RELIGIOUS EXEMPTIONS TO NEUTRAL LAWS OF GENERAL APPLICABILITY AND THE THEORY OF DISPARATE IMPACT DISCRIMINATION

JAMES M. DELISE*

This Article argues that the theory undergirding religious exemptions to neutral laws of general applicability represents a viable theoretical and legal justification for race-based disparate-impact policies such as Title VII. Though not always expressly stated as such, one can best understand the theory underpinning the exemptions approach to religious free exercise as a paradigm of disparate impact discrimination. Similar to disparate-impact discrimination in the context of race and employment policy, the statutory level serves as the domain of execution for religious-based models of disparate impact. Just as Washington v. Davis *relegated remedies for race-based disparate impact in employment to the statutory level, the Court's ruling in* Employment Division v. Smith *served the same function in the context of religion. However, in sharp contrast to Title VII and the paradigm of race-based disparate impact in the context of employment, the Supreme Court has not evinced hostility toward disparate-impact legislation in the context of religious free exercise; it has not found a tension between the positive right to be judged as an individual and the tendency of Congress and other legislative bodies to engage in explicitly religious-conscious decision-making. Constitutionally speaking, there is no tenable method of differentiating between race-conscious and religious-conscious decision-making. Because there is no legitimate method of constitutional differentiation here, and because the Court has not interpreted the legal-theoretical model of religious exemptions as offending the Equal Protection Clause, this Article posits that the theory undergirding religious exemptions to neutral laws of general applicability represents a viable theoretical and legal justification for race-based disparate-impact policies such as Title VII.*

I. INTRODUCTION

In *Griggs v. Duke Power Co.*,[1] the Supreme Court interpreted Title VII of the Civil Rights Act of 1964 as banning not only overt, purposeful employment discrimination, but also "practices that are fair in form, but discriminatory in operation."[2] In other words, the *Griggs* Court construed Title VII as proscribing overt racial discrimination in employment, as well as employment practices that did not overtly discriminate on the basis of race but had the effect of excluding non-Whites or other protected groups from employment.[3] The *Griggs* Court was careful to note that Title VII's ban on discriminatory effects did not authorize "preference for any group, minority or majority."[4] Instead of supporting preferential treatment and racial quotas, the *Griggs* Court interpreted the ban on discriminatory effects as eliminating only those racially exclusionary employment practices that were not related to "job performance."[5] In short, employers could avoid liability under Title VII if the employment practices in question were related to "job performance" or "business necessity"—even if those policies had the effect of disproportionately excluding non-Whites or other protected groups.[6]

The ruling in *Griggs* was limited to statutory interpretation of Title VII. As such, it did not answer the broader constitutional question of whether facially neutral state actions devoid of discriminatory intent violate the Equal Protection Clause if they have racially discriminatory effects (adverse racial impact).[7] The Court answered this question in *Washington v. Davis*,[8] ruling that an equal protection violation does not occur absent a showing of purposeful or intentional racial discrimination on the part of a state actor.[9] While the effects of a particular policy may be useful in sniffing out illicit racial motives, adverse racial impact by itself does not constitute an equal protection violation.[10] To elevate the statutory rule of *Griggs* to the level of constitutional law would, in the *Davis* Court's view, be "far reaching" and possibly lead to the invalidation of "a whole range of tax, welfare, public service, regulatory, and licensing statutes."[11] However, the *Davis* Court did not express a constitutional concern with a statutory rule proscribing disproportionate racial impact in employment—

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* Assistant Professor of Instruction, Temple University Intellectual Heritage Program. I would like to thank Heath Fogg-Davis, Jane A. Gordon, Joseph M. Schwartz, and Rogers M. Smith for their helpful comments on the initial draft of this Article.

[1] 401 U.S. 424 (1971).

[2] *Id.* at 431.

[3] *Id.* at 431.

[4] *Id.* at 431. The Civil Rights Act of 1964 classifies as an unlawful employment practice discrimination "against any individual…because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e(a)(1) (2015).

[5] 401 U.S. at 431.

[6] *Id.*

[7] Washington v. Davis, 426 U.S. 229, 238–239 (1976). After noting that the "Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it," the *Davis* Court went on to note that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 239 (emphasis in original).

[8] *Id.* at 229.

[9] *Id.* at 247–48.

[10] *Id.* at 242. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the U.S. Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justified only by the weightiest of considerations." *Id.* (citing McLaughlin v. Florida, 379 U.S. 184 (1964)).

[11] *Id.* at 248.

essentially affirming in its dicta the *Griggs* Court's interpretation of Title VII—and indicated that future expansions of such a rule would have to come from the legislative process.[12]

A series of cases before and after *Davis* affirmed the *Griggs* Court's interpretation of Title VII and the disparate impact standard of employment discrimination,[13] and in 1991 Congress amended the Civil Rights Act of 1964 to clarify employers' disparate impact liability under Title VII, expressly codifying a disparate impact standard of discrimination under Title VII.[14] Although the Civil Rights Act of 1991 may have provided statutory clarification for disparate impact liability under Title VII, it did not offer any guidance for answering the larger constitutional question that would lay dormant for roughly 18 years and eventually surface in the 2009 case of *Ricci v. DeStefano*.[15] In *Ricci*, the Court for the first time raised the question of whether disparate impact statutes such as Title VII, with their use of racial criteria for evaluating decisions and allocating employment opportunities, violate the Equal Protection Clause of the United States Constitution. There was a time when a question like this would have been hard to fathom. As Richard Primus notes, "Once upon a time, the burning issue about equal protection and disparate impact was whether the Fourteenth Amendment itself embodied a disparate impact standard."[16] However, since the time of *Davis*, the Court has grown increasingly intolerant of race-conscious decision making, even for the purpose of redressing prior invidious discrimination.[17] Given this trend, perhaps one should not be surprised that the Court raised this question in *Ricci*. But the *Ricci* Court only raised the question; it did not offer resolution.[18] Because the *Ricci* Court limited its decision to the statutory question of reconciling the disparate treatment and disparate impact prongs of Title VII, it is not yet clear whether disparate impact violates the Equal Protection Clause.[19] As Justice Scalia noted in his concurrence, the *Ricci* decision "merely postpones the evil day which the Court will have to confront the question: Whether, and to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[20]

Even though the *Ricci* Court did not rule on the constitutionality of disparate impact, the fact that it perceived a potential conflict and intimated that there may be a constitutional issue with disparate impact and equal protection by itself "represents a complete turnabout in antidiscrimination law."[21] Interestingly enough, in a different legal domain—religious free exercise—a similar turnabout had come to pass almost thirty years prior. With the case of *Employment Division v. Smith*,[22] the Supreme Court jettisoned the compelling interest test it had used for roughly thirty years to examine the constitutionality of laws and policies that incidentally burdened religious exercise.[23] For several decades prior to *Smith*, the Court abided by the principle that

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[12] *Id.* at 248. It is reasonable, then, to view the *Davis* Court's opinion as affirming the statutory interpretation of *Griggs*.

[13] Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2158 (2013).

[14] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

[15] Ricci v. DeStefano, 557 U.S. 557 (2009).

[16] Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1344 (2010).

[17] *See* Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 496 (2003).

[18] Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 54, 55 (2009).

[19] *Ricci*, 557 U.S. at 584.

[20] *Id.* at 594 (Scalia J., concurring). The majority opinion in *Ricci* did not portray the tension between disparate impact and equal protection as starkly as Justice Scalia. Writing for the majority, Justice Kennedy noted: "Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case." *Id.* at 584.

[21] Primus, *supra* note 16.

[22] 494 U.S. 872 (1990).

[23] *See generally*, Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992) (describing the changes in the Supreme Court's doctrinal framework for analyzing cases involving accommodation of religion); *see also* Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990). Although religious exemptions were the official court doctrine, McConnell notes that

individuals had a constitutional right to be exempted from generally applicable, neutral laws that incidentally burdened their religious exercise.[24] Under this principle, states could overcome a free exercise challenge only by showing that the law in question was narrowly tailored (the least restrictive means) and represented a compelling state interest.[25] Prior to *Smith*, then, the Court conceived of a constitutional right to religious exemptions, and the judiciary had a role to play in carving out religious exemptions when the state failed to satisfy certain requirements.

After *Smith*, however, decisions regarding exemptions to neutral laws burdening religious exercise were left exclusively to the democratic process.[26] The *Smith* Court argued that this process might put unpopular religious practices at a disadvantage, but this relative disadvantage was preferable "to a system in which each conscience is a law unto itself or in which judges weight the social importance of all laws against the centrality of religious beliefs."[27] Although the *Smith* ruling limited constitutional free exercise protections, it engendered a host of statutory remedies designed to restore the compelling interest test that had governed free exercise jurisprudence for the nearly thirty years prior to *Smith*.[28] For example, in the wake of *Smith* Congress passed the Religious Freedom Restoration Act (RFRA),[29] and since *Smith*, twenty-one states have adopted laws designed to mimic the federal Religious Freedom Restoration Act (state RFRAs).[30]

Beyond its determination that the federal RFRA applied only to actions of the federal government,[31] the Supreme Court has not found statutory religious exemptions to be constitutionally problematic—even though these laws require state actors to engage in religious-conscious decision making, much like disparate impact laws require state and private actors to engage in race-conscious decision making.

This Article posits that a nexus exists between the disparate impact theory of racial discrimination and the legislative and judicial practice of carving out exemptions for religious persons whose ideals conflict with so-called neutral laws of general applicability. With few exceptions, the literature on equal protection and discrimination, as well the scholarly literature covering religious free exercise, overlooks this connection.[32] Though not always expressly stated as such, one can best understand the theory underpinning the exemptions approach to religious free exercise as a paradigm of disparate impact discrimination. Similar to disparate impact discrimination in the context of race and employment policy, the statutory level serves as the domain of execution for religious-based models of disparate impact. Just as *Washington v. Davis*[33] relegated remedies for race-based disparate impact in employment to the statutory level, the Court's ruling in *Employment Division v. Smith*,[34] served the same function in the context of religious free exercise, as the Court determined that there was no constitutional right to religious exemptions—thus ensuring that Congress and state legislatures would determine the ultimate fate of religious exemptions to generally applicable, neutral laws.

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this right "was more talk than substance" because the Court infrequently rendered decisions in favor of religious claimants. *Id.* at 1109–10.

[24] This principle emanated from the watershed cases of Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972).

[25] *See* McConnell, *supra* note 23, at 1110.

[26] Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

[27] *Id.*

[28] Christopher C. Lund, *Religious Liberty after Gonzalez: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

[29] *See* Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb (2006).

[30] *State Religious Freedom Restoration Acts,* NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (Nov. 15, 2015); *see also* Lund, *supra* note 28.

[31] *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

[32] The author is aware of one exception to this trend in the literature. Bernadette Meyler argues that there is a "distinctive similarity between the structure of free exercise and equal protection claims." Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and their History*, 47 B.C. L. REV. 275, 285 (2006).

[33] 426 U.S. 229, 240–242 (1976).

[34] 494 U.S. 872 (1990).

In sharp contrast to Title VII and the paradigm of race-based disparate impact in the context of employment, the Supreme Court has not evinced hostility toward disparate impact legislation in the context of religious free exercise; it has not found a tension between the positive right to be judged as an individual and the tendency of Congress and other legislative bodies to engage in explicitly religious-conscious decision-making.[35] There is, constitutionally speaking, no tenable method of differentiating between race-conscious and religious-conscious decision making such that one form of group-based evaluation should be greeted with incredulity and disapprobation while the other should not even command a modicum of scrutiny. Because there is no constitutional method of differentiation here, and because the Court has not interpreted the legal-theoretical model of religious exemptions as offending the Equal Protection Clause, I conclude that the theory undergirding religious exemptions to neutral laws of general applicability represents a viable theoretical and legal justification for race-based disparate impact policies such as Title VII. This justificatory approach has the advantage of employing principles emanating from the conservative wing of the Court—i.e., those moving public policy in the direction of color blindness—to defend a policy of which these jurists have become increasingly skeptical.[36] Moreover, it bolsters the defense of Title VII in the face of its impending showdown with the Equal Protection Clause. For "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."[37] This Article is an effort at making such peace.

II. THE HISTORY OF RELIGIOUS EXEMPTIONS IN THE UNITED STATES

During the winter of 1812-1813, Daniel Phillips, a parishioner at St. Peter's—the only Catholic Church in New York City at the time—participated in the Catholic sacrament of Reconciliation. Pursuant to Church doctrine, Phillips orally confessed his sins and agreed to perform the prescribed penance. According to Roman Catholic ethos, Phillips had to engage in these acts—oral confession and penance—before he could take part in the Catholic sacrament of Holy Communion.[38] During his confession, Phillips acknowledged that he had, with full cognizance, received stolen property.[39] Since it was, and remains, a longstanding, sacrosanct practice of the Catholic Church to keep the content of one's confession between him/her and God, Phillips had good reason to believe that the details of his confession would remain confidential and not be divulged to any outside authorities.[40] After learning of Phillips' illicit act, Father Anthony Kohlmann, the priest hearing Phillips' confession, encouraged him to return the stolen property to its lawful owner. Phillips, presumably operating under the shroud of confidentiality, gave the stolen items to Father Kohlmann, who ensured the safe return of the illegally obtained items to their owner, James Keating. Keating, upon receipt of the property, reported the theft to the appropriate legal authorities. Subsequently, the New York Court of General Sessions subpoenaed Father Kohlmann to testify under oath and reveal the germane details of Phillips' confession.[41]

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[35] The Supreme Court's decision in *Ricci v. DeStefano* called into question the constitutionality of race based disparate impact statutes and severely circumscribed the range of cases in which employers could apply the disparate impact requirements of Title VII. 557 U.S. 557, 558 (2009). The Court's decision in *Ricci* followed from its embrace of an individualized interpretation of equal protection—an interpretation supported by several affirmative-action rulings. *See* Wygant v. Jackson, 476 U.S. 267 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Adarand Constructors v. Pena, 515 U.S. 200 (1995). In these cases, the Court interpreted equal protection as guaranteeing a positive right to be judged as an individual, without reference to "morally arbitrary" group attributes. *See* Primus *supra* note 17. As noted in the sections below, the Supreme Court has not viewed religious exemptions and the group classifications on which they are based as violating this positive right to be judged as an individual.

[36] *See* Ricci, 557 U.S. at 558.

[37] *Id.* at 595–96 (Scalia, J., concurring).

[38] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1410 (1990).

[39] *Id.* at 1410.

[40] *Id.* at 1410–11.

[41] *Id.* at 1411.

Father Kohlmann, under questioning from the District Attorney, refused to provide the details of Phillips' confession and so began the first recorded free exercise case in United States history, *People v. Phillips* (1813).[42] *In Phillips*, the central question under examination was whether a government entity could enjoin a priest to divulge information obtained during the sacrament of Reconciliation (during confession), as forcing a priest to reveal such information would unequivocally violate the priest's conscience, the principles of his church, and the requirements of his position. Furthermore, Father Kohlmann's contravention of the church tenets under examination would have most assuredly resulted in his dismissal from the priesthood and, possibly, his excommunication from the church. Father Kohlmann had to decide between observing his religious scruples—his identity as a Catholic—and serving jail time for refusing to testify. Fortunately, for Father Kohlmann's sake, the Honorable De Witt Clinton, then mayor of New York City, delivered a unanimous opinion that carved out an exemption to the generally applicable rule under consideration. That rule under consideration was "that every man when legally called upon to testify as a witness, must relate all he knows."[43]

After noting several exceptions to this general rule of testifying under oath (e.g., spouses cannot be compelled to testify against one another), De Witt then moved to consider the applicability of the New York State Constitution's free exercise provision to the specific case at hand. The state's free exercise provision called for the allowance of the "free exercise and enjoyment of religious profession and worship" in a nondiscriminatory manner, except under circumstances where the allowance of such "profession and worship" ran counter to the "peace or safety" of the state or resulted in the sanctioning of licentious acts.[44] According to De Witt, the excusal of Father Kohlmann from the rule/obligation of general applicability at issue here—the general law that a person must "relate all that he (or she) knows" when compelled to testify in a court of law—did not constitute a breach of the state's free exercise proviso. In other words, exempting a Catholic priest from the general rule of veraciously bearing witness in a court of law, at least in this circumstance, did not result in state sanctioned "licentiousness" or in the compromised "peace or safety" of its citizens.[45]

The overarching conflict presented in *Phillips*—a conflict between seemingly neutral laws/rules of general applicability and the beliefs and/or practices of a particular religious sect, or of particular religious persons—is a conflict that has deep roots in American history, dating back to the colonial and pre-constitutional periods. In fact, several colonies had free exercise provisions that circumscribed religious exercise only in circumstances where the actions of adherents jeopardized public safety ("outward disturbance of others") or entailed licentious behavior.[46] As Michael McConnell notes in his seminal work on the history of free exercise, although not explicitly endorsing the idea of exemptions, these expansive provisions were nonetheless compatible with the notion of religious-based dispensation from laws. They provided requisite space for exemptions to laws of general applicability insofar as the religious practice in question did not run counter to the prevention of licentiousness or the protection of public safety.[47] Moreover, the second Charter of Carolina (revised in 1665) went even further and expressly authorized the use of religious exemptions. The Charter acknowledged that private actions and beliefs would not always comport with the Church of England, and it gave authorities the ability to grant "indulgences" and "dispensations" as they saw "fit and reasonable."[48]

In post-Revolutionary, but pre-constitutional, America, free exercise provisions of state constitutions exhibited three common features that were also consistent with the practice of granting religious exemptions.

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[42] People v. Philips, N.Y. Ct. Gen. Sess. (1813), cited in MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 103–08 (2nd ed. 2006).

[43] *Id.* at 105.

[44] *Id.* at 107.

[45] *Id.* at 107–09.

[46] McConnell, *supra* note 38, at 1426–27.

[47] *Id.* at 1427–28.

[48] *Id.* at 1428.

First, state constitutions did not limit the free exercise of religion to conscience or belief; free exercise in pre-constitutional America subsumed religious beliefs and the actions following from such dictates of conscience.[49] Second, early state constitutions circumscribed free exercise only when it came into conflict with specific state purposes.[50] These free exercise limitations, most of which related to ensuring public safety and rectitude, could only have had relevance in situations where the actions of religious adherents came into conflict with general laws. In other words, the limitations would be meaningless unless one understood them as creating space for religious exemptions to general laws up until a certain point.[51] Finally, the actual manner in which states dealt with the conflict between one's religious scruples and neutral laws of general applicability during this period supports the exemptions approach to religious accommodation. Conflict between general laws and religious conviction commonly arose in three areas: military conscription, oath requirements, and religious assessments.[52] When conflict arose in these areas, "the colonies and states wrote special exemptions into their laws."[53]

The free exercise provisions in early state constitutions, as well as the actual practice of exemptions surrounding oaths, military conscription, and religious assessments, while not providing direct evidence that the Free Exercise Clause of the U.S. Constitution mandates religious-based exemptions to neutral laws of general applicability, show that the idea of exemptions was not foreign to the Framers of the First Amendment. Although the Framers of the First Amendment did not expressly address exemptions in their debates over free exercise, there is no substantial proof that they considered such exemptions inconsistent with the Constitution.[54] McConnell points to this indirect evidence, along with writings of James Madison, to argue that the exemptions approach to free exercise is more consistent with the Framer's original intent than the no-exemptions approach.[55] At the same time, however, he acknowledges that this evidence is merely suggestive and not probative.[56] Although other scholars have called McConnell's original-intent thesis into question, generally their critiques have disputed his finding that religious exemptions are constitutionally mandated, not his evidence of statutory religious exemptions in the colonial and pre-constitutional periods.[57] At the very least, then, McConnell provides a cogent defense of the idea that traditional interpretations of religious free exercise incorporated the notion of exemptions to generally applicable laws.[58] To what extent

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[49] *Id.* at 1458–59.

[50] *Id.* at 1461.

[51] *Id.* at 1462.

[52] *Id.* at 1466. Quakers and other religious groups refused to take oaths, which were the primary method employed to guarantee veracious testimony in a court of law. As McConnell notes, "A regime requiring oaths prior to court testimony effectively precluded these groups from using the court system to protect themselves." *Id.* at 1467. As a result, almost all states had oath exemptions on the books by 1789. *Id.* at 1468. Military Conscription: Many religious groups objected to military service, and states such as Rhode Island, North Carolina, Maryland, and New Hampshire granted religious exemptions to military service. *Id.* at 1468. Religious Assessments: These exemptions applied only in states with established churches. In those states, it was common to require citizens to remit support payments to the established church or their own church. It also was common, however, for states to exempt from this requirement members of religious denominations that objected to compulsory tithing. *Id.* at 1469.

[53] *Id.* at 1472.

[54] *Id.* at 1511.

[55] *Id.* at 1512. The no-exemptions approach states that laws are consistent with free exercise to the extent that they are facially neutral toward religion. McConnell, *supra* note 38, at 1452–55. *But see* Vincent Phillip Munoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17 (2003) (concluding that constitutional applications of Madison's thoughts of religious liberty fail to grasp his position).

[56] *Id.* at 1512.

[57] *See, e.g.*, Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 591 (1990) (contending that religious exemptions are not constitutionally mandated); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historic Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Vincent Phillip Munoz, *The Original Meaning of the Free Exercise Clause: Evidence from the First Congress*, 31 HARV. J. L. & PUB. POL'Y 1083 (2008).

[58] MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 124-125 (2008).

these historical interpretations translate into a right to exemptions readily derivable from the Free Exercise Clause of the U.S. Constitution is, however, far from certain.[59]

A. The U.S. Supreme Court And Religious Exemptions: *Sherbert* And Its Progeny

Until the case of *Sherbert v. Verner*,[60] the U.S. Supreme Court did not interpret the Free Exercise Clause of the First Amendment as granting a constitutional right of exemption from neutral laws of general applicability. Prior to *Sherbert*, the High Court ruled that anti-polygamy statutes did not violate the First Amendment rights of Mormons,[61] that child labor laws forbade a minor from distributing religious materials with her aunt,[62] that a public university's punitive action against students who refused to participate in ROTC on religious grounds was legitimate,[63] and that Sunday closing laws did not infringe upon the free exercise rights of Orthodox Jews.[64] Although the Supreme Court had not established a constitutional right of exemption prior to *Sherbert*, it had ruled that the Free Exercise Clause proscribed intentional discrimination against particular individuals or groups because of their religious beliefs,[65] and that it prohibited the regulation[66] and compulsion of religious beliefs.[67]

At issue in *Sherbert* was whether the state of South Carolina could deny unemployment benefits to a member of the Seventh-Day Adventist Church because of his or her unwillingness to work on Saturdays in observance of the Sabbath.[68] The South Carolina Unemployment Compensation Act conditioned unemployment benefits upon one's willingness "to accept 'suitable work when offered him by employment office or the employer.'"[69] The Employment Security Commission found that Sherbert's inability to work on Saturdays made her ineligible for benefits under the terms of the statute; in other words, she was unwilling "to accept 'suitable work.'"[70] In *Sherbert*, the Court reaffirmed its long-standing precedent that laws intentionally discriminating against certain individuals or groups because of their religious beliefs, or statutes regulating or compelling religious belief, were repugnant to the Free Exercise Clause.[71] At the same time, however, the Court noted that in prior cases, it had not interpreted the Free Exercise Clause as protecting against government regulations that incidentally burdened or inhibited actions impelled by religious belief or conscience.[72] In other words, the Court had yet to extend free exercise protections to religiously motivated actions under circumstances where state regulations incidentally burdened religious free exercise, but did not discriminate against—or endeavored to compel or regulate—religious belief.

Although it had not yet granted free exercise protections in such cases, the Court had examined cases where neutral laws of general applicability burdened religious free exercise; however, the laws at issue in all of these cases fell within the ambit of the state's legitimate regulatory powers. Specifically, the Court had not found regulations of religiously motivated activity constitutionally problematic in these cases because they all entailed "conduct or action" that "posed some substantial threat to public safety."[73] However, the conduct at issue in *Sherbert*—a refusal to work on Saturdays in observance of the Sabbath—hardly constituted behavior

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[59] *Id.* at 125.

[60] 374 U.S. 398 (1963).

[61] Reynolds v. United States, 98 U.S. 145, 165 (1879).

[62] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[63] Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 261 (1934).

[64] Braunfeld, 366 U.S. at 605. *See generally* McConnell, *supra* note 38, at 1412 (discussing the cases outlined above and an overview of the Supreme Court's free exercise jurisprudence prior to *Sherbert*).

[65] Fowler v. Rhode Island, 345 U.S. 67, 69 (1953).

[66] Cantwell v. Connecticut, 310 U.S. 296, 305 (1940).

[67] Torasco v. Watkins, 367 U.S. 488, 496 (1961).

[68] Sherbert v. Verner, 374 U.S. at 400–01.

[69] *Id.*

[70] *Id.* at 401.

[71] *Id.* at 402.

[72] *Id.* at 402–03.

[73] *Id.* at 403.

creating a "substantial threat to public safety."[74] Thus, the Court differentiated *Sherbert* from this prior line of cases. What is more, it reasoned that the unyielding application of eligibility requirements and the concomitant denial of benefits to the appellant in *Sherbert* could pass constitutional muster only under certain conditions. Mainly, they could pass constitutional muster if they did not burden the free exercise of religion or the state had a "compelling interest" for implementing such regulations in a uniform fashion.[75]

The Court unequivocally viewed the denial of unemployment compensation as burdensome to the free exercise of religion.[76] Having established that the eligibility requirements of South Carolina's statute represented a "substantial infringement of the appellant's First Amendment right,"[77] (i.e., they are burdensome) the Court found no compelling state interest in the enforcement of the eligibility requirements in this case.[78] That is to say, it found no "compelling interest" in the uniform application of the statute's requirements sufficient to justify impingement of the appellant's First Amendment rights. As such, the Court held that South Carolina's denial of unemployment benefits in circumstances where a person's religious beliefs make him/her unavailable for work unconstitutionally infringes upon his/her free exercise rights—forcing him/her to jettison "his religious convictions respecting the day of rest."[79] As Justice Harlan noted in his dissent, the Court's holding means that the state "is constitutionally compelled to carve out an exception—and to provide benefits—for those whose unavailability is due to their religious convictions."[80]

Following *Sherbert*, the Court continued to apply the compelling-interest test to "carve out" free exercise exemptions in the context of unemployment compensation. In *Thomas v. Review Board*,[81] and *Hobbie v. Unemployment Appeals Commission*,[82] the Court ruled that, when religious convictions require behavior that leads to, or is the basis for, the refusal or denial of a benefit, it violates the Free Exercise Clause unless there is a compelling government interest for such a denial.[83] What is more, *Thomas* went even further, establishing that states encroaching upon religious liberty in pursuit of a compelling interest must also choose the "least restrictive means" of pursuing their objective.[84] These cases thus affirmed the standard of review propounded in *Sherbert*; and employing that standard, the Court was not able to find a compelling interest to justify the infringement of First Amendment rights in either of these cases. The Court extended its

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[74] *Id.*

[75] *Id.* The *Sherbert* Court did not use the term "uniform" to describe the application of eligibility requirements contained in South Carolina's unemployment law. However, the Court contrasted its ruling in *Sherbert* with that of *Braunfeld v. Brown*, 366 U.S. 599 (1961), asserting that the major difference between the two cases was that, in *Braunfeld*, the state had a compelling interest that could not be achieved if it granted exemptions to the uniform-day-of-rest requirement. *Sherbert,* 374 U.S. at 408. "Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable." *Id.* at 408–09. In sharp contrast to *Braunfeld*, the state of South Carolina did not present evidence that such religious-based exemptions would undermine its legitimate interest. *Id.* at 407–09. Therefore, what differentiates the two cases is a compelling interest in uniformity that justifies the infringement of rights in *Braunfeld* but not *Sherbert*. The question here is not whether the state has a compelling interest in providing for a uniform day of rest (*Braunfeld*) or ensuring that persons receiving employment benefits are willing to "accept available suitable work" (*Sherbert*). The Court does not question the legitimacy of either of these state interests in regulating behavior (as evidenced by the fact that the Court did not invalidate either law). Rather, the question is, in pursuit of a legitimate interest (i.e., one that falls within the ambit of the state's regulatory powers), does the state have a compelling interest in uniformity—that is, in disallowing exemptions—when the regulation infringes upon the constitutional right of free exercise.

[76] *Id.* at 403–06.

[77] *Id.* at 406.

[78] *Id.* at 406–09.

[79] *Sherbert*, 374 U.S. at 410.

[80] *Id.* at 420 (Harlan, J., dissenting).

[81] Thomas v. Review Bd., 450 U.S. 707 (1981).

[82] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

[83] *Hobbie*, 480 U.S. at 141; *Thomas*, 450 U.S. at 717–18.

[84] *Thomas*, 450 U.S. at 718.

compelling-interest analysis to the context of public education in *Wisconsin v. Yoder*.[85] In *Yoder*, the Court found Wisconsin's compulsory school-attendance law, which mandated attendance until the age of 16, in violation of religious free exercise. Members of the Old Order Amish challenged the state law on grounds that attendance beyond the eighth grade undermined core tenets of the Amish faith and their "way of life."[86] The High Court agreed, contending that the Wisconsin's interest in mandating formal education beyond eighth grade did not meet the compelling-interest requirement; similar to *Sherbert* above, the Court found no "compelling interest" in the uniform application of the statute's requirements sufficient to justify infringement of the free exercise of religion.[87] As such, the Court granted the Old Order Amish and "others similarly situated" an exemption to the compulsory education statute.[88]

Although the free exercise rulings cited above might lead one to conclude that *Sherbert* ushered in a new epoch of free exercise jurisprudence, one in which the Court regularly upheld religious claimants' objections to neutral laws of general applicability, this conclusion does not reflect the bulk of post-*Sherbert* decisions handed down prior to the landmark decision in *Employment Division v. Smith*.[89] Following the *Sherbert* decision, religious claimants inundated the Court, seeking exemptions to neutral laws of generally applicability in accordance with the compelling-interest (strict scrutiny) test of *Sherbert*.[90] However, the Court, while often adhering to the compelling-interest test in procedure, rarely produced substantive outcomes favoring religious claimants.[91] Michael McConnell describes this post-*Sherbert* trend in free exercise jurisprudence as a peculiar quality to the consensus, wherein the "free exercise doctrine was more talk than substance."[92] In cases covering a panoply of statutes and regulations, the Court consistently rejected constitutional free exercise claims, usually by determining that the law or regulation in question did not sufficiently burden religion, or that the government had a compelling interest.[93] For example, the Court rejected free exercise challenges to the Social Security Tax,[94] to the requirement that welfare applicants be identified by their own Social Security number,[95] to regulations prohibiting headgear in the Air Force,[96] and to prison rules interfering with the ability of Muslims to attend midday service.[97] Eventually, the Court severely attenuated, if not jettisoned entirely, its commitment to the compelling-interest test with the case of *Employment Division v. Smith*.[98].

B. The U.S. Supreme Court And Religious Exemptions: *Employment Division v. Smith* And The End Of The *Sherbert* Test For Free Exercise Cases

Smith pivoted on the constitutionality of an Oregon state law that proscribed peyote use without making an exception for religious-based consumption.[99] Oregonians Alfred Smith and Galen Black, both of whom were members of the Native American Church, had their employment at a drug rehabilitation center terminated because they consumed peyote during a religious ceremony of their church. Smith and Black subsequently applied for unemployment benefits, and the state denied their applications because "they had

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[85] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[86] *Yoder*, 406 U.S., at 209.

[87] *Id.* at 235–36.

[88] *Id.* at 236. Because the Amish "have carried the even more difficult burden of demonstrating the adequacy of their alternate mode of education […] it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." *Id.* at 235–36.

[89] 494 U.S. 872 (1990).

[90] KATHLEEN SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 539–40 (4th ed. 2010).

[91] *Id.* at 540.

[92] McConnell, *supra* note 23, at 1109.

[93] *Id.* at 1110.

[94] United States v. Lee, 455 U.S. 252, 254 (1982).

[95] Bowen v. Roy, 476 U.S. 693, 711–12 (1986).

[96] Goldman v. Weinberger, 475 U.S. 503, 510 (1986).

[97] O'Lone v. Estate of Shabazz, 482 U.S. 342, 342 (1987).

[98] *Emp't Div.*, 494 U.S. at 876.

[99] *Id.*

been discharged for work-related 'misconduct.'"[100] In *Smith,* the question before the Court was whether Oregon's blanket criminalization of peyote use and possession was acceptable under the Free Exercise Clause of the First Amendment, thus legitimating the state's denial of unemployment compensation.[101] Smith and Black grounded their free exercise claims in the unemployment compensation cases of *Sherbert v. Verner*, *Thomas v. Review Board*, and *Hobbie v. Unemployment Appeals Commission*,[102] all of which sanctioned the carving out of religious-based exemptions to neutral laws of general applicability (i.e., laws that did not intentionally discriminate against religion).[103] These cases established the standard that, when religious convictions require behavior that leads to, or is the basis for, the refusal or denial of a benefit, it violates the Free Exercise Clause unless there is a compelling government interest for such a denial.[104]

In sharp contrast to the established precedent of *Sherbert*, *Thomas* and *Hobbie*, the *Smith* Court asserted that neutral laws of general applicability burdening religious practices did not have to be justified by a compelling government interest in order to pass constitutional muster.[105] The Court sought to differentiate *Smith* from *Sherbert*, *Thomas* and *Hobbie* based on the legality (or illegality) of the conduct under examination. *Smith* dealt with illegal conduct whereas the unemployment compensation cases did not.[106] Moreover, cases outside of the unemployment context in which the Court carved out religious-based exemptions implicated more than one constitutional protection: they were hybrid cases. For example, *Yoder* entailed not only free exercise protections, but also the rights of the parents to "direct the education of their children."[107] Justice Scalia's majority opinion also contended that the Court did not need to analyze *Smith* through the compelling-interest framework of *Sherbert* because relevant precedent (e.g., *Sherbert*, *Thomas* and *Hobbie*) had applied this test only to countermand rules governing unemployment decisions. "We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."[108]

The difference here, then, appears to stem from the criminal nature of peyote ingestion; at first blush, *Smith* seems to be a case about unemployment compensation indistinguishable from the others. However, granting a judicial exemption would not only result in the distribution of unemployment benefits, but also an exemption to any criminal penalties meted out against religious offenders. Finally, the Court construed the unemployment compensation cases as special because they involved rules and standards amenable to individualized consideration. For example, *Sherbert* and *Thomas* allowed for the denial of unemployment compensation if a person had quit his/her job or would not accept available employment "without good cause."[109] The construction of these statutes created space for, and in fact necessitated, "individualized exemptions."[110] However, a similar amenability is not present when dealing with the uniform criminalization of particular actions.[111]

C. The Aftermath Of *Smith*: The Religious Freedom Restoration Act Of 1993

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[100] *Id.* at 874.

[101] *Id.* at 874.

[102] *See Emp't Div.*, 494 U.S. at 883 (citing Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd., 450 U.S. 707 (1981); and Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987)).

[103] *Sherbert*, 374 U.S. 398; *Thomas*, 450 U.S. 707; *Hobbie*, 480 U.S. 136.

[104] *Hobbie*, 480 U.S. at 141 (citing *Thomas*, 450 U.S. at 717–18; *Sherbert*, 374 U.S. at 403).

[105] *See Emp't Div.*, 494 U.S. at 878–79 (1990) (explaining the Supreme Court "…never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

[106] *See id.* at 876.

[107] *Id.* at 881 (citing Wisconsin v. Yoder, 406 U.S. 233 (1972)).

[108] *Emp't Div.*, 494 U.S. at 883.

[109] *Id.* at 884.

[110] *Id.*

[111] *Id.* at 884–85 (holding that criminal prohibitions are not subject to invalidation through individualized government assessment).

While *Smith* certainly did not champion a constitutional right to religious exemptions, the Court nonetheless put its imprimatur on legislative attempts to accommodate religious practices burdened by neutral laws of general applicability. "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use."[112] The *Smith* decision, having at best circumscribed the *Sherbert* standard of review to a small subset of unemployment compensation cases, left the process of religious accommodation to legislative bodies—noting all the while that this would put minority religions at a "relative disadvantage" *vis-à-vis* majority religions.[113]

Seeking to amend this shortcoming of the *Smith* decision by restoring the compelling-interest test of *Sherbert* and *Yoder*, Congress passed the Religious Freedom Restoration Act of 1993 (hereinafter RFRA) with overwhelming bipartisan support.[114] Congress noted that the *Smith* decision eviscerated the compelling-interest standard propounded in *Sherbert* and *Yoder*, and that the compelling-interest standard employed in these judicial decisions is the appropriate analytical tool for balancing religious freedom and government interests.[115] As such, the Act specified that, even when burdens placed on religion are the consequence of a generally applicable law, the relevant governing body "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Furthermore, the Act applied to all units of government within the jurisdiction of the United States.

Although the RFRA appeared to restore some potency to the standards set forth in *Sherbert* and *Yoder*, this was fleeting, as soon thereafter, the Court ruled in *City of Boerne v. Flores*,[116] that Congress had overstepped its constitutional authority when it enacted the RFRA.[117] Congress depended upon its enforcement powers under Section Five of the Fourteenth Amendment to render the Act's regulatory framework applicable to state governments. While Congress undoubtedly possessed the authority to enforce with legislation where necessary the protections contained in the Fourteenth Amendment (which subsumes the freedoms enshrined in the First Amendment),[118] the Court reasoned that this power was limited to remedial action. By enacting standards of enforcement that went beyond remedial action, and by doing away "with proof of deliberate or overt discrimination" and focusing instead on the discriminatory effects of law, Congress was fundamentally amending, rather than simply enforcing, the Free Exercise Clause of the First Amendment pursuant to its Section Five enforcement powers.[119] Thus, the Court concluded that Congress could not apply the regulations of the RFRA to the States, and its subsequent decision in *Gonzalez v. O Centro Espirita Beneficente*

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[112] *Id.* at 890.

[113] *Emp't Div.*, 494 U.S. at 890.

[114] William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, II PUB. PAPERS 2000, 2000-01 (Nov. 16, 1993); KATHLEEN SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 559 (2010).

[115] The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb4 (2012).

[116] 521 U.S. 507 (1997).

[117] *Id.* at 536.

[118] *Id.* at 519 (explaining the court's holding in *Cantwell v. Conn.*, 310 U.S. 296 (1940), "'that the 'fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment.'").

[119] *City of Boerne*, 521 U.S. at 519. As Justice O'Connor notes in dissent, the Court's determination of whether RFRA falls within the boundaries of Congress' Section 5 enforcement power hinges on one's interpretation of the Free Exercise Clause. The *Boerne* Court embraces Smith's interpretation of the Clause, an interpretation that views the Free Exercise Clause as a mere antidiscrimination principle that prohibits only intentional discrimination (i.e., "only against those laws that single out religious practice for unfavorable treatment"). Justice O'Connor does not espouse this interpretive stance. "Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law." *Id.* at 546 (O'Connor, J., dissenting).

Uniao Do Vegetal,[120] affirmed that the RFRA, while unenforceable against the States, nonetheless binds the Federal Government:[121]

> Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." The only exception recognized by the statute requires the Government to satisfy the compelling interest test—to "demonstrate the application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling interest."[122]

Therefore, the compelling-interest standard of *Sherbert* and *Yoder* applies to the United States Federal Government as a matter of settled law.[123]

By determining that that the Free Exercise Clause of the U.S. Constitution did not imply a right to exemptions, the *Smith* Court's decision represented a setback for those championing religious-based exemptions to generally applicable laws. However, the manner in which the *Sherbert* and *Yoder* standards gained applicability to the Federal government—through the legislative process under the auspices of the RFRA—is continuous with the long history of religious exemptions in the United States. The States and Federal Government have long maintained a tradition of carving out religious exemptions to "neutral" laws of general applicability. In fact, throughout US history, the majority of religious-based exemptions flowed not from judicial rulings, but rather statutorily from Colonial governments, state legislatures and Congress.[124] Thus, the Court's approbation of exemptions realized through the "democratic process" in *Smith* only reinforced through dictum the constitutional legitimacy of a pattern of legislative and judicial exemptions extant since the Colonial Era,[125] and the Court's abrogation of the RFRA as applied to states in *Boerne* simply meant that exemptions at the state level would have to proceed through normal political channels without federal statutory mandate.

III. THE THEORY OF RELIGIOUS EXEMPTIONS TO "NEUTRAL" LAWS OF GENERAL APPLICABILITY, TITLE VII DISPARATE IMPACT STANDARDS, AND THE EQUAL PROTECTION CLAUSE

In the foregoing sections, I provided an overview of the U.S. Supreme Court free exercise jurisprudence covering religious exemptions to neutral laws of generally applicability. Additionally, I offered a brief adumbration of statutory exemptions at the federal and state levels of government. Omitted from these sections, however, was any discussion of the theory underlying the exemptions approach to the free exercise of religion. Michael McConnell, in his influential work on the history of the Free Exercise Clause, furnishes a succinct explication of the theory undergirding the exemptions approach. Exponents of the exemptions approach to religious free exercise posit that "powerful and influential" religious groups garner sufficient representation and protection in the political domain, whereas "unpopular or unfamiliar" religions do not receive similar indemnification; they are more vulnerable to free exercise infringements engendered by

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[120] 546 U.S. 418 (2006).

[121] Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 n.1 (2006) (citations omitted) ("As originally enacted, RFRA applied to the States as well as the Federal Government. In *City of Boerne v. Flores*, we held the application to States to be beyond Congress' legislative authority under § 5 of the Fourteenth Amendment.").

[122] *Id.* at 424.

[123] *See id.* at 424. The RFRA's applicability to the federal government was most recently upheld in the case of *Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751 (2014). In this case, the Court extended RFRA protections to for profit, closely-held corporations.

[124] Louis Fisher, *Statutory Exemptions for Religious Freedom*, 44 J. CHURCH & STATE 291 (2002).

[125] *See* McConnell, *supra* note 38, at 1412.

"neutral" laws of general applicability.[126] Under the exemption theory, inequality and disadvantage are present not because of intentional or purposeful discrimination against certain religious groups and/or religious persons, but rather because of insensitivity and ignorance to the demands and needs of these groups.[127] Accordingly, judicially executable religious-based exemptions are necessary to guarantee that these "unpopular or unfamiliar" religions receive equal treatment and protection in the political domain.[128] Religious exemptions to "neutral" laws of general applicability serve as an equalizer of sorts, ensuring that there is no hierarchy among religious groups, so that adherents of dominant or powerful religious groups and disfavored and/or unpopular groups have an equal opportunity to follow the religious dictates of their conscience. In this way, the state is neutral toward religion; it does not favor particular religions in the political process.[129] Overall, this is a form of religious accommodation; it eliminates barriers to free exercise on both the individual and institutional levels.[130]

McConnell contrasts the exemptions approach to free exercise with the "no-exemptions view," or the idea that the role of government, as it pertains to religious free exercise, does not extend beyond the prevention of intentional discrimination, which is understood as the singling out of particular religious practices—or the singling out of religion in general—for differential and disadvantageous treatment.[131] On this interpretation, laws are consonant with free exercise protections when they do not advert to religion and have a secular purpose other than the subjugation of religion; when laws and government actions meet these criteria, they are neutral toward religion.[132] Here, intentional or purposeful discrimination—much as it is in the context of race—is associated with prejudice, or judgments against particular groups or classes of persons that serve "to deny persons of those classes the full enjoyment of that protection which others enjoy."[133] The liberal individualist philosophy of John Locke is the fountainhead of the "no-exemptions" understanding of free exercise, and cases such as *Employment Division v. Smith*,[134] typify this view.[135]

For example, the *Smith* decision commenced with a discussion of two hypothetical scenarios, both of which indubitably offended the Free Exercise Clause. These scenarios entailed either the singling out of persons for differential treatment based solely on the religious nature of their actions (discrimination against religion in general), or the singling out of persons for differential treatment because of their particular religious practices (discrimination against particular religions/religious practices). "It would be true […] that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."[136] Scalia notes that the issue in *Smith* differs from such scenarios insofar as the prohibition of religious-inspired peyote use is not the particular object of the law under examination (this is not an instance of purposeful or intentional discrimination, as cognized above). Any free exercise burden placed on religious adherents is therefore incidental to a constitutionally legitimate exercise of state power, and construing such incidental

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[126] *Id.* at 1419–20. Martha Nussbaum echoes this sentiment with the use of slightly different terminology. Employing the language of majority-minority relations, she notes that laws in democratic societies often reflect a majoritarian bias and, consequently, do not take into account the demands and needs of religious (and other) minorities. "Majority thinking is usually not malevolent, but it is often obtuse, oblivious to the burdens such rules impose on religious minorities." NUSSBAUM, *supra* note 58, at 116.

[127] *Id.*

[128] McConnell, *supra* note 38, at 1420.

[129] *Id.* at 1419–20.

[130] *Id.*; Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

[131] McConnell, *supra* note 38, at 1418.

[132] *Id.* at 1419.

[133] Strauder v. West Virginia, 100 U.S. 303, 309 (1879).

[134] 494 U.S. 872 (1990).

[135] McConnell, *supra* note 38, at 1434–35. Locke states, "For the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation." JOHN LOCKE, A LETTER CONCERNING TOLERATION 48 (Liberal Arts Press 2nd ed. 1955).

[136] *Emp't Div.*, 494 U.S. at 877.

burdens as contrary to the free exercise of religion would constitute a judicial overreach: an over-expansive interpretation of the Free Exercise Clause that is inconsistent with First Amendment jurisprudence.[137] Thus, the *Smith* decision embodies the "no-exemptions" approach, viewing the Free Exercise Clause as protecting against purposeful discrimination, not the incidental effects of general legislation.

Three years after the Court rendered the decision in *Smith*, it upheld the "no-exemptions" interpretation of the Free Exercise Clause in *Church of the Lukumi Babalu Aye v. City of Hialeah*.[138] In this case, the City of Hialeah, Florida enacted three ordinances that had the combined effect of proscribing religious animal sacrifice, and the Court determined that the purpose of these ordinances was the suppression of the Santeria religion.[139] Invoking *Smith* and its "no-exemptions" view of free exercise, the Court reaffirmed that neutral laws of general applicability do not traduce the Free Exercise Clause, as they do not require the establishment of a compelling government interest to pass constitutional muster.[140] However, when a statute affecting the free exercise of religion does not conform to the *Smith* standards of neutrality and general applicability, it can survive constitutional scrutiny only if a compelling government interest is present and the law is narrowly tailored in pursuit of that government objective.[141] That is to say, when a law or regulation singles out persons on the basis of religion for particular disadvantage, it must satisfy compelling interest and narrow tailoring criteria.[142] For this reason, the Court stated, "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[143]

The ordinances at issue in *Lukumi* constituted targeting of religious behavior.[144] The ordinances did not include within their reach other non-religious activities substantially related to the avowed government interests of safeguarding public health and preventing animal cruelty.[145] Thus, the ordinances were under inclusive—falling short of the requirement of general applicability.[146] Moreover, the actual effect of the ordinances in question, coupled with available contextual and historical evidence, shows that "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice[s]."[147] The City could have achieved its twin interests of public health promotion and the prevention of animal cruelty through less expansive and far-reaching means—means that would not have reached Santeria religious practices. Because there was no cogent explanation for the overreaching nature of the regulations, the professed government objectives of the City were dubious at best, lending credence to the notion that the actual object of the regulation was the suppression of certain religious activity.[148] Finally, recordings of city council meetings revealed a general antipathy for the Santeria religion and its practices on the part of council members, Hialeah denizens, and other government officials.[149] Thus, as these examples show, the City ordinances were decidedly non-neutral, having as their object the suppression of Santeria religious practice.[150]

Since the city council of Hialeah did not narrowly tailor the ordinances under examination, the discernment of a compelling government interest in this case could not have saved the City's regulations

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[137] *See id.* at 878 (explaining the Supreme Court "…never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

[138] 508 U.S. 520 (1993).

[139] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993).

[140] *Id.* at 531.

[141] *Id.* at 531–32.

[142] *Id.* at 533.

[143] *Id.* at 546.

[144] *Id.* at 520.

[145] *Id.* at 543.

[146] *Id.* at 545–46.

[147] *Id.* at 540.

[148] *Id.* at 538.

[149] *Id.* at 541–42.

[150] *Id.* at 542.

(pursuant to *Smith* above).[151] Moreover, since there can never be a compelling government interest in suppressing particular religions or their practices, the City of Hialeah failed in passing the compelling-interest test.[152] "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void."[153] This is analogous to impermissible discrimination in the context of race; the lack of narrow tailoring, which would have been exemplified by a closeness of fit between means and ends, along with supplemental evidence, meant that the discrimination in question was based solely on religion and, as such, represented impermissible discrimination rooted in animus or prejudice.[154]

A. The Theory Of Religious Exemptions As A Paradigm Of Disparate Impact Discrimination

The disparate impact theory of discrimination is primarily concerned with the eradication of hierarchies predicated upon irrelevant characteristics, such as race. The theory does not cognize discrimination in terms of purpose or intent (as in the *Strauder* standard of impermissible discrimination listed below), but rather in terms of the operation or effects of laws and regulations. If a law or regulation does not embody purposeful or intentional discrimination but nonetheless operates in a manner that disproportionately affects persons based on race or other impertinent distinctions (e.g., gender, national origin, religion), the law or regulation constitutes invidious discrimination.[155] There is, however, one exception: if the law or regulation satisfies other conditions, such as the business necessity requirement, it does not constitute a form of invidious discrimination that qualifies for protection under Title VII.[156] One should understand the disproportionate effect here as a burden placed on certain groups—a burden that creates "artificial, arbitrary and unnecessary barriers to employment" for persons based on their group membership.[157]

Even though a law or regulation may be devoid of a discriminatory motive or purpose based on such irrelevant classifications, laws qualifying for judicial relief under Title VII disparate impact standards are similar in their outcomes to laws that have a discriminatory purpose. In other words, they have outcomes similar to those one would anticipate if, for example, employers used race as a "criterion of selection" or "sorting tool" that effectively distributed opportunities along racial (or other) lines. However, such laws and/or regulations are not "functionally equivalent" to the use of race as a "criterion of selection" for employment because laws qualifying for disparate impact relief satisfy legitimate government interests in addition to operating in a way that distributes opportunities along racial lines.[158] Purposefully discriminatory

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[151] *Id.* at 546.

[152] *Id.* at 546–47.

[153] *Id.* at 547.

[154] All laws discriminate. The question is thus not discrimination *per se*, but rather what forms of discrimination are permissible. With race and racial classifications, the Supreme Court has associated impermissible discrimination with racial prejudice—or discrimination designed to subjugate and subordinate persons on the basis of racial classification and identification. This standard has roots in the case of Strauder v. West Virginia, 100 U.S. 303 (1879). In this case, the Court defined impermissible discrimination as being based singularly on race—that is, rooted in racial prejudice, or judgments against particular groups or classes of persons that served "to deny persons of those classes the full enjoyment of that protection which others enjoy." *Id.* at 309.

[155] The Civil Rights Act of 1964, as amended in 1991, allows for disparate impact claims based on the following classifications: "race, color, religion, sex, or national origin." *See* 42 U.S.C. §§ 2000e-2(k) (2012). Thus, the statute considers these categories or classifications irrelevant for the purposes of employment, with the exception of employment in religious organizations. The Civil Rights Act of 1964 allows for discrimination based on religion in the employment practices of religious organizations. *See* 42 U.S.C. §§ 2000e-1(a) (2012). Courts have generally granted religious organizations sweeping autonomy in hiring practices and internal operations that far exceeds the exception to religious-based discrimination outlined in Title VII. *See* Caroline Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law,* 75 FORDHAM L. REV. 1965, 1975–76 (2007).

[156] *Griggs*, 401 U.S. at 431.

[157] *Id.*

[158] Michael Perry, *The Disproportionate Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 554 (1977).

laws, whether overt or covert, do not satisfy any other interest or purpose except racial selection; they reduce to race.[159] Since the laws and/or regulations qualifying for disparate impact relief satisfy a purpose other than racial selection, and since they do not make any express racial classifications, they are race-neutral in terms of purpose or intent. They are, to quote the *Griggs* Court, "practices that are fair in form, but discriminatory in operation."[160] The practices are "fair in form" precisely because they do not entail intentional discrimination (overt or covert), and they are unfair in operation because they have effects similar to practices based on purposeful discrimination—effects that could be eschewed due to a lack of "business necessity." Thus, these laws, regulations and practices operate in ways that, although not intending to discriminate, unfairly perpetuate "the status quo of prior discriminatory employment practices."[161]

Irrespective of discriminatory intent, however, these laws engender a disadvantage for Blacks, as compared to Whites, in areas ranging from educational to economic attainment. It should also be noted that regulations and practices that encumber those with low educational attainment and low income disproportionately burden Blacks.[162] In this way, certain race-neutral policies exhibit the effects of purposeful race-based discrimination because they place a greater burden on Blacks than they do on other racial groups. Such policies give relevance to race, effectively sorting opportunity along racial lines—even though they are devoid of racially discriminatory purpose. It is the absence of necessity, coupled with racial relevance (i.e., racially disproportionate impact) that defines invidious discrimination pursuant to the theory of discrimination expounded in *Griggs*.[163] Therefore, if such policies do not satisfy the "business necessity" requirement, and create "artificial, arbitrary and unnecessary barriers to employment" for Blacks, this constitutes invidious discrimination.

In a manner similar to the theory of discrimination expounded in *Griggs*, the theory underlying the exemptions approach to religious free exercise is primarily concerned with the elimination of hierarchy among groups. Instead of racial inequality, however, the exemption theory focuses upon inequalities among religious groups and the relative ability of members of these groups to engage in practices that follow from their religious convictions. It is explicitly concerned with the differential treatment accorded to "powerful and influential" religious groups in the democratic process relative to "unpopular or unfamiliar" groups, theorizing that the latter are more susceptible than the former to burdens engendered by neutral laws of general applicability.[164] Exponents of the exemptions approach to free exercise do not understand this inequality or group disadvantage in terms of intentional or purposeful discrimination, but rather, in terms of insensitivity and ignorance to the demands and needs of these groups.[165] This ignorance and insensitivity is structural—usually the result of majority-minority relations in democracies—and judicially executable exemptions purport to correct this imbalance of power by ensuring that voice is given to groups otherwise marginalized by the structural inequality.

> Both the exemption and no-exemption views […] insist on neutral, "secular" laws and government practices, but the no-exemption view makes that judgment exclusively according to the perspective of the government, while the exemption view takes the perspective of the religious claimant, as well as the countervailing interests of the government, into account.[166]

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[159] *Id.* at 553. *See also* McLaughlin v. Florida, 379 U.S. 184, 194 (1964) ("That a general evil will be partially corrected may at times, and without more, serve to justify the limited application of a criminal law; but legislative discretion to employ the piecemeal approach stops short of permitting a State to narrow statutory coverage to focus on a racial group.").

[160] *Griggs*, 401 U.S. at 431.

[161] *Id.* at 430.

[162] Perry, *supra* note 158, at 557–58.

[163] *Griggs*, 401 U.S. at 430–31.

[164] McConnell, *supra* note 38, at 1419–20.

[165] NUSSBAUM, *supra* note 58, at 116.

[166] McConnell, *supra* note 38, at 1419.

McConnell associates the "perspective of the government" with majoritarian politics, asserting that "a law or governmental practice is not neutral if it embodies the majority's view on a contested question of religious significance to the minority."[167] On contested questions of importance to religious minorities, then, the "majority's view" is not neutral with respect to religion because it does not take into account the "perspective" of the religious persons burdened by the law or action in question.

Although McConnell does not label this incidental disadvantaging of certain religious groups discrimination, the mechanics of disadvantage bear an uncanny resemblance to disparate impact discrimination in the context of race.[168] A failure to consider the effects of laws, regulations and/or government practices on certain religious persons—specifically those affiliated with unpopular faiths—results in outcomes similar to those one would anticipate if, for example, government actors used religion (or particular religions) as the "criterion of selection" or "sorting tool" that effectively distributed opportunities along religious lines.[169] In short, it has effects similar to intentional discrimination against particular religions—even though the practices under examination are devoid of discriminatory intent or motive. However, such laws, regulations and/or practices are not "functionally equivalent" to the use of religion as a "criterion of selection" for disability or disadvantage because laws qualifying for judicial exemption satisfy legitimate government interests in addition to operating in a manner that distributes opportunities along religious lines. In other words, the burden is incidental; it is not the object of the law to discriminate on the basis of religion. In contradistinction to *Lukumi* above, the laws, regulations and/or practices under examination in cases of religious exemption do not reduce to religion; they do not represent impermissible discrimination rooted in animus or prejudice.[170] What is more, the source of disadvantage—while not necessarily traceable to a history of prior intentional discrimination—is nonetheless structural in nature. The normal functioning of democratic institutions and the advantages that accrue to religious majorities are the wellspring of disadvantage here, as opposed to the purposefully discriminatory actions of individuals or institutions.

This structural inequality and the attendant disadvantage of minority religions *vis-à-vis* more powerful religious groups means that seemingly "neutral" laws of general applicability are more likely to inadvertently disadvantage certain religious groups even though the laws in question serve legitimate government objectives and lack discriminatory motives (such as the interdiction of controlled substances in *Smith*). Analogously, the structural disadvantage of Blacks relative to Whites means that, at least in the context of employment law, regulations and practices based on "neutral" criteria of general applicability, such as education requirements and testing procedures, will be more likely to disadvantage Blacks than Whites even though the laws in question serve legitimate interests and are absent discriminatory intent. In both contexts, structural disadvantage renders members of the racial or religious group(s) in question vulnerable to neutral laws of general applicability. By virtue of ignorance or insensitivity to the impact that such laws, regulations, practices and/or procedures have on socially disadvantaged groups—whether religious or racial in composition—these practices exhibit the effects of invidiously discriminatory policies specifically because of the impediments they place on employment opportunity (in the context of race) and free exercise (in the context of religion). They give relevance to race and religion—effectively sorting opportunity along racial and religious lines in areas of law where such classifications should have no pertinence, and they further perpetuate the condition of social disadvantage facing certain groups. One's particular religious affiliation should not determine the receipt of government benefits (i.e., unemployment compensation as in *Sherbert*), and one's race should not determine employment opportunity (i.e., *Griggs*).

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[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*

Therefore, if such consequences of laws, regulations, procedures and/or practices are avoidable—that is, if the government does not have a compelling interest in uniformity or could achieve its interest in a less intrusive way (i.e., the compelling-interest test of *Sherbert* and *Yoder* codified by RFRA), or if there is no "business necessity" for employment procedures (i.e., Title VII of the Civil Rights Act)—then there is an obligation to eschew such adverse outcomes. There is an obligation to reduce the relevance of race and religion in the distribution of opportunities, an obligation to reduce morally arbitrary inequalities.[171] Furthermore, just as the statutory level serves as the domain of execution for disparate impact in the context of race (e.g., Title VII), the legislative arena—post-*Smith*—serves as domain of execution for disparate impact as applied to religion (e.g., RFRA).

It is clear from the similarities underscored above that there is a nexus between the disparate impact theory of racial discrimination and the legislative and judicial practice of carving out exemptions for religious persons whose ideals conflict with so-called neutral laws of general applicability. The mechanics of disadvantage work in the same fashion, with structural inequalities engendering vulnerability to neutral laws of general applicability. This vulnerability has the potential to translate into practices that exhibit the effects of invidiously discriminatory policies through the placement of unnecessary burdens on certain groups. It is this absence of necessity, coupled with racial relevance (i.e., disparate impact) that defines invidious discrimination pursuant to the theory of discrimination propounded in *Griggs* and Title VII. Similarly, it is the absence of necessity (i.e., failure to satisfy the compelling interest and/or narrow tailoring requirements) coupled with religious relevance that defines invidious discrimination pursuant to *Sherbert*, *Yoder*, and RFRA. Thus, one can best understand the theory underpinning the exemptions approach to free exercise as a paradigm of disparate impact discrimination.

Although *Sherbert*, *Yoder* and RFRA do not explicitly refer to the disadvantage facing religious persons as discrimination (as in Title VII), contemporary research on the nexus between equal protection and free exercise jurisprudence confirms that an understanding of equality rooted in the disparate impact theory of discrimination forms the basis of the exemptions approach to religious free exercise. In her work exploring the connections between equal protection and free exercise jurisprudence, Bernadette Meyler notes that the equal protection logic of purpose and effects expounded in *Washington v. Davis*[172] is at odds with the compelling-interest test of *Sherbert*.[173] The *Davis* Court held that race-neutral laws devoid of discriminatory intent or purpose are consistent with the demands of equal protection—even if such laws produce racially disparate results. In short, purpose—not effect—is relevant from an equal-protection standpoint; one should classify this understanding of equality as "formal" or procedural.[174] As long as policies do not purposefully discriminate and are fair in procedure or form, they are consistent with the demands of equal protection (equality). In contrast, the *Sherbert* Court embraced a "substantive" notion of equality that was concerned with not only proscribing intentional discrimination, but also ensuring the relative ability of religious groups to follow the dictates of their conscience in the absence of such impermissible discrimination. Equality here deals with the obstacles faced by certain groups when they engage in religious exercise—impediments not faced by other similarly situated groups.[175] Here, the actual effects of laws on religious practice matter; they are, in contrast to *Davis*, relevant from the standpoint of equality under the law. The *Smith* decision brought these inconsistent interpretations of purpose and effect into alignment, as Justice Scalia's majority opinion used the equal protection logic of *Davis* to countermand the compelling-interest test of *Sherbert*.[176] Scalia writes:

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[171] *See* WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP 328 (2001) (discussing morally arbitrary inequalities).

[172] 426 U.S. 229 (1976).

[173] Meyler, *supra* note 32, at 336–37.

[174] *Davis*, 426 U.S. at 276.

[175] *Id.* at 276–77.

[176] *Id.* at 337.

> Just as we subject to the most exacting scrutiny laws that make classifications based on race […] so too we strictly scrutinize governmental classifications based on religion. But we have held that race- neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause. [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 governmental interest is the only approach compatible with these precedents.[177]

Sherbert embraces a form of equality that runs counter to the formal concept of equality propounded in *Washington v. Davis*. Just as race-neutral laws "disproportionately disadvantaging a particular racial group" do not need to survive the compelling-interest test (heightened scrutiny) to pass constitutional muster, neither do "religion-neutral" laws that burden a particular religion.[178] In other words, the same standard of equality applies in both contexts, and it is a standard inconsonant with *Sherbert* and an effects-based approach to equality under the law. To embrace *Sherbert* would be to champion the compelling-interest test in the context of religion, and this would require a focus on effects of neutral laws of general applicability—something expressly rejected by equal protection case law.[179] Thus, the Court associates the compelling-interest test—the exemptions approach in the context of religion—with disparate impact discrimination in the context of race. In other words, the Court understood the exemptions approach to free exercise as a paradigm of disparate impact discrimination; since there is no constitutional right indemnifying against disparate racial impact, there is similarly no right against disparate religious impact.[180]

To the extent that disparate impact protections exist, then, they exist on the statutory (not constitutional) level through measures such as RFRA and Title VII. Just as *Davis* relegated remedies for race-based disparate impact to the statutory level (further legitimating measures such as Title VII), the Court's ruling in *Smith* served the same function in the context of religion. In fact, the *Smith* Court noted that it was constitutionally unproblematic for legislative bodies to grant religious exemptions to generally applicable laws.[181]

In recent years, however, the Court has evinced hostility toward disparate impact legislation in the context of race, but not in the context of religion; it has adhered to its dicta in *Smith* but not *Davis*. For example, the Court's decision in *Ricci v. DeStefano* called into question the constitutionality of race based disparate impact statutes and severely circumscribed the range of cases in which employers could apply the disparate impact requirements of Title VII.[182] Above all else, the Court's decision in *Ricci* followed from its embrace of an individualized interpretation of equal protection—an interpretation espoused by affirmative-action rulings such as *Wygant v. Jackson*,[183] *City of Richmond v. J.A. Croson Co.*,[184] and *Adarand Constructors v. Pena*.[185] In these cases, the Court construed equal protection as guaranteeing a positive right to be judged as an individual, without reference to "morally arbitrary" group attributes.[186] If the exemptions approach to free exercise is best understood as a paradigm of disparate impact discrimination, and if the application of this

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[177] *Emp't Div.*, 494 U.S. at 886 (emphasis in original quotation).

[178] For controlling precedents in these cases, *see* Emp't Div. v. Smith, 494 U.S. 872 (1990) for religion, and Washington v. Davis, 426 U.S. 229 (1976), for race.

[179] *Emp't Div.*, 494 U.S. at 886 n.3 ("But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause.").

[180] *Id.* at 886 n.3 (citing Washington v. Davis, 426 U.S. 229 (1976)).

[181] *Id.* at 890.

[182] 557 U.S. 557 (2009).

[183] 476 U.S. 267 (1986).

[184] 488 U.S. 469 (1989).

[185] 515 U.S. 200 (1995).

[186] Primus, *supra* note 17, at 553.

paradigm of discrimination at the statutory level is unproblematic, why has the Court found this paradigm constitutionally problematic when applied to race?

B. Religion, Race and the Equal Protection Clause: Attempting to Understand the Court's Differential Treatment of Race-Conscious and Religious-Conscious Public Policies

What accounts for the discrepancy between the Court's treatment of religious and race-conscious public policies? Perhaps there is something peculiar to race that renders the very act of classifying and sorting opportunity based on race deleterious and constitutionally problematic, whereas classifying and sorting opportunity on the basis of religion does not have a similarly pernicious effect. There are at least two reasons why this is an untenable method of reconciling the Court's free exercise and equal protection jurisprudence. First, the Court's opinion in *Smith* belies the notion that racial classifications and race-conscious decision-making warrant greater scrutiny than religious classifications. For example, Justice Scalia's majority opinion states, "Just as we subject to the most exacting judicial scrutiny laws that make classifications based on race […] so too we strictly scrutinize governmental classifications based on religion."[187] If the Court treats racial classifications as more problematic than religious ones, it seems to offer an opinion unequivocally contrary to the controlling case on free exercise exemptions. Thus, this argument is dubious at best. Second, despite the Court's retrenchment of race-conscious public policies in recent years, it has still refused to champion a *per se* rule against racial classifications.[188] If racial classifications were inherently pernicious and constitutionally problematic regardless of their object, a distinction between invidious and non-invidious forms of discrimination would be misplaced.

If nothing intrinsic to racial classifications and race-conscious decision-making justifies the differential treatment of race and religion in the context of disparate impact and equal protection, perhaps disparate impact in the context of religion does not involve group classifications (or group-based decision-making) and this alone explains the differential consideration given by the Court. One might be tempted to arrive at this conclusion since individuals—not necessarily particular religious groups—exercise the right to religious free exercise. If religious exemptions do not entail group classifications, then religious-conscious policies would not contravene the positive equal protection right to be judged as an individual. As such, this could account for the constitutional distinction between the two applications of the disparate impact theory of discrimination considered above. This attempt at reconciliation, however, is similarly unviable. Although it is true that individuals ultimately exercise the right to religious free exercise, successful claims for judicial relief (exemptions) have required the establishment of a connection to a religious group and its practices. For example, "[i]n bringing free exercise claims […] the challenger is obliged to describe the collectivity to which she belongs, persuasively alleging its religious character and the nature of the accompanying religious beliefs."[189] This is evident in the two cases forming the legal-theoretical foundation of RFRA: *Yoder* and *Sherbert*.[190]

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[187] *Emp't Div.*, 494 U.S. at 886 n.3.

[188] The notion that racial classifications are inherently pernicious and should be outlawed is known as the "anticlassification principle." "The anticlassification principle has never been applied to all situations and all spheres of social life." And, even in the case of racial classifications made by state actors, racial classifications are not always subject to strict scrutiny. *See* Jack M. Balkin & Reva B. Siegel, *American Civil Rights Tradition: Anticlassification or Antisubordination*, 58 U. MIAMI L. REV. 9, 19 (2003).

[189] Meyler, *supra* note 32, at 285.

[190] It is important to note here that, even if this standard is not derivative of *Sherbert* and *Yoder*, there is still a group classification being made insofar as these protections are available to religious persons only; the protections apply to the general class of religious persons, regardless of one's particular religious affiliation; there is no individual consideration of religious belief. Given this, the benefit is conferred only to members of this specific class based on group membership. One wonders, ontologically speaking, what differentiates this type of group-based consideration from the consideration of membership in a racial group. Insofar as neither type of classification is inherently deleterious, there does not appear to be any reasonable distinction to be made between these two types of group classifications.

In *Yoder*, the Court went to great lengths to ensure that the respondent's claims were religious in nature, noting that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[191] The Court further reasoned that allowing individuals to reject state regulation based on subjective, philosophical judgments—as opposed to religious ones—would run counter to the principle of "ordered liberty" and be akin to anarchy (wherein everyone makes "his own standards on matters of conduct").[192] Ultimately, the Court concluded that the claims made by the Old Order Amish were not reducible to individual judgment. "Giving no weight to such secular considerations […] the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[193] Thus, the Amish rejected the regulatory authority of the state in *Yoder* because of their religious beliefs; the actual content of their religious beliefs conflicted with the state regulation.[194]

Similarly, in *Sherbert* the Court addressed the issues of religious belief and group membership—noting that the appellant was a member of the Seventh-day Adventist Church whose religious beliefs were genuine. Furthermore, it was beyond question that the appellant's religious beliefs ran counter to the conditions placed on unemployment recipients. "No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed."[195] These statements imply that, if the Court were to discover the beliefs were disingenuous, not relevant to the regulation in question, and/or non-religious, the practice under examination would not be eligible for protection under the Free exercise Clause. Thus, the inquiry in *Sherbert* follows the same general form, and to argue that disparate impact in the context of religion does not entail group-based decision-making is to ignore the basic logic of these foundational cases. Such an argument is a nonstarter; one cannot coherently defend the position that disparate impact in the context of religion does not entail group-based decision-making when the cases establishing the legal-theoretical framework for religious exemptions follow a group-based analytic.

What is more, the distinction between group and individual classifications in this context is problematic. Even if the evidence furnished above is not convincing—even if one does not view *Sherbert* and *Yoder* as establishing the legal-theoretical framework for all religious exemptions—a court or legislature must still engage in group classification in order to arrive at a decision that a religious exemption is warranted. At a minimum, one must establish that the actions in question fit within the class of persons/actions defined as religious; the exemptions in question are not available to secular persons or organizations and their actions. Thus, one must have membership in a class—a group affiliation—even if said affiliation is not an organized religion or group. Without viewing such persons and actions through the lens of this general grouping it would be impossible for legislatures or courts to grant exemptions on the basis of religious identity. Religious identity is deemed relevant for consideration, and this identity establishes class membership for the purposes of legislation and adjudication.

If none of the possibilities outlined above accounts for this discrepancy, maybe the privileged position of religion in the United States constitutional system wields some explanatory power. After all, the Bill of Rights explicitly incorporates the right to free exercise under the auspices of the First Amendment. While this argument has some superficial plausibility, it lacks explanatory power from a constitutional perspective. After the Court's decision in *Employment Division v. Smith*,[196] all cases involving religious exemptions derive their authority from statute—not the constitution. As such, it cannot be the fact of constitutional free exercise

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[191] *Yoder*, 406 U.S. at 215.
[192] *Id.* at 215–16.
[193] *Id.* at 216.
[194] *Id.* at 218.
[195] *Verner*, 374 U.S. at 399 n.1.
[196] 494 U.S. 872 (1990).

incorporation that explains the Court's differential treatment of disparate impact statutes in the context of race and religion. To be sure, legislatures and other governing bodies may be following their interpretations of the religion clauses when they grant exemptions (i.e., it is a legislative attempt at realizing a cherished, constitutional principle), but one could also make a similar argument for race-based disparate impact statutes such as Title VII. In other words, one could argue that Title VII represents a legislative attempt to realize the constitutional principle of equal protection under the laws. Therefore, the privileged position of religion in the constitutional system cannot explain this discrepancy.

Because there is no constitutional explanation for the differential treatment accorded to race and religion in these contexts, the legitimacy of statutory disparate impact as applied to religion can serve as a justificatory mechanism for race-based disparate impact statutes. In other words, since the Court has not interpreted the legal-theoretical model of religious exemptions as offending the Equal Protection Clause, and since the theory underpinning the exemptions approach to free exercise is best understood as a paradigm of disparate impact discrimination, this Article concludes that the theory undergirding religious exemptions to neutral laws of general applicability (the understanding of equality it enshrines) represents a viable and robust justification for race-based disparate impact policies such as Title VII.

If disparate impact statutes in the context of religion (e.g., RFRA) do not offend the positive equal protection right to be judged as an individual, then, by virtue of their consanguinity, neither do race-based disparate impact statutes. However, the arguments of this Article have the advantage of meeting the conservative wing of the Court—i.e., those moving public policy in the direction of color-blindness—on its own terms. The individualized Equal Protection Clause cannot explain the Court's disparate treatment of race and religion; this bolsters the contention that race-based disparate impact statutes such as Title VII do not offend the Constitution and "the war between disparate impact and equal protection" is overblown. One can best make "peace" between equal protection and disparate impact by realizing that the "war" is chimerical.

Although there appears to be no constitutional explanation for the Court's adverse reaction to race, there is at least one plausible extra-constitutional explanation for this distinction. Daniel Ortiz has noted a serious discrepancy within equal-protection case law; mainly, when rendering determinations of impermissible racial discrimination, the Supreme Court has clung tenaciously to the intent (purposeful discrimination) requirement in the context of housing and employment law, but it has not held fast to the intent requirement in other areas of law, such as jury selection and voting rights.[197] In contrast to these other areas, when it comes to housing and employment law a plaintiff must establish discriminatory intent for the Court to arrive at a finding of invidious discrimination; he/she cannot simply point to discriminatory effects (disproportionate racial impact). In these contexts, discriminatory intent acts both to sniff out non-racial classifications that are used as a pretext for race (when there are no overt racial classifications but racially impermissible motives), but the intent requirement simultaneously ensures that wealth—a class that correlates with race—remains protected from judicial reach.[198]

One can see this concern in the *Davis* Court's opinion: "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another 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 [B]lack [person] than to the more affluent [W]hite [person]."[199] So here intent "works not just to identify troubling classifications but also to insulate others—which largely constitute our

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[197] *See* Washington v. Davis, 426 U.S. 229 (1976) (discussing employment discrimination); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (discussing housing discrimination). *See also* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STANFORD L. REV. 1105, 1139 (1989).

[198] *Id.* at 1138–40.

[199] Washington v. Davis, 426 U.S. 229, 248 (1976).

society—from serious review."[200] To Ortiz, this desire to insulate from review classifications such as wealth reflects overriding liberal values in society. It reflects the political ideology of liberalism—specifically the notion that individuals should be able to define for themselves what constitutes the good life, and this entails state neutrality to questions of the good life (these should be decided by private actors).[201] Perhaps, then, the *Ricci* Court applied the "strong-basis in evidence test" to Title VII because disparate impact was being used—or at least had the potential to be used—to create the kind of distributional effects that would have resulted from the constitutional rule the *Davis* court decried. That is to say, a weaker requirement than the strong-basis-in-evidence standard runs the risk of establishing a quota system, which would produce through statutory means effects similar to the constitutional rule rejected in *Davis*.[202] And, if the Court was wary of interventions in the employment and housing markets in *Davis* because such interventions would have run counter to fundamental liberal values, why would they not be wary of similar interventions in the context of Title VII, even if those interventions were guided by statute and not principles of constitutional law? This is one plausible extra-constitutional explanation for the Court's differential reaction to group classification in the domains of race and religion.

IV. CONCLUSION

From the conclusions reached in the preceding sections, it is clear that a nexus exists between the disparate impact theory of racial discrimination and the legislative and judicial practice of carving out exemptions to neutral laws of general applicability. More specifically, the theory underpinning the exemptions approach to free exercise is a paradigm of disparate impact discrimination. Despite this theoretical similarity, the U.S. Supreme Court has evinced a general hostility toward race-based disparate impact statutes, while it has found religious exemptions to generally applicable laws constitutionally unproblematic. In accordance with evidence presented in the foregoing sections of this article, there is, constitutionally speaking, no tenable method of differentiating religious and race-conscious decision-making such that one form of group-based evaluation should be greeted with hostility and the other open acceptance, if not outright embrace. Because the Court has not interpreted the legal-theoretical model of religious exemptions as offending the Equal Protection Clause, and because the theory underpinning the exemptions approach to free exercise is best understood as a paradigm of disparate impact discrimination, the theory undergirding religious exemptions to neutral laws of general applicability (the understanding of equality it enshrines) represents a viable and robust justification for race-based disparate impact policies such as Title VII. This justificatory approach has the advantage of meeting the conservative wing of the Court on its own terms, and it elucidates the fantastical nature of the purported tension between disparate impact and equal protection. As such, the evidence presented in this Article contributes to a defense of race-conscious policies such as Title VII and the history upon which they are founded.

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[200] Ortiz, *supra* note 197, at 1139–40.

[201] *Id.* at 1141.

[202] Kenneth Marcus argues that the *Ricci* Court adopted the strong-basis-in-evidence standard to eschew a quota system. *See* Marcus, *supra* note 18, at 74. Marcus also contends that disparate impact can be made consistent with the demands of equal protection only by the adoption of the strong-basis-in-evidence standard. To Marcus, equal protection allows for disparate impact to serve only the purpose of "eliminating intentional and unconscious discrimination," and the strong-basis-in-evidence standard allows for disparate impact to fulfill this purpose while reducing the likelihood that racial quotas will be established. *See id.* at 55.