasized the ways "in

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242. 245 U.S. 60 (1917).

243. *See id*. at 75, 78.

244. *Id*. at 80.

245. 334 U.S. 1 (1948).

246. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 528 (2015).

247. *Id*. at 528-29.

248. *Id*. at 529.

249. *See id*. at 533-37.

250. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).

251. *See, e.g.*, David H. Chae et al., *Conceptualizing Racial Disparities in Health: Advancement of a Socio-Psychobiological Approach,* 8 DU BOIS REV. 63, 65 (2011).

which social inequalities generate unjust patterns in disease distribution"[252] and in which "racial disparities in health are reflections of underlying social inequalities"[253]—noting as a specific example that "residential segregation, particularly with regard to poverty and racial concentration among Blacks, has a negative impact on health."[254] Other scholars have similarly noted "the myriad ways racism affects health:"[255]

> [B]eing Black in America . . . has negative implications for educational and professional trajectories, socioeconomic status, and access to health care services and resources that promote optimal health, which in combination, may reduce or exacerbate health risks.[256]

These inequities in health care and outcomes have always been present, but they were brought into particularly vivid relief during the COVID-19 pandemic.[257] Data released in the summer of 2020 showed that Black and Hispanic people were "disproportionately affected by the coronavirus in a widespread manner that span[ned] the country, throughout hundreds of counties in urban, suburban and rural areas, and across all age groups."[258] The disparities manifested themselves in multiple ways: Black and Hispanic Americans were three times more likely to become infected than white Americans, and almost two times more likely to die after contracting the virus.[259] Native Americans were likewise becoming infected at higher rates than whites.[260] Other studies indicated that these populations were not inherently more susceptible to COVID-19, but were rather experiencing more negative outcomes as a result of structural and systemic inequalities in housing, education, employment, and access to care.[261]

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252. *Id.*

253. *Id.* at 68.

254. *Id.* at 69.

255. Karishma Furtado & Kira Hudson Banks, *A Research Agenda for Racial Equity: Applications of the Ferguson Commission Report to Public Health*, 106 AM J. PUB. HEALTH 1926, 1927 (2016).

256. Jennifer Jee-Lyn Garcia & Mienah Zulfacar Sharif, *Black Lives Matter: A Commentary on Racism and Public Health*, 105 AM J. PUB. HEALTH e27, e28 (2015).

257. *See* Renée M. Landers, *Race (and Other Vulnerabilities) in Healthcare and Administrative Law*, YALE J. ON REG. NOTICE & COMMENT (Sept. 1, 2020), https://www.yalejreg.com/nc/race-and-other-vulnerabilities-in-healthcare-and-administrative-law-by-renee-m-landers/ [https://perma.cc/9QPP-MTWA] (noting that "[t]he disparate impact of the COVID-19 crisis on communities of color has sharpened the focus on the health inequities, income disparities, and myriad other social determinants of health").

258. Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequality of Coronavirus*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html [https://perma.cc/K6Y5-U4VL].

259. *Id*.

260. *See id*.

261. *See* Gbenga Ogedegbe et al., *Assessment of Racial/Ethnic Disparities in Hospitalization*

Racial and ethnic disparities persisted as the pandemic progressed and as vaccines became available. As of March 2021, data indicated that the vaccination rate for Black Americans was half the rate for white Americans, and lower than the share of the Black population in every single state.[262] Vaccination gaps for Hispanic Americans were even more substantial.[263] Not surprisingly, the rates of infection, hospitalization, and death reported by the Centers for Disease Control continued to be higher for Black, Hispanic, and Native Americans than for whites into the summer of 2021.[264] All of these results are the natural outcome of a long history of racial inequality and an Equal Protection Clause jurisprudence that has remained singularly inhospitable to disparate impact claims.

At the same time that the COVID-19 crisis was highlighting racial disparities in public health, Black Lives Matter protests were bringing renewed attention to racial disparities in criminal justice. The Black Lives Matter movement began after the killing of Black teenager Trayvon Martin and the subsequent acquittal of his shooter in 2013.[265] The movement garnered additional attention in light of large protests that followed the shooting death of Michael Brown, an unarmed Black teenager, by a white police officer in Ferguson, Missouri in 2014.[266] But the most widespread and sustained Black Lives Matter protests took place in the summer of 2020 after the killing of George Floyd by a white Minneapolis police officer. Video taken by a bystander showed the police officer pinning a handcuffed Mr. Floyd to the ground with a knee to his neck for more than eight minutes while Floyd repeatedly stated, "I can't breathe."[267] Thousands turned out

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and Mortality in Patients with COVID-19 in New York City, JAMA NETWORK OPEN (Dec. 4, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2773538 [https://perma.cc/UB2N-KMMZ]; Leo Lopez III et al., Racial and Ethnic Health Disparities Related to COVID-19, 328 JAMA 719 (Jan. 22, 2021), https://jamanetwork.com/journals/jama/ fullarticle/2775687 https://perma.cc/VLK4-KT7Y.

262. *See* Amy Schoendfeld Walker et al., *Pandemic's Racial Disparities Persist in Vaccine Rollout*, N.Y. TIMES (March 5, 2021), https://www.nytimes.com/interactive/2021/03/05/us/vaccine-racial-disparities.html [https://perma.cc/L3L7-JMYA].

263. *See id*.

264. See *Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity*, Centers for Disease Control and Prevention (Sept. 9, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html [https://perma.cc/46SF-XSD7].

265. *See About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ [https://perma.cc/AMJ6-4QKT]; Mitchell F. Crusto, *Black Lives Matter: Banning Police Lynchings*, 48 HASTINGS CONST. L.Q. 3, 15-16 (2020); Butler, *supra* note 30, at 1470.

266. *See* John Eligon, *Black Lives Matter Grows as Movement While Facing New Challenges*, N.Y. TIMES (Aug. 28, 2020), https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html [https://perma.cc/B3NR-DSWP]; Crusto, *supra* note 265, at 16; Butler, *supra* note 30, at 1422-24.

267. John Eligon et al., *Derek Chauvin Verdict Brings a Rare Rubuke of Police Misconduct*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html [https://perma.cc/7CAE-BQLT]; *see* Tim Arango et al., *How George Floyd Died, and*

in cities and towns across the United States.[268] as well as in countries across the globe.[269] Although the officer in Mr. Floyd's case was ultimately convicted of second degree murder, that conviction stands as an exceedingly rare exception to the general pattern in which charges are rarely filed against officers who kill civilians—even when victims are unarmed.[270]

The racial injustices against which the Black Lives Matter protests were directed extend beyond killings by the police and permeate the entire U.S. criminal justice system.[271] Studies have documented racial disparities in police stops, arrests, charging decisions, conviction rates, and severity of sentences.[272] Like the disparities in health outcomes discussed above, the disparities in criminal justice are not mere accidents but are rather the result of a long history of official action. Indeed, Paul Butler has argued that many inequities are "integral features of policing and punishment in the United States,"[273] which "evidence a racial project by the U.S. Supreme Court to allow the police to control African-American men."[274] Dorothy Roberts takes a similar view, arguing that "criminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination were abolished."[275] Put plainly, the criminal justice system is "racist . . . front to

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What Happened Next, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/article/george-floyd.html [https://perma.cc/8XZT-FQTW].

268. *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/P9AP-MCWT].

269. *See* Damien Cave et al., *Huge Crowds Against the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html [https://perma.cc/EEM7-X4ZG].

270. *See* David Leonhardt, *A Very Rare Conviction*, N.Y. TIMES (Apr. 21, 2021), https://www.nytimes.com/2021/04/21/briefing/chauvin-verdict-super-league-dementia.html [https://perma.cc/YQ3N-5W4Q]; Aidan Gardiner & Rebecca Halleck, *Few Charges, Fewer Convictions: The Chauvin Trial and the History of Police Violence*, N.Y. TIMES (Apr. 19, 2021), https://www.nytimes.com/interactive/2021/04/19/us/derek-chauvin-police-killings.html [https://perma.cc/4YRS-WXF8].

271. *See* René Reyes, *Abolition Constitutionalism and Non-Reformist Reform: The Case for Ending Pretrial Detention*, 53 CONN. L. REV. 667 (2021) (discussing inequities throughout various stages of the system).

272. *See* Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, THE SENTENCING PROJECT, 12 (2015), http://sentencingproject.org/doc/publications/rd_Black_Lives_Matter.pdf.[https://perma.cc/C9WK-ABZB]; *see also* Reyes, *supra* note 271, at 670 (citing and discussing study); Butler, *supra* note 30, at 1427.

273. Butler, *supra* note 30, at 1425.

274. *Id*. at 1450.

275. Roberts, *supra* note 30, at 4.

back."[276]

Yet despite the breadth of these racial and ethnic inequities, the disparate impacts of the criminal justice system on BIPOC individuals are not sufficient to establish a violation of the Equal Protection Clause under current doctrine. Claimants must still establish discriminatory intent—even in matters quite literally involving life and death. Take the case of *McClesky v. Kemp*.[277] The petitioner there argued that administration of a state's capital punishment regime was racially discriminatory, and cited a sophisticated study demonstrating that race played an important factor in sentencing: Black defendants were more likely to receive a death sentence than white defendants, with Black defendants who were accused of killing white victims facing the highest likelihood of execution of all.[278] The Supreme Court did not question the validity of this statistical evidence, but nevertheless rejected McClesky's Fourteenth Amendment claim.[279] To begin, the Court held that evidence of systemic discrimination in previous cases was not enough to "prove that the decisionmakers in *his* case acted with discriminatory purpose."[280] In other words, because each jury that imposes a capital sentence is unique, statistical evidence of racism on the part of previous juries would not suffice to show racism on the part of McClesky's own jury.

The Court then held the statistical study was likewise insufficient to establish that the state as a whole was acting with a discriminatory purpose in continuing to operate a capital sentencing scheme with disproportionate racial impacts. The majority reiterated the rule that a challenger must show that the state "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[281] Thus, in order to succeed on his Equal Protection Clause claim, "McClesky would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect."[282] The implications of this line of reasoning are breathtaking in their insensitivity to racial inequality. In effect, the Court is saying that even if a state is fully aware that its capital punishment system is being administered in a manner that dramatically and disproportionately affects BIPOC defendants, there is no constitutional violation as long as the state is "only" utterly indifferent to this fact. If Black lives do not matter enough to spur corrective action, there has been no violation of the Equal Protection Clause in the absence of further evidence of discriminatory intent.

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276. Bill Barrow, *Elizabeth Warren Calls US Criminal Justice System 'Racist*,' BOS. GLOBE (Aug. 4, 2018, 7:06 PM), https://www.bostonglobe.com/news/nation/2018/08/04/warren-calls-criminal-justice-system-racist/B6mdqVFWRPQfVDJ03S02yL/story.html [https://perma.cc/D5EH-FAGK]; *see also* Reyes, *supra* note 271, at 670-71 (quoting and discussing Butler, Roberts, and Warren).

277. 481 U.S. 279 (1987).

278. *See id*. at 286-287.

279. *Id*. *at* 297.

280. *Id*. at 292 (emphasis in original).

281. *Id*. at 298.

282. *Id*.

The *McClesky* decision is also strikingly obtuse about the history of racial discrimination in criminal justice in general and in capital sentencing in particular. Justice Brennan's dissenting opinion takes the majority to task on this very point. He argues that "Georgia's legacy of a race-conscious criminal justice system, as well as this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey's claim is not a fanciful product of mere statistical artifice."[283] He specifically notes that "[f]or many years, Georgia operated openly and formally precisely the type of dual system the evidence shows is still effectively in place,"[284] under which "[t]he criminal law expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery."[285] The majority's approach turns a blind eye to this history and instead "assumes [that] discrimination against [Black defendants] is exceptional rather than the normal way carceral punishment operates."[286] As argued by Dorothy Roberts, "[t]he problem with this approach is that discriminatory death sentencing is not a system malfunction. The death penalty survives as a legacy of slavery and Jim Crow because it still helps to preserve an unequal racial order."[287] And again, much like the majority in *Davis*,[288] the majority in *McClesky* does not even appear to question the reality of racially disparate impacts throughout the system. Indeed, the Court notes that "McClesky's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[289] The concern is thus not that systemic injustice does not exist; it is rather that addressing it would lead to "too much justice"[290] for racial and ethnic minorities.[291]

In light of these cases and the inequities that they allow to persist, it is small wonder that a movement would emerge to challenge judges and lawmakers to acknowledge the equal rights of BIPOC individuals. But if the COVID-19 pandemic and the Black Lives Matter protests of 2020-2021 have focused the public's attention on the enduring effects of entrenched historical injustices, they do not appear to have influenced the Justices of the Supreme Court to reexamine their jurisprudence under the Fourteenth Amendment in the same way that they have been reexamining their jurisprudence under the First Amendment. To the contrary, as Parts I and II of this Article have now demonstrated, claimants under the Equal Protection Clause stand at a significant disadvantage relative to their counterparts under the Free Exercise Clause. The Court has moved markedly in

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283. *Id*. at 328-9.
284. *Id*. at 329.
285. *Id*.
286. Roberts, *supra* note 30 at 86.
287. *Id*.
288. *See supra* note 238 and accompanying text.
289. McClesky, 481 U.S. at 314-15.
290. Roberts, *supra* note 30, at 91.
291. *See id*. at 92-93.

the direction of allowing plaintiffs to challenge a seemingly neutral and generally applicable law that impacts religious exercise without requiring them to establish a discriminatory purpose. A majority of the Court has implicitly embraced this result under the most-favored-nation approach taken in *Tandon*,[292] and at least three Justices have made clear that they are willing to go further by overruling *Smith* and explicitly holding that religious objectors are entitled to exemptions from generally applicable laws.[293] Under either approach, indifference toward religious communities may be sufficient to support a claim under the Free Exercise Clause; a discriminatory purpose is not required. The Court has shown no such movement in the direction of expanding the rights of claimants under the Equal Protection Clause. Instead, the doctrine remains firmly settled that even the most extreme forms of indifference toward minorities who are disproportionately impacted by facially neutral laws do not violate the Fourteenth Amendment; a discriminatory purpose must be shown. Part III below argues that this doctrinal dichotomy is untenable as a matter of constitutional history, text, and structure.

III. EQUAL PROTECTION AS A DOMINANT CONSTITUTIONAL VALUE

The free exercise of religion is undoubtedly a fundamental constitutional value. It is given express protection in the very first amendment to the Constitution,[294] and there is evidence that "[r]eligious exercise was among those rights the framers of the First Amendment were most concerned with protecting against interference by the federal government they created in 1787."[295] There are also many trenchant criticisms that have been made against the *Smith* decision,[296] and a number of arguments that could support strengthening the Free Exercise Clause to at least some degree while avoiding some of the excesses that might have attended the *Sherbert* approach. For example, some scholars have suggested that laws incidentally burdening religion should be evaluated more searchingly than *Smith* requires, but that courts should rely on intermediate scrutiny[297] or a "significant interest" test[298] rather than returning to strict scrutiny and the compelling interest standard. Others have suggested that there should be some right to exemptions from neutral and generally applicable laws, but any such right should apply equally to all those who object to compliance as a matter of conscience—regardless of whether their conscientious judgments are ultimately

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292. *See supra* notes 130-138 and accompanying text.

293. *See supra* notes 158-168 and accompanying text.

294. *See* Reyes, *supra* note 56, at 738 (noting that the Free Exercise Clause "occup[ies] pride of place in the Bill of Rights").

295. Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 930 (2000); *see also* Matthew W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

296. *See supra* note 56 and accompanying text.

297. *See* Gedicks, *supra* note 295, at 934-38.

298. *See* KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 215 (2006).

religious or secular in nature.[299] Finally, a number of scholars have contended that an exemptions regime should include a robust commitment to the "no harm" doctrine[300]—i.e., the principle that "[a]ccommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties."[301] A synthesis of these approaches would strengthen the Free Exercise Clause relative to the *Smith* rule, even if they would not quite restore it to the status it enjoyed under *Sherbert*.[302]

Thus, the problem with the Supreme Court's recent jurisprudence is not that there are no compelling arguments in favor of reinvigorating the Free Exercise Clause to some degree. The problem is the manner in which the Court has approached and framed the reinvigoration process.[303] A major theme in the Court's decisions under the Free Exercise Clause is that lawmakers must be respectful toward religious objectors and must take care not to impose even unintended incidental burdens on religious activity that are not imposed on practically everyone else.[304] This solicitude was conspicuously absent from the Rehnquist Court's treatment of the claims advanced by members of the Native American Church in *Smith*, but has been prominently on display in the Roberts Court's response to the arguments asserted by members of Christian traditions in cases like *Masterpiece Cakeshop* and *Fulton*.[305] One important implication of this jurisprudential innovation has been to give license to Christian majorities to engage in at least some forms of religious discrimination. Yet at the same time, the Court has issued no analogous command under the Equal Protection Clause that lawmakers take care to avoid imposing unintended disparate burdens on BIPOC communities—even if those burdens are shared by practically no one else. One important implication of this jurisprudential intransigence has been to prevent minorities from being free from the effects of racial discrimination.

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299. *See* Reyes, *supra* note 56; Reyes, *supra* note 51; *see also* Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433, 1469-72 (1999).

300. *See* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099 (2004); *see also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); *Developments in the Law—Reframing the Harm: Religious Exemptions and Third-Party Harm After* Little Sisters, 134 HARV. L. REV. 2186 (2021).

301. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 745 (2014) (Ginsburg, J., dissenting); *see also Developments in the Law—Reframing the Harm*, *supra* note 300, at 2186 (quoting Ginsburg dissent).

302. For further discussion of the *Sherbert* rule, *see supra* notes 37-41 and accompanying text.

303. *See* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2481 (2021) (critiquing Court's "special solicitude for religion and the construction of a public—private divide that naturalizes existing distributions of power and wealth").

304. *See, e.g.*, Fulton v. Philadelphia, 141 S. Ct. 1868 (2021).

305. *See* Emp. Div. v. Smith, 494 U.S. 872, 890 (1990); Masterpiece Cakeshop v. Colo. C. R. Comm'n, 138 S. Ct. 1719, 1721 (2018); Fulton, 141 S.Ct. at 1879.

Again, this is not necessarily to say that the claims of religious believers should not be given more protection than the *Smith* rule provides. But however strong the arguments in favor of strengthening constitutional protections for religious liberty may be, they cannot justify giving the Free Exercise Clause privileged status relative to the Equal Protection Clause. This is so for a number of reasons. Perhaps the most important reason is history. Part II above offered an illustrative but incomplete review of some of the ways in which the law explicitly discriminated on the basis of race for literally hundreds of years; many more examples could be adduced and explored. There is simply no comparable history of religious oppression in the United States. Even prominent critics of *Smith* and advocates for religious exemptions like Douglas Laycock acknowledge that "[r]ace is constitutionally unique in our history, which is why every other identity group tries to free ride on the black experience."[306] For instance, in the course of arguing in favor of some limited religious exemptions from antidiscrimination laws in cases involving same-sex marriage, Laycock has rejected any attempt to liken the status of LGBTQ people today to that of Black people in the Jim Crow south as "absurd."[307] Leslie Kendrick and Micah Schwartzman have pushed back against the suggestion that protections for LGBTQ individuals should be less secure than protections for racial and ethnic minorities, noting that "[f]ar from 'free riding,'. . . gays and lesbians have struggled for decades to obtain protection under civil rights laws."[308] But whatever Laycock might make of the aptness of giving equal constitutional protection to LGBTQ and BIPOC individuals, it would surely be the ultimate absurdity to give even *greater* protection to conservative Christians—which is precisely the effect of current doctrine.

A second reason why the Equal Protection Clause should be applied at least as robustly as the Free Exercise Clause relates to constitutional language. The text of the two clauses is similar in several ways. The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion],"[309] while the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[310] Obviously, neither clause says anything on its face about government intent. Justice Scalia concluded in *Smith* that it was nevertheless "a permissible reading of the text" to hold that laws that incidentally and unintentionally burdened religious exercise did not violate the First Amendment.[311] Professor Michael McConnell is willing to grant that that this is a "plausible" interpretation of the text, but argues that the "more natural reading" is one that attends to the effects of a law on religious practice and contends that "we should at least begin with the presumption that the

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306. Douglas Laycock, *The Campaign Against Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 231 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016); *see also* Kendrick & Schwartzman, *supra* note 35, at 160-61 (quoting and discussing Laycock).

307. Laycock, *supra* note 176, at 190.

308. Kendrick & Schwartzman, *supra* note 35, at 161.

309. U.S. CONST. amend. I.

310. U.S. CONST. amend. XIV, § 1.

311. Emp. Div. v. Smith, 494 U.S. 872, 878 (1990).

words carry as broad a meaning as their natural usage."[312] For his part, Justice Alito rejects the intent requirement adopted in *Smith* as a "hair-splitting interpretation" that "certainly does not represent the 'normal and ordinary' meaning of the Free Exercise Clause's terms."[313]

Yet the very same point can be made with as much force with respect to the intent requirement adopted in *Davis* under the Equal Protection Clause. To repeat, the Fourteenth Amendment on its face says no more about intent than the First Amendment does. Nor does the "natural usage" or "natural and ordinary meaning" of the text support reading an intent requirement into the Equal Protection Clause any more than it does with respect to the Free Exercise Clause. Consider another example from the coronavirus context. While all of the vaccines that have been authorized for use in the U.S. are considered safe and effective,[314] they have been shown to have different levels of efficacy against COVID-19.[315] These differences have led to observations about the vaccines providing different levels of "protection" against the virus.[316] These observations have nothing to do with the intent of those who developed or manufactured the vaccines; every developer and manufacturer presumably intended to produce the most effective vaccine possible. Rather, the concern is entirely with the effects of the vaccines—which is to say that the natural and ordinary understanding of the term "protection" is one that focuses on impacts and results rather than on intentions and purposes. Thus, to hold that unintended disparate impacts on the basis of race do not violate the Equal Protection Clause is at least as linguistically anomalous as holding that unintended impacts on religious practice do not violate the Free

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312. McConnell, *Free Exercise Revisionism and the Smith Decision*, *supra* note 56, at 1115-1116.

313. Fulton v. City of Philadelphia, 141 S. Ct. 1868,1898 (2021) (Alito, J., concurring).

314. *See Different COVID-19 Vaccines*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 20, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html [https://perma.cc/3UGB-X4FD].

315. *See* C. Buddy Creech, Shannon C. Walker, & Robert J. Samuels, *SARS-CoV-2 Vaccines*, JAMA INSIGHTS (Feb. 26, 2021), https://jamanetwork.com/journals/jama/fullarticle/2777059 [https://perma.cc/XC5E-3667].

316. *See, e.g.*, Isaac Stanley-Becker, *Johnson & Johnson Vaccine Deepens Concerns Over Racial and Geographic Inequities*, WASH. POST (Mar. 1, 2021, 6:11 PM), https://www.washingtonpost.com/health/2021/03/01/johnson-and-johnson-vaccine-distribution-disparities/ [https://perma.cc/GAQ6-PZLM] (noting "different levels of protection reported in clinical trials" with respect to various vaccines); Michael Erman, *Booster May Be Needed for J&J Shot as Delta Variant Spreads, Some Experts Already Taking Them*, REUTERS (June 28, 2021), https://www.reuters.com/business/healthcare-pharmaceuticals/booster-may-be-needed-jj-shot-delta-variant-spreads-some-experts-already-taking-2021-06-25/ [https://perma.cc/GTR7-9N9P] (suggesting that different vaccination options "might provide broader protection"); Carl Zimmer, Noah Weiland & Sharon LaFraniere, *New Analyses Show Johnson & Johnson's One-Dose Vaccine Works Well*, N.Y. TIMES (Feb. 24, 2021), https://www.nytimes.com/2021/02/24/science/johnson-johnson-covid-vaccine.html [https://perma.cc/5SJZ-QEWA] (citing efficacy rates to indicate levels of "protection").

Exercise Clause.

Another reason why the Equal Protection Clause should offer as much protection as the Free Exercise Clause is constitutional structure. As their respective ordinal numbers indicate, the Fourteenth Amendment was added to the Constitution well after the First Amendment. This implies that equal protection is a dominant constitutional value that takes precedence over other constitutional values that preceded it. Indeed, Justice Alito himself has invoked "the established rule that a later adopted provision takes precedence over an earlier, conflicting provision of equal stature."[317] While the Equal Protection Clause and the Free Exercise Clause should not necessarily or invariably be regarded as "conflicting provisions," there have undoubtedly been instances of conflict between racial equality and religious practice in the caselaw. *Newman v. Piggie Park Enterprises, Inc*.[318] is an instructive example. There, the petitioners brought a class action under the Civil Rights Act of 1964 to enjoin racial discrimination at several restaurants in South Carolina.[319] The respondents argued that "the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'"[320] The Supreme Court deemed the argument "so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable."[321] *Bob Jones University v. United States*[322] is similarly illustrative. The Supreme Court in that case upheld the denial of federal tax-exempt status to private religious schools that discriminated on the basis of race for religious reasons.[323]The petitioners claimed that such denial violated their rights under the Free Exercise Clause, but the Court concluded that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[324]

Both *Piggie Park* and *Bob Jones University* were decided after *Sherbert* and prior to *Smith*. That is, they were decided in a jurisprudential era when laws imposing incidental burdens on religious practice had to satisfy strict scrutiny and be justified by a compelling government interest.[325] In neither case did the Court question the sincerity of the objectors' religious beliefs concerning race, nor did it deny that prohibiting discrimination would impact their ability to act in

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317. Tenn. Wine & Spirits Retailers Ass'n. v. Thomas, 139 S. Ct. 2449, 2462 (2019) (analyzing the relationship between the Twenty-First Amendment and the Dormant Commerce Clause).

318. 390 U.S. 400 (1968) (per curiam).

319. *Id.* at 400-01.

320. *Id.* at 402 n.5.

321. *Id.*; *see also* Kendrick & Schwartzman, *supra* note 35, (quoting and discussing *Piggie Park*).

322. 461 U.S. 574 (1983).

323. *Id.* at 584-85.

324. *Id.* at 604.

325. *See supra* notes 37-41 and accompanying text.

accordance with those beliefs. Yet in neither case did the Court hold that the religious objectors were entitled to an exemption from the law. Rather, the Court upheld application of the law because the interest in combatting racial discrimination was sufficiently compelling—i.e., racial equality was a dominant constitutional value that trumped religious exercise.

Thus, constitutional history, language, and structure all militate in favor of applying the Equal Protection Clause with equivalent or greater force than the Free Exercise Clause. Justice Scalia generally took a quite narrow approach to interpreting the Equal Protection Clause,[326] but even he emphasized in *Smith* that it would be anomalous to essentially recognize disparate impact liability in cases involving religion when it has been rejected in cases involving race.[327] Recent cases have restored this anomaly. Even if a majority of the Court is not yet ready to embrace the position taken by Justice Alito in *Fulton* and to overrule *Smith* outright, the most-favored-nation approach taken in *Tandon* once again privileges plaintiffs under the Free Exercise Clause compared to plaintiffs under the Equal Protection Clause by eliminating the requirement of discriminatory intent for religious claimants.

To be sure, Douglas Laycock and Steven Collis have suggested that the most-favored-nation approach actually treats race and religion in an analogous way:

> If an African-American plaintiff shows that he was treated worse than similarly situated white employees, we would never let the employer defend on the ground that Asian or Hispanic employees were treated just as badly as the plaintiff. Minority employees are entitled to be treated as well as the best-treated race, not merely as well as some other badly treated race. It is no different to say that the exercise of religion is entitled to be treated like the best-treated secular analog.[328]

But under current interpretations of the Equal Protection Clause, minority employees are manifestly not entitled to be treated as well as the best-treated race.

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326. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (rejecting affirmative action measure and arguing that "[t]he benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected"); *see also* Gil Seinfeld, *The Good, The Bad, and The Ugly: Reflections of a Counterclerk*, 114 MICH. L. REV. FIRST IMPRESSIONS 111, 118-20 (2016) (discussing and critiquing Scalia's approach to affirmative action cases under the Equal Protection Clause); Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 392 (2000) (same); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 444-46 (1997) (same).

327. Emp. Div. v. Smith, 494 U.S. 872, 886 n. 3 (1990) (citing Washington v. Davis, 426 U.S. 229 (1976) and stating "our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling government interest is the only approach compatible with these precedents").

328. Laycock & Collis, *supra* note 133, at 26.

Recall that *Davis* held that the government was free to insist upon passage of a test that had not been shown to have any predictive value with respect to performance as a police office, even though it disproportionately excluded Black applicants.[329] More gravely still, *McClesky* held that the state was free to administer its capital punishment regime notwithstanding sophisticated statistical evidence showing that Black defendants accused of killing white victims were notably more likely to be sentenced to death than white defendants accused of killing Black victims.[330] This is not equal treatment in any meaningful sense of the term. To the contrary, it is much more akin to the kind of "hostile indifference" that Laycock and Collis perceive in the government's treatment of religious objectors.[331] If improper motive or discriminatory intent are not required when challenging such indifference toward the constitutional value of religious liberty,[332] they should not be required with respect to the dominant constitutional value of racial and ethnic equality.

There are, of course, a number of statutes that prohibit racial discrimination and provide for disparate impact liability without evidence of discriminatory intent in some settings.[333] But the imperative of combating the effects of systemic racism is so great that it cannot be left to the political process. The comparison to religion is again instructive. For example, Congress responded to the *Smith* decision by passing the Religious Freedom Restoration Act in 1993 and the Religious Land Use and Institutionalized Persons Act in 2000, both of which sought to restore the compelling interest test to many religious claims[334]—yet Justice Alito has noted that such measures "can be weakened or repealed by Congress at any time," and has insisted that "[t]hey are no substitute for a proper interpretation of the Free Exercise Clause."[335] More fundamentally, he maintains that "the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials."[336]

Once again, there may be force to this argument as applied to the Free Exercise Clause—but there is just as much force as applied to the Equal Protection Clause. All of the statutory measures protecting against racial and ethnic discrimination are just as vulnerable to being repealed or weakened as the

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329. *See supra* notes 226-33 and accompanying text.

330. *See supra* notes 278-92 and accompanying text.

331. Laycock & Collis, *supra* note 133, at 27.

332. *See id.* (discussing discrimination cases and stating that "[i]mproper motive or purpose often accompanies unequal treatment of religious and secular conduct, but that is not required.")

333. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (recognizing disparate impact liability under Title VII of the Civil Rights Act of 1964); *see also* Tex. Dep't of Hous. and Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015) (recognizing disparate impact liability under federal Fair Housing Act).

334. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1893-94 (2021) (Alito, J., concurring) (discussing passage of Acts).

335. *Id.* at 1894.

336. *Id.* at 1917 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

statutory measures protecting religion. Moreover, given the current composition of the Supreme Court, statutes recognizing disparate impact liability are likely even more vulnerable to being undermined—not necessarily by Congress, but rather by the Justices themselves. For example, the Court narrowly recognized disparate impact liability under the Fair Housing Act by a 5-4 margin in 2015.[337] The majority opinion was written by Justice Kennedy and joined by Justice Ginsburg, neither of whom is still on the Court. By contrast, the principal dissenting opinion was written by Justice Alito, who remains on the bench as part of the Court's current "conservative supermajority."[338] It hardly seems beyond the realm of possibility that the issue of disparate impact could be revisited and reversed.

The prospect of weakening statutory disparate impact liability appears all the more likely in light of a case decided at the very end of the October 2020 term, *Brnovich v. Democratic National Committee*.[339] The case involved a pair of Arizona voting provisions: one required in-person voters to cast their ballots in their own precincts in order to have their ballots counted, and another prohibited mail-in ballots from being collected by anyone other than a few designated categories of persons.[340] Both provisions were challenged under the federal Voting Rights Act of 1965.[341] Unlike the Equal Protection Clause, the Voting Rights Act recognizes disparate impact liability—indeed, the Act was amended in 1982 to clarify that it included disparate impact liability precisely because a plurality of the Court had previously concluded otherwise.[342] Section 2 of the Act now contains express language that focuses on discriminatory impacts of voting measures: it prohibits any voting qualification or procedure that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[343] The Court held that neither of the state voting provisions at issue violated the Act.[344] Professor Richard Hasen has suggested that this result was "unsurprising," given that the two state measures "were relatively tame" in comparison to many other voting regulations that have been adopted in

337. Tex. Dep't of Hous. and Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015).

338. Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html [https://perma.cc/EG4L-AMCJ].

339. 141 S. Ct. 2321 (2021).

340. *Id.* at 2330.

341. *Id.*

342. *Id.* at 2332 (citing Mobile v. Bolden, 446 U.S. 55 (1980)).

343. 52 U.S.C. § 10301; *see also Brnovich*, 141 S. Ct. at 2336-37 (quoting and analyzing statutory language).

344. *Brnovich*, 141 S. Ct. at 2349.

recent years.[345] The greater significance of the case was in its analytic approach.[346] Despite clear evidence of Congressional intent to provide for disparate impact liability and statutory language to that effect, Justice Alito's majority opinion holds that the existence of an undisputed racially disparate impact is not enough to establish a violation of the Act:

> To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. The size of any disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential. What are at bottom very small differences should not be artificially magnified.[347]

The Court also distinguishes the Voting Rights Act from other statutes that recognize disparate impact liability in another important way. Specifically, the Court rejects the requirement that states show that their interests could not be achieved in a less discriminatory manner, holding that it would be "inappropriate to read § 2 to impose a strict 'necessity requirement' that would force States to demonstrate that their legitimate interests can be accomplished only by means of the voting regulations in question."[348] Thus, not only are "small" racially disparate impacts predictable—they need not even be justified by a showing that they are legislatively unavoidable.

The *Brnovich* decision demonstrates that the current Court's conception of disparate impact liability is a very narrow one. It also confirms that statutory measures can indeed be weakened at any time—if not by Congress, then by the Court. For it is ultimately the Justices who have the last word, and fragile statutory attempts to guard against disparate impacts "are no substitute for a proper interpretation of the [Equal Protection Clause]."[349] It is therefore imperative that the Supreme Court itself acknowledge the historical, textual, and structural reasons why racial equality is a dominant constitutional value. If the Court is going to recognize disparate impact liability for religious objectors under the Free Exercise Clause, it must also do so for racial and ethnic minorities under the Equal Protection Clause.

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345. Richard L. Hasen, *The Supreme Court is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html [https://perma.cc/4Z99-EKR9].

346. *See id.* (arguing that "[t]he real significance of Brnovich is what the court says about how Section 2 applies to suppressive voting rules").

347. *Brnovich*, 141 S. Ct. at 2339.

348. *Id.* at 2341.

349. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring).

CONCLUSION

Recent Supreme Court jurisprudence has steadily privileged claims brought under the Free Exercise Clause relative to claims brought under the Equal Protection Clause. This has been accomplished by allowing religious plaintiffs to prevail in some cases by demonstrating that laws have an incidental effect on religious practice, even if the intention of those laws is not to discriminate against religion.[350] BIPOC plaintiffs have not been afforded the same rights: laws that have an incidental disparate impact against racial minorities do not violate the Equal Protection Clause in the absence of discriminatory intent.[351] To be sure, this privilege is not limited to plaintiffs bringing claims under the Free Exercise Clause alone. Claimants can also prevail without demonstrating discriminatory intent in some cases under the Free Speech Clause, such as where a content-neutral law incidentally burdens expressive conduct.[352] Claimants can even prevail on the basis of discriminatory effects without demonstrating discriminatory intent under the Dormant Commerce Clause[353]—despite the seemingly obvious truth that "the right of people to be free of state action that discriminates against them because of race . . . 'occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.'"[354]

The point, then, of focusing on the Free Exercise Clause in this Article is not that it enjoys unique status compared to the Equal Protection Clause. Rather, the point is that the Supreme Court has shown a particular willingness to reconsider and strengthen the Free Exercise Clause of late—in part because of the light the COVID-19 pandemic and other recent events have thrown on the shortcomings of current doctrine. Some of those shortcomings may be genuine and may be ripe for reexamination. But the coronavirus crisis, the Black Lives Matter movement, and other developments in 2020-2021 have surely cast even harsher light on the glaring racial inequalities that persist throughout American law and society. Disparities that exist in public health, housing, employment, education, and

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350. *See supra* Part I.

351. *See supra* Part II.

352. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968) (stating test for evaluating laws that incidentally burden expressive conduct); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 85-94 (considering potential applicability of *O'Brien* standard to claims for religious exemptions); Gedicks, *supra* note 295, at 937; Reyes, *supra* note 51, at 123-24.

353. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 352-353 (1977) ("[W]e need not ascribe an economic protection motive . . . to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.").

354. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 279 (1964) (Douglas, J., concurring).

criminal justice all have deep roots in legally mandated and/or sanctioned racial discrimination. The Supreme Court itself has played an important role throughout American history in enabling that discrimination and allowing its effects to endure. After the ratification of the Constitution, it was the Court that held that Black people were not citizens and could not partake of its protections. After the Fourteenth Amendment declared that all people born or naturalized in the United States were indeed citizens and entitled to the equal protection of the law, it was the Court that held "separate but equal" was constitutionally permissible. After *Brown* ruled that separate educational facilities were inherently unequal, it was the Court that held de facto school segregation and other disparate impacts did not violate the Equal Protection Clause in the absence of proof of discriminatory intent. And after Congress declared that the Voting Rights Act encompassed disparate impact liability, it was the Court that held that "small" disparate impacts were nevertheless acceptable and should not be "artificially magnified." The list goes on and on.

It is long past time for the Supreme Court to correct the error of its ways. As a matter of constitutional history, text, and structure, racial equality is an equal if not dominant value relative to religious liberty. If the Court is going to revisit longstanding precedent and recognize disparate impact liability for religious objectors, it must do the same for racial minorities. It is time to give the Equal Protection Clause equal protection.