Utah Law Review

Volume 2023 | Number 5 Article 4

11-2023

Religious Liberty, Discriminatory Intent, and the Conservative Constitution

Luke Boso
University of San Francisco, lboso@usfca.edu

RELIGIOUS LIBERTY, DISCRIMINATORY INTENT, AND THE CONSERVATIVE CONSTITUTION

Luke A. Boso*

Abstract

The Supreme Court shocked the world at the end of its 2021–22 term by issuing landmark decisions ending constitutional protection for abortion rights, expanding gun rights, and weakening what remained of the wall between church and state. One thread uniting these cases that captured the public's attention is the rhetoric common of originalism—a backwards-looking theory of constitutional interpretation focused on founding-era meaning and intent. This Article identifies the discriminatory intent doctrine as another powerful tool the Court is using to protect the social norms and hierarchies of a bygone era, and to build a conservative Constitution.

Discriminatory intent rose to prominence during the Burger and Rehnquist Courts through the development of rules requiring intent, rigidly defining intent, and limiting the evidence relevant to prove intent. Application of these rules in equal protection claims often shielded legal structures from reproach that disadvantage women and people of color. By contrast, today's Court is revisiting and radically reinterpreting these rules in ways that favor conservative religious adherents in First Amendment claims.

In Free Exercise Clause cases brought by conservative Christians challenging seemingly religiously neutral and generally applicable laws, the Court has credited allegations of discriminatory intent on thin evidentiary records. Additionally, the Court has crafted a new strict rule designed to prevent even the possibility that discriminatory intent could creep into future decision-making—even when no evidence of actual bias presently exists. Meanwhile, the Court in Establishment Clause claims has abandoned longstanding intent rules prohibiting favoritism or hostility towards religion; instead, the sole relevant question is now whether founding-era practices support the government's religious involvement. These emerging and conflicting roles for discriminatory intent in the Religion Clauses leave religious minorities and non-believers with diminished constitutional protection, while insulating the Christian right

 Professor of Law at Southwestern Law School. I thank my excellent Research Assistants, University of San Francisco School of Law students Darya Kaboli-Nejad and Emma Stephens, for their hard work and thoughtful input throughout this project. For helpful comments, critiques, and suggestions, I thank Professors Tristin K. Green, Julie A. Nice, Brian Soucek, and Lawrence B. Solum. This piece significantly benefitted from feedback stemming from a faculty scholarship workshop at the University of San Francisco School of Law.

from perceived victimization by progressive forces who have sought to stem a global pandemic, promote reproductive rights, and prevent discrimination against LGBTQ individuals.

INTRODUCTION

At the end of the 2021–2022 term, the Supreme Court issued a series of landmark decisions that radically altered the landscape of constitutional law. Infamously, the Court in *Dobbs v. Jackson Women's Health Organization*[1] overruled *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] rescinding a right that many pregnant persons in the United States had relied on for nearly fifty years.[4] As if the perceived assault on reproductive rights and women's dignitary interests[5] was not significant enough on its own, the *Dobbs* decision also provided tools for unsettling the very foundation of Fourteenth Amendment privacy rights jurisprudence by calling into question constitutional protections for same-sex marriage, same-sex sexual intimacy, and access to contraception.[6]

In the very same week, the Court expanded individual gun rights under the Second Amendment in *New York State Rifle and Pistol Association v. Bruen*,[7] striking down a commonsense New York concealed carry law in effect since 1905.[8] A few days later, the Court upended over fifty years of Establishment Clause jurisprudence in *Kennedy v. Bremerton School District,*[9] holding that a public high school violated a football coach's free exercise rights by disciplining him for praying on the field after games.[10] To rule in favor of this religious claimant required the

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[1] 142 S. Ct. 2228 (2022).

[2] 410 U.S. 113 (1973) (holding that a woman's right to choose to have an abortion prior to the point of fetal viability is a fundamental right).

[3] 505 U.S. 833 (1992) (reaffirming the constitutional right to terminate a pregnancy but relaxing the level of judicial scrutiny for evaluating abortion regulations).

[4] *See, e.g.*, Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 42–44 (2022) (discussing the social and structural factors that lead Black and indigent women to "turn to abortion care more frequently than other racial groups").

[5] *See, e.g.*, Yvonne Lindgren, *From Rights to Dignity: Drawing Lessons from Aid in Dying and Reproductive Rights*, 2016 UTAH L. REV. 779, 822–26 (2016) (discussing dignity's jurisprudential and rhetorical relevance to abortion rights, and characterizing dignity as primarily about autonomy and liberty of choice).

[6] *Dobbs*, 142 S. Ct. at 2300–01 (Thomas, J., concurring) (calling on the Court to "reconsider" these "demonstrably erroneous decisions" given the logical implications of the methodology the majority used to overrule its abortion precedents).

[7] 142 S. Ct. 2111 (2022).

[8] *Id.* at 2122.

[9] 142 S. Ct. 2407 (2022).

[10] *Id.* at 2422–23.

Court to declare—to the apparent surprise of the three dissenting liberal Justices[11]—that the Court had "long ago abandoned" a major Establishment Clause test focused on questions of discriminatory purpose and effect.[12]

One thread uniting these three monumental cases that has garnered national attention is the language and rhetoric common of a controversial theory of constitutional interpretation known as originalism.[13] Originalism has many variations: some focus on the framers' original intent while others focus on the original public meaning of constitutional texts.[14] Regardless of the specific variation, scholars and judges tend to agree that originalism is a theory that understands a constitutional provision's meaning to be "fixed" at the time of adoption.[15] Ascertaining that fixed meaning is a backwards-looking exercise that analytically centers history and tradition.[16] Preserving old status quos and insulating the Constitution from contemporary progressive change is originalism's core function, and such outcomes were seemingly achieved[17] in *Dobbs*,[18] *Bruen*,[19] and

[11] *Id.* at 2434 (Sotomayor, Breyer, & Kagan, JJ., dissenting) (observing that the majority had overruled the *Lemon* test and therefore "call[ed] into question decades of subsequent precedents").

[12] *Id.* at 2427.

[13] A discussion of the political debate about originalism is beyond the scope of this Article. For a thorough critique of originalism as a political tool to achieve conservative ends, see generally Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

[14] *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 6–9, 84–89 (2018).

[15] ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 14 (2022).

[16] For example, in *Michael H. v. Gerald D.*, Justice Scalia—a well-known originalist—reasoned for the majority in a parental rights dispute that an "asserted liberty interest" must "be rooted in history and tradition." 491 U.S. 110, 123 (1989).

[17] In a forthcoming Article, Professors Randy Barnett and Lawrence Solum explain the various ways in which "history" and "tradition" are used in judicial decision-making, some of which are originalist and some of which are not, and they identify and differentiate both the originalist and non-originalist notes in *Dobbs*, *Bruen*, and *Kennedy*. *See generally* Randy E. Barnett & Lawrence B. Solum, *History, Tradition, and Originalism* (unpublished manuscript) (on file with author).

[18] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (explaining that rights "not mentioned in the Constitution" are only guaranteed if they are "deeply rooted in this Nation's history and tradition" (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

[19] "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment[] . . . ." N.Y. State Rifle & Pistol Ass'n Inc., v. Bruen, 142 S. Ct. 2111, 2126 (2022). The Court's newly announced approach to the Second Amendment is unusual in that it seemingly collapses the question of whether a right is within the scope of the Second Amendment into questions about the government's purported reasons for interfering with the right, bypassing traditional tiers of scrutiny.

Kennedy.[20] Originalism, however, is not the only mechanism by which the increasingly conservative Court has sought to protect traditional social hierarchies and norms from disruption.

This Article focuses on the Court's development and inconsistent application of discriminatory intent rules—also sometimes referred to as governmental purpose, object, or motivation—as one increasingly potent tool in this conservative ideological project. Beginning in the early 1970s, the Court formalized an equal protection rule requiring claimants to prove discriminatory racial intent to trigger demanding strict scrutiny review of formally race-neutral laws that have a disparate racial impact.[21] The same is true for claimants challenging a facially sex-neutral law as sex discrimination.[22] The Court could just as easily have permitted group-based disparate impact or proof of some other structural disadvantage to trigger more searching review.[23] Instead, it doubled down by rigidly defining discriminatory intent and rendering it more difficult to prove.[24] Discriminatory intent in equal protection has accordingly become a de facto defense mechanism to shield longstanding hierarchies from reproach.[25] In other constitutional areas like free speech, the Court has defined and used discriminatory intent in different ways to achieve its preferred conservative ends.[26]

This Article focuses on a new aspect of the Court's manipulation of discriminatory intent rules—one that is taking shape in the wake of President Trump's successful transformation of the Court into a staunchly conservative institution.[27] In addition to originalism's triumph, the Court's ideological renovation

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[20] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (declaring that alleged Establishment Clause violations are to be assessed by "reference to historical practices and understandings," and an "analysis focused on original meaning and history . . . has long represented the rule rather than some exception" (internal quotation marks omitted) (citing Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))).

[21] *See infra* Part I.A.

[22] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (rejecting a sex discrimination challenge to a veteran's hiring preference—which overwhelmingly benefited men—because claimants could not prove intent to discriminate against women).

[23] For an early critique of the discriminatory intent theory of equal protection as too individualistic, too fault-oriented, and not responsive to group-based needs and nuances, see generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976).

[24] *See infra* Part I.

[25] For a similar discussion of how the discriminatory intent doctrine protects the status quo, see Derek W. Black, *Cultural Norms and Race Discrimination Standards: A Case Study in How the Two Diverge*, 43 CONN. L. REV. 503, 514–15 (2010).

[26] *See infra* Part IV for a brief discussion of the Court's manipulative use of discriminatory intent in sexual speech cases.

[27] *See* Jacob Bronsther & Guha Krishnamurthi, *The Iron Rule*, 42 CARDOZO L. REV. 2889, 2890 (2021) (characterizing the replacement of Ruth Bader Ginsberg with Amy Coney Barrett as cementing conservative control "for a generation"). As others have noted, the Court is now the most conservative it has been since its public battles with FDR over the

of constitutional law is reflected in its renewed interest in combatting discrimination against conservative Christians. Through radical reinterpretations of the First Amendment's Religion Clauses, the Court is insulating the Christian right from perceived victimization by progressive forces seeking to stem a global pandemic, promote reproductive rights, and prevent discrimination against LGBTQ individuals.[28] In both Free Exercise and Establishment Clause cases, the Court is eschewing decades of precedent in favor of robust new theories of discrimination that favor religious adherents. While these doctrinal changes may trickle down to benefit religious minorities in some conflicts, conservative Christians account for the vast majority of recently successful religious liberty claims.[29]

Taking the Free Exercise Clause first: based on the 1990 *Employment Division v. Smith*[30] precedent, claimants hoping to trigger strict scrutiny review must demonstrate that the government has failed to act in a (1) religiously "neutral" and (2) "generally applicable" manner.[31] Instead of overruling *Smith* as many on the right have called on the Court to do given the growing perception that *Smith* is insufficiently protective of Christian interests,[32] the Court has injected both *Smith* rules with new and religiously deferential power.

Prior to 2018, the Court rarely struck down a law under *Smith*'s neutrality rule, either because of the rarity of cases involving discriminatory religious intent or the Court's reluctance to find such evidence.[33] But then came *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[34] pitting a Christian baker opposed to baking a cake for same-sex weddings against an LGBTQ-protective antidiscrimination law. Based largely on generous inferences from its reading of a thin record, the Court ruled in favor of the religious baker's free exercise claim by finding that the government was hostile to the baker's religious beliefs and was therefore not religiously neutral.[35]

Prior to 2021, it was unclear whether *Smith*'s "generally applicable" rule was distinct from the neutrality rule, and if so, what additional work it might do. But after Justice Amy Coney Barrett's confirmation, the Court sought to elaborate. First, in *Tandon v. Newsom*,[36] a COVID-19 social distancing case, the Court announced a new rule: If the government treats any secular entity more favorably than a

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New Deal. *See* Michael J. Klarman, *Foreward: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 252 (2020).

[28] *See infra* Parts II & III.

[29] *See, e.g.,* Richard Schragger & Micah Schwartzmann, *Religious Freedom and Abortion*, IOWA L. REV. (forthcoming) (manuscript at 32) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4266006 [https://perma.cc/X3P4-MNEA].

[30] 494 U.S. 872 (1990).

[31] *Id.* at 901.

[32] *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021) (demonstrating an instance where a religious claimant expressly asked the Court to overrule *Smith*).

[33] *See infra* Part II.B.

[34] 138 S. Ct. 1719 (2018).

[35] *Id.* at 1729.

[36] 141 S. Ct. 1294 (2021).

"comparable" religious entity, which can occur when the law allows for individualized exceptions, then the government's action presumptively violates the Free Exercise Clause.[37] Second, in *Fulton v. City of Philadelphia*,[38] another case pitting religious claimants against LGBTQ-protective policies, the Court further clarified that a law providing for individualized exceptions runs afoul of the general applicability rule "because it invite[d] the government to decide which reasons for not complying with the policy are worthy of solicitude . . . ."[39] Even though the government had never granted a single individualized exemption to the antidiscrimination policy in *Fulton*, the *mere possibility* that discriminatory intent *could* infect the decision-making process was sufficient to trigger the Court's demanding strict scrutiny review and rule in favor of the Christian complainant.[40]

The First Amendment also precludes the government from establishing religion. Since 1971, the *Lemon* test governed Establishment Clause claims.[41] Scholars and Justices alike understood the *Lemon* test as requiring governmental neutrality as between religions and as between religion and non-religion.[42] One of the *Lemon* test's key factors asked whether the government's predominant purpose was to favor or disfavor religion, or in other words, whether the government acted with discriminatory intent. Today, discriminatory intent no longer seems relevant to establishment questions. For example, in 2018's *Trump v. Hawaii*,[43] the Court minimized damning evidence of President Trump's anti-Muslim animus to uphold a Travel Ban that overwhelmingly affected foreign nationals from majority-Muslim nations. And in 2022's *Kennedy*,[44] the Court overruled *Lemon* and the judicial concern for governmental purpose along with it.

This Article sounds the alarm about the direction in which the newly constituted Supreme Court is taking constitutional law. Its comparative analysis of the Court's unfavorable treatment of discriminatory intent in equal protection versus its favorable treatment in religious liberty offers a more holistic accounting of still-nascent ideological efforts to protect historical and traditional status quos. Part I sets the foundation for this comparative analysis with a deep dive into the Equal Protection Clause. Part I.A outlines the evolution of discriminatory intent doctrine, its meaning today, and methods of proof. Part I.B and I.C illustrate the harsh effects of these rules as they relate to criminal justice reform and voting rights. Part II then moves to the Free Exercise Clause; it describes the evolution of religious liberty claims and then illustrates the favorable treatment that Christian claimants receive under today's religiously neutral and generally applicable rules. Part III describes the rise and fall of discriminatory intent in efforts to ensure that the government does not establish religion; its disappearance from such claims effectively permits the

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[37] *Id.* at 1296.
[38] 141 S. Ct. 1868 (2021).
[39] *Id.* at 1879 (internal brackets and quotation marks omitted).
[40] *Id.* at 1881.
[41] *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971) (creating the *Lemon* test).
[42] *See infra* Part III.A.
[43] 138 S. Ct. 2392 (2018).
[44] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

government to favor Christianity. Part IV summarizes the Court's manipulation of intent rules to achieve a conservative vision of the Constitution as a document that no longer (to the extent it ever did) protects minority interests from the tyranny of a dead-hand majority.[45]

I. EQUAL PROTECTION AND THE ROLE OF DISCRIMINATORY INTENT IN PROTECTING RACIAL HIERARCHIES

To fully appreciate the different ways in which the Court uses discriminatory intent doctrine across doctrinal areas to achieve conservative ends requires contemporary context. At the close of the 2021–2022 term, the Supreme Court in *Dobbs* upended nearly fifty years of settled Constitutional law by extinguishing the individual fundamental right to terminate a pregnancy. *Dobbs* stunned the world, prompting condemnation from the international community,[46] a failed attempt by Democrats in Congress to federally codify abortion rights,[47] and a successful congressional effort to codify same-sex marriage rights.[48] Political analysis suggests that *Dobbs* generated enough voter anger to affect the 2022 midterm elections.[49]

Perhaps of lesser interest to the public, but of great interest to constitutional law and antidiscrimination scholars, is the *Dobbs* Court's brief discussion of the discriminatory intent doctrine. For decades, feminists and pro-choice activists have made the argument that restrictive abortion laws discriminate against women.[50] The Supreme Court foreclosed one of the most obvious variations of this argument by ruling in a 1974 decision, *Geduldig v. Aiello*,[51] that state actions affecting sex-linked

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[45] *See generally* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 21–34 (2014).

[46] Adam Taylor, Erin Cunningham, Karina Tsui & Claire Parker, *U.S. Abortion Decision Draws Cheers, Horror Abroad*, WASH. POST (June 25, 2022), https://www.washingtonpost.com/world/2022/06/24/global-reaction-roe-abortion-supreme-court/ [https://perma.cc/PA98-W3W6] (noting condemnation from the British and Canadian Prime Ministers and the French President).

[47] Amy B. Wang & Eugene Scott, *House Passes Bills to Codify Abortion Rights and Ensure Access*, WASH. POST (July 15, 2022), https://www.washingtonpost.com/politics/2022/07/15/house-abortion-roe-v-wade/ [https://perma.cc/VB43-KV8T] (noting Republican opposition in the Senate where sixty votes are required to end a filibuster).

[48] Jonathan Capehart, *Biden, Harris and the Arc of Same-Sex Marriage Rights in One Gesture*, WASH. POST (Dec. 15, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/12/15/gay-marriage-biden-harris-respect-for-marriage-act/ [https://perma.cc/M9CL-9P89].

[49] *See* Mary Radcliffe & Amelia Thomson-DeVeaux, *Abortion Was Always Going to Impact the Midterms*, FIVETHIRTYEIGHT (Nov. 17, 2022, 6:00 AM), https://fivethirtyeight.com/features/abortion-was-always-going-to-impact-the-midterms/ [https://perma.cc/LBC9-SBBV].

[50] *See, e.g.*, Reva B. Siegel, Roe's *Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875, 1879–86 (discussing historical arguments within the women's rights movement about how abortion restrictions impeded women's equality).

[51] 417 U.S. 484 (1974).

traits such as pregnancy were not inherently sex-based classifications warranting heightened judicial scrutiny under the Equal Protection Clause. [52] Contemporaneously, the Court in *Personnel Administrator of Massachusetts v. Feeney*[53] held that state actions which disparately impacted women as a group were likewise Constitutionally insufficient to establish a sex-based claim.[54]

Following these decisions, the only viable sex-based equality argument remaining was that abortion restrictions were tainted by the invidious discriminatory intent. The *Dobbs* Court snuffed out this argument for good and, in the process, seemingly called the entire doctrine of discriminatory intent into question. Citing to amicus briefs, the Court rearticulated a proffered argument that abortion bans originally enacted in the 1800s were motivated by a pernicious concern that "the availability of abortion was leading White Protestant women to shirk their maternal duties."[55] The Court first dismissed this argument as lacking evidentiary support, but then went much further by asserting that the Court "has long disfavored arguments based on alleged legislative motives."[56] "Even when an argument about legislative motive is backed by statements made by legislators who voted for a law," the Court explained, "we have been reluctant to attribute those motives to the legislative body as a whole."[57]

The *Dobbs* majority's apparent hostility to allegations of discriminatory intent is not necessarily surprising if the jurisprudential exemplar is only equal protection cases. In this doctrinal area, the Court has seldom found sufficient evidence of discriminatory intent in equality claims brought by racialized minorities and others from marginalized groups. The *Dobbs* Court's statement on intent is misleading, however, when religious liberty claims are included in the survey of the broader constitutional field. There, the Court is increasingly drawing on principles sounding in discriminatory intent to rule in favor of Christian claimants.

This Part illustrates the failure of discriminatory intent in securing racial equity under the Constitution. The problem is twofold. First, the Court announced a rule *requiring* evidence of discriminatory intent for certain kinds of constitutional claims—creating a rule that serves a constitutional gatekeeping function. Second, the Court is consistently reluctant to search for or credit evidence that would satisfy

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[52] *Id.* at 496 n.20 ("Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy . . . . on any reasonable basis, just as with respect to any other physical condition.").

[53] 442 U.S. 256 (1979).

[54] *Id.* at 270, 281 (holding that Massachusetts's hiring policy favoring veterans did not amount to a sex classification even though ninety-eight percent of state veterans at the time were men).

[55] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2255 (2022) (internal brackets and quotation marks omitted).

[56] *Id.*

[57] *Id.* at 2256.

its own discriminatory intent rule. The effect of this circular and mostly futile exercise has been to insulate the racial status quo and white interests from constitutional challenge.

A. The Rise of the Discriminatory Intent Doctrine

Throughout the 1950s and '60s, the liberal Warren Court gradually chipped away at the facial race classifications of Jim Crow segregation. In the landmark *Brown v. Board of Education*,[58] the Court ended *de jure* racial segregation in public schools. In a series of *per curium* opinions, the Court ended racial segregation in public transportation,[59] public golf courses,[60] public beaches,[61] and eventually all aspects of public life. Further, the Court put an end to state-sanctioned segregationist projects designed to control the composition of intimate relationships. In *McLaughlin v. Florida*,[62] the Court invalidated laws prohibiting cohabitation by unmarried interracial couples; and in *Loving v. Virginia*,[63] the Court struck down all remaining bans on interracial marriage. This two-decade stretch of Supreme Court jurisprudence brought about a revolution in formal racial equality that persists today.

Following decisions like these, state and local officials largely ended the practice of formally separating citizens on the basis of race. In place of *de jure* segregation, however, formal colorblindness proliferated in ways that continued to have racialized effects. Lawmakers learned to avoid expressing racist sentiment in the wake of shifting legal and social change, and as a result, evidence of individualized discriminatory legislative motive became less overt and more difficult to identify.[64]

Towards the end of the 1960s, dramatic shifts in national political power created a new path for the Constitution that would forever change the law of equal protection. On June 13, 1968, in the middle of a Presidential election year, Chief Justice Earl Warren informed President Johnson that he intended to resign from the Court.[65] Warren expressed his hope that the President would replace him with another progressive jurist,[66] but President Johnson's subsequent nomination of Abe Fortas failed in the Senate.[67] Richard Nixon won the Presidential election later that

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[58] 347 U.S. 483 (1954).

[59] *See* Gayle v. Browder, 352 U.S. 903 (1956).

[60] *See* Holmes v. City of Atlanta, 350 U.S. 879 (1955).

[61] *See* Mayor of Balt. City v. Dawson, 350 U.S. 877 (1955).

[62] 379 U.S. 184 (1964).

[63] 388 U.S. 1 (1967).

[64] *See, e.g.*, Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 296 (1991) (explaining that the Equal Protection cases about race from the Warren Court era all involved state laws "consciously motivated by hostility" towards Black people).

[65] ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA, at xvii (2020).

[66] *Id.*

[67] *Id.*

fall, and he went on to appoint four new Justices to the Court in his first three years in office.[68] The era of the liberal Warren Court had officially ended, and the newly conservative Burger Court would go on to make the complicated issue of discriminatory governmental intent one of its first projects.

At first, the burgeoning Burger Court seemed disinterested in legislative motive as relevant to equal protection challenges. In 1971, the Court handed down its decision in *Palmer v. Thompson*,[69] which dealt with a recalcitrant city's efforts to impede desegregation efforts. The factual predicate to *Palmer* involved a decision by the city of Jackson, Mississippi to close rather than integrate its public swimming pools pursuant to a lower court's order.[70] *Palmer* is perhaps best known for its dubious assertion that the city's pool closures equally burdened people of all races and therefore lacked a requisite disparate racial impact.[71] The Court also, however, expressly rejected evidence of discriminatory legislative motive as relevant. There was no question that some members of the city council acted out of racist impulses.[72] But, according to the Court, no precedent supported the argument "that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[73]

The primary problem as the Court saw it then was that "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."[74] The Court's refusal in *Palmer* to carefully evaluate the subjective motivations of governmental actors gave it cover to close its eyes to injustice, shield racist decision-making from judicial review, and leave the status quo of hierarchical race relations undisturbed. In this way, the Court's willful blindness to evidence of discriminatory intent frustrated the Constitutional project of racial equity.[75]

The Court's distaste for evaluating evidence of legislative motive as a mechanism for rooting out invidious discrimination was short-lived, due in part to its rapidly changing composition. Between the summer of 1971, when the Court decided *Palmer*, and 1973, when the Court next addressed improper motive, two more of President Nixon's conservative nominees joined the Court: Lewis Powell Jr. and William Rehnquist. Notably, in his 1972 campaign for reelection, Nixon had railed against the kinds of "forced bussing" that federal courts had been requiring as

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[68] *Id.* at xviii.

[69] 403 U.S. 217 (1971).

[70] *Id.* at 219.

[71] Klarman, *supra* note 64, at 296.

[72] *Palmer*, 403 U.S. at 224–25.

[73] *Id.* at 224.

[74] *Id.*

[75] *See* Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 4 (2016) (explaining that it was initially "race liberals" who championed discriminatory intent doctrine due to fears that Southern states could "indefinitely avoid integration" if courts did not investigate their decision-making processes).

part of remedial efforts to integrate public schools.[76] The Supreme Court itself had approved integrative cross-town bussing plans in its landmark 1971 decision, *Swann v. Charlotte-Mecklenburg Board of Education*.[77] But white backlash to bussing and its attendant disruption of neighborhood schools was swift and politically ubiquitous.[78] Now infamous audio recordings of President Nixon's Oval Office conversations confirm that President Nixon discussed his desire for the Supreme Court to change direction on bussing with his Attorney General, who in turn, some scholars believe, may have sought certain assurances from then-nominees Powell and Rehnquist regarding the controversial remedial measure's constitutional limitations.[79] Reigning in the federal judiciary's oversight of public school integration, however, would require new doctrinal rules. As Professor Justin Driver explains, Powell and Rehnquist "would ultimately prove to be the antibusing reinforcements" Nixon needed.[80]

In 1973, the Supreme Court decided *Keyes v. School District No. 1*[81] regarding allegations of intentional segregation in school district line-drawing. The factual predicate to *Keyes* involved the existence of a racially segregated school system that had never operated under formalized racial apartheid.[82] Instead, the plaintiffs in *Keyes* claimed that the segregation was due to purposeful governmental manipulation of attendance zones, selection sites for schools, and other similar techniques for student assignments.[83] The Court ultimately ruled against the school district, finding "the entire school system's pupil-assignment method presumptively unconstitutional"[84] because the evidence suggested a "purpose or intent to segregate."[85] The Court used *Keyes* to announce a new rule governing future

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[76] *See, e.g.*, Yvonne Lindgren, *Trump's Angry White Women: Motherhood, Nationalism, and Abortion*, 48 HOFSTRA L. REV. 1, 33 (2019) (describing the Republican Party's 1972 presidential election "social issues" strategy that contributed to President Nixon's victory); Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 145 n.86 (2017) (describing President Nixon's appeals to white identity politics as including "denunciation of bussing in service of integration").

[77] 402 U.S. 1 (1971). *See also* John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1734 (2000) (explaining that the *Swann* Court embraced race conscious assignment policies to achieve integration, including "cross-town bussing or other transportation remedies").

[78] *See* RICHARD KLUGER, THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 765 (1975) (describing "bussing" as a racial "code word" of the early 1970s).

[79] Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 385 (2015).

[80] JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 274 (2018).

[81] 413 U.S. 189 (1973).

[82] *Id.* at 191.

[83] *Id.*

[84] DRIVER, *supra* note 80, at 275.

[85] *Keyes*, 413 U.S. at 208.

Constitutional challenge to racially isolated schools: proof of discriminatory intent is required.

At this moment in history, it was not yet clear that the new discriminatory intent requirement would pose a major hurdle in equality litigation—especially given that the specific outcome in *Keyes* was plaintiff-friendly due to the strong evidence of discriminatory motive in the record. Moreover, in the 1960s, the liberal Warren Court had used evidence of discriminatory intent as an effective and racially progressive tool for dismantling Jim Crow segregation.[86] In the immediate wake of Jim Crow's fall, evidence of discriminatory intent was easy to come by. As Professor Derek Black explains, "[t]he significance of this requirement only grew as time passed[,] and the connection between current segregation and past discrimination became less clear."[87]

But *Keyes* marked the beginning of the Court's conservative revolution regarding discriminatory intent. Soon, the Court would both strictly define "intent" and dramatically narrow the pool of evidence relevant to proving it. For these reasons, Professor Derek Bell identifies *Keyes* as a pivotal moment in the Court's retreat from the egalitarian principles that once supported robust integration efforts.[88] *Keyes* is just the beginning in a long line of cases in which the Court "has increasingly erected barriers to achieving the forms of racial balance relief it earlier had approved" because, in a post-*Keyes* world, courts could no longer presume that segregation is the "natural and foreseeable" result of state and local school board policy, and because proving discriminatory intent is notoriously difficult.[89]

The better-known example of the Court's early efforts to limit equality claims through the discriminatory intent doctrine came in 1976 with the *Washington v. Davis*[90] decision. At issue in *Washington* was the District of Columbia's use of police officer recruiting tactics—most notably the use of a written civil service exam—that disparately excluded Black applicants.[91] The plaintiffs solely relied on a disparate impact theory of discrimination and did not allege "intentional discrimination or purposeful discriminatory acts."[92] The Court strongly leaned on *Keyes* in declining to find a Constitutional violation, explaining from the context of school desegregation that "the basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a

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[86] *See, e.g.*, Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 375 U.S. 391 (1964) (holding that the facially race-neutral closure of all public schools in a Virginia county was unconstitutional because of racist motives). *See also* Eyer, *supra* note 75, at 20–22 (describing the evolution of desegregation jurisprudence leading to the Court's progressive use of discriminatory intent to achieve integration in *Griffin* and subsequent cases).

[87] Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 380–81 (2012).

[88] Derek A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 527 (1980).

[89] *Id.*

[90] 426 U.S. 229 (1976).

[91] *Id.* at 233.

[92] *Id.* at 235.

racially discriminatory purpose."[93] The Court thus imported the discriminatory intent doctrine from *Keyes* and declared it the rule for all equal protection claims in which the alleged classification is not facially apparent.[94]

Despite the discriminatory intent doctrine's rise to prominence in *Washington*, the door remained open—at least for a while—to liberal understandings of its definition, scope, and methods of proof.[95] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[96] for example, the Court in 1977 embraced a contextual and inferential approach to proving discriminatory intent by articulating a variety of non-exhaustive factors relevant to the inquiry.[97]

As the 1970s drew to a close, however, the Court formalized yet another discriminatory intent rule that persists today and makes it more difficult for claimants to win equal protection claims.[98] In June of 1979, the Court decided *Feeney*.[99] At issue in *Feeney* was a Massachusetts state law that mandated a hiring preference for veterans in civil service jobs.[100] Because most veterans at that time were men, the Court had no difficulty recognizing at the outset that the "preference operates overwhelmingly to the advantage of males."[101] The Court nevertheless seemed uncomfortable by the argument that such policies pose a sex equality problem of constitutional concern. It framed its analysis by first detailing the long history and tradition of preferential treatment for veterans in Massachusetts.[102] It also highlighted the presumed noble impetus for such preferences and the societal benefits thought to flow therefrom.[103] These rhetorical moves suggest a Court that sought to justify its unwillingness to disturb a longstanding practice. But if Massachusetts lawmakers knew, or should have known, that this hiring preference

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[93] *Id.* at 240.

[94] "But 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.

[95] The *Washington v. Davis* Court rejected any contention that proof of discriminatory intent must be "express" and explained instead that an "invidious discriminatory purpose" may be inferred from a wide variety of facts. *Id.* at 241–42.

[96] 429 U.S. 252 (1977).

[97] *Id.* at 265–68.

[98] *See, e.g.*, Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993) (arguing that the discriminatory intent doctrine has led to the "failure to effectuate substantive racial justice" and "is indicative of a complacency concerning, or even a commitment to, the racial status quo that can only be enjoyed by those who are its beneficiaries.").

[99] Pers. Adm'r of Mass v. Feeney, 442 U.S. 256 (1979).

[100] *Id.* at 259.

[101] *Id.*

[102] *Id.* at 265–67.

[103] Veteran hiring preferences, the Court explained, are "designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations." *Id.* at 265.

disproportionately excluded women from civil service jobs, might that awareness or indifference to reality suggest discriminatory intent?

In ruling against the statute's challengers, the Court simultaneously cemented a conservative interpretation of equal protection: "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences; it implies that the decision maker [in this case a state legislature,] selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."[104] In *Feeney*'s aftermath, perhaps the most immediately obvious result was the effective insulation of governmental efforts to favor veterans from Constitutional challenge. Scholars describe *Feeney*'s longer-term effect as equating discriminatory intent with something akin to malice and therefore imposing an almost impossible burden on claimants bringing equality challenges.[105] Ronald Reagan's two presidential terms during the 1980s and his attendant opportunity to accelerate the Court's rightward shift effectively fortified and enforced these new status quo preservation mechanisms.[106]

The Court's definition of discriminatory intent as malice in the equal protection context has successfully shielded old status quos from meaningful disruption in myriad ways. This Article now highlights two areas of note: criminal justice reform and voting rights. Both examples powerfully demonstrate the real-world impact that seemingly esoteric constitutional rules have on American life, culture, and even democracy.

B. Discriminatory Intent as a Barrier to Criminal Justice Reform

Decided in 1987, *McCleskey v. Kemp*[107] is easily among the most criticized opinions in recent Supreme Court history.[108] In the intersecting scholarly worlds of Constitutional law and criminal justice, its facts and holding are notorious. In 1978, the defendant, a Black man, was convicted by a Georgia jury on "two counts of armed robbery and one count of murder" involving a white victim.[109] The jury

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[104] *Id.* at 279 (internal quotation marks and citations omitted).

[105] *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (explaining that *Feeney* establishes the requirement that plaintiffs must prove that decisionmakers "acted with the express purpose of injuring women or minorities—in short, a legislative state of mind akin to malice"); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1834 (2012) (describing the malice standard as initially articulated in *Feeney* as "a major step toward closing courthouse doors to contextual evidence of discrimination against vulnerable groups.").

[106] *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2098 (2002) (arguing that "the Reagan Court . . . more vigorously protected the racial status quo against civil rights perturbation" than did the Burger Court).

[107] 481 U.S. 279 (1987).

[108] *See, e.g.*, COHEN, *supra* note 65, at 297 ("Many civil rights advocates have come to regard *McCleskey* as one of the Court's worst rulings.").

[109] *McCleskey*, 481 U.S. at 283.

subsequently recommended imposition of the death penalty—a recommendation that the trial court judge followed.[110] McCleskey appealed the convictions and his sentence all the way to Supreme Court without success.[111] McCleskey then filed a petition for habeas relief in federal court and, this time, the Supreme Court granted certiorari.[112]

The problem according to McCleskey was that Georgia's criminal justice and capital punishment systems were infected with racial bias.[113] In support of his petition, McCleskey relied on peer-reviewed empirical data demonstrating that "persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers."[114] The Supreme Court, in fact, accepted the empirical data as valid and conceded that it demonstrated "a risk" that race played a role in some capital sentencing decisions.[115] Justices Brennan and Marshall poignantly explained in dissent what this empirical reality would mean in practice: criminal defense attorneys advising clients charged with murder in Georgia would be compelled in the interest of honest representation to explain that "there was a significant chance that race would play a prominent role in determining" whether the defendant "lived or died."[116]

Nevertheless, the Court rejected McCleskey's equal protection claim, peppering its analysis with incredulity. Writing as if such a proposition were inherently preposterous, the Court characterized McCleskey's race discrimination claim as extending "to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application."[117] McCleskey's claim "taken to its logical conclusion," the Court explained, "throws into serious question the principles that underlie our entire criminal justice system."[118] The Court in the end upheld McCleskey's death sentence, expressly relying on the rules it laid down in *Feeney* and finding insufficient evidence that individual actors in his specific case acted because of race[119] or "that the Georgia legislature enacted or maintained" its capital punishment system "to further a racially discriminatory purpose."[120] According to the Court, even McCleskey's strong empirical data demonstrating that race statistically matters in Georgia's death penalty apparatus is not enough evidence

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[110] *Id.* at 285.
[111] *Id.* at 285–86.
[112] *Id.* at 286–91.
[113] *Id.* at 291.
[114] *Id.*
[115] *Id*. at 291 n.7.
[116] *Id.* at 321 (Brennan & Marshall, JJ. dissenting).
[117] *Id.* at 292 (majority opinion).
[118] *Id.* at 314–15.
[119] *Id.* at 297.
[120] *Id.* at 298.

from which to draw an inference of bad motive given the many other possible variables at play.[121]

Allegations of racial discrimination are of serious Constitutional concern, and the *McCleskey* Court declined to even entertain the possibility that Georgia's penal system invites it at nearly every juncture. The Court's glib dismissal of potentially widespread racial bias was only possible, however, because of the Court's own limited definition of discrimination under the Equal Protection Clause. After *Feeney*, the only form of discrimination that matters is purposeful and perpetuated by individual bad actors; it is not, therefore, unconscious, implicit, or embedded in institutional structures by virtue of long histories and traditions of exclusionary decision-making. Absent an express declaration of racial animus by legislators, the prosecutor, the jurors, or the judge, what evidence would suffice to demonstrate the requisite discriminatory intent? If taken seriously, the factors articulated in *Arlington Heights* could have offered answers. *McCleskey* suggests, however, that satisfactory evidence simply does not exist, all but conceding that the requirement of discriminatory intent insulates criminal justice from Constitutional reform.

McCleskey has taken on even greater contemporary significance in the zeitgeist of the Black Lives Matter movement and increased national focus on racial justice. Professor Michelle Alexander identifies *McCleskey* as a major obstacle impeding activists and reformers who seek to use the Constitution as a tool for dismantling systems and institutions that produce disparate racial effects—like mass incarceration.[122] Professor Jamal Greene points to *McCleskey* as a painful reminder of how the United States remains an international outlier in its refusal "to see government acts that produce racial or sex disparities—like McCleskey's death sentence—as raising any constitutional concern unless the government specifically intends to cause the disparity."[123] Even Justice Powell, *McCleskey*'s author, had a change of heart, telling his biographer just three years removed from the decision that he regretted his vote.[124]

Conversely, California recently became a national leader in state legislative efforts to blunt *McCleskey*'s impact by enacting the California Racial Justice Act of 2020.[125] This revolutionary legislation allows defendants to challenge criminal convictions and sentences if race played a role and, importantly, it does not require proof of racially discriminatory intent.[126] Efforts to disrupt deeply embedded racial

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[121] *Id.* at 293–97.

[122] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 138–40 (2010).

[123] JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART, at XXVII (2021).

[124] *See* Samuel R. Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1905, 1918–19 (2012) (recounting the timeline and context of Powell's repudiation).

[125] Racial Justice Act, Cal. Assem. Bill 2542, 2020 Reg. Sess. (2020) (enacted).

[126] *See* Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 239 (2021) (explaining what California's Racial Justice Act does and highlighting it as a model of progressive criminal justice reform).

hierarchies in the world of criminal justice are likely to proliferate, but any such effort will be successful only in spite of and not because of the Supreme Court's equal protection jurisprudence.

C. Discriminatory Intent as a Barrier to Protecting Voting Rights

To put it mildly, efforts to suppress voting access for members of racial minority groups is an old yet stubbornly persistent problem in United States politics. The Supreme Court's role in dismantling or perpetuating voter suppression tactics has oscillated depending on its ideological makeup. For example, in the early days of the Black civil rights movement, the Court in *Terry v. Adams*[127] employed an expansive vision of the state action doctrine[128] to strike down an all-White pre-primary system conducted by private political parties rather than the state of Texas itself.[129]

Just six years after *Terry*, however, the Court in *Lassiter v. Northampton County Board of Elections*[130] unanimously upheld a state law requiring that voters be able to speak and write in English. Despite the obvious exclusionary effects that laws like this would have on racial minorities who had systematically been denied educational opportunities under Jim Crow,[131] as well as on U.S. citizens from territories like Puerto Rico,[132] the Court formalistically reasoned that "[l]iteracy and illiteracy are neutral on race, creed, color, and sex . . . ."[133]

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[127] 345 U.S. 461 (1953).

[128] In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court interpreted the Fourteenth Amendment as governing only state action, and Congress therefore lacked the power to legislatively enforce its provisions against private individuals and businesses. The Supreme Court has never strayed from this basic principle. *See* United States v. Morrison, 529 U.S. 598, 620–23 (2000) (striking down the civil remedies provision of the federal Violence Against Women Act because Congress had unconstitutionally sought to enforce the Fourteenth Amendment by reaching private conduct).

[129] *See* Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 68–69 (2001) (characterizing the state action analysis in *Terry* as not "terribly persuasive," but noting that the Court was simply unwilling to "legitimize a Southern community's scheme for disfranchising blacks, regardless of how strained the constitutional rationale for invalidating it").

[130] 360 U.S. 45 (1959).

[131] *See, e.g.*, Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789, 829–30 (2014) (characterizing English literacy requirements as a formally race neutral device that nevertheless served as a "veil for racial discrimination" in that it "target[ed] poor, largely uneducated blacks for suppression of their votes.").

[132] *See* Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 936 (1992) (citing Puerto Rican disenfranchisement as the "practical effect" of New York's version of an English literacy voting law).

[133] *Lassiter*, 360 U.S. at 51.

More recently, in *Shelby County, v. Holder*,[134] the Court did something worse than merely close its eyes to disenfranchisement: it affirmatively exacerbated the problem. In *Shelby County*, the Court struck down the "coverage formula"[135] Congress had relied on in the Voting Rights Act of 1965—and for over forty subsequent years of reauthorization—to determine which states and localities must seek "preclearance" from a panel of federal judges before changing voting requirements.[136] Demonstrating greater concern for the "disparate treatment of the States"[137] with a history of voter suppression than for the victims of that voter suppression, the Court explained that racial discrimination in voting practices is less rampant now than in 1965, and the Fifteenth Amendment "is not designed to punish for the past"[138]—minimizing the likelihood that improved voting conditions are due in large part to the very preclearance requirement that the Court finds unconstitutional.[139]

Perhaps not surprisingly, another way the Supreme Court has exacerbated voter suppression and insulated old racial status quos from reproach is by hiding behind the discriminatory intent doctrine. Since 1980, the Court has largely demonstrated an unwillingness to find credible evidence of discriminatory intent in claims of voter dilution or suppression brought on behalf of racial minority groups.

This particular jurisprudential chapter begins with *Mobile v. Bolden*.[140] In *Bolden*, the city of Mobile, Alabama, since 1911, had operated an "at-large" voting system in which all voters in the city (rather than a subset organized by neighborhood or district) cast their ballot for all open city commissioner positions (rather than for a single seat) with the top vote-getters declared the winners.[141] As Professor Michael Selmi explains, the factual predicate for the Fourteenth and Fifteenth Amendment claims was that "no African-American in Mobile had ever been elected to the city commission even though African-Americans comprised thirty-five percent of the voting population."[142]

In this opinion, the Court first clarified that the Fourteenth Amendment's discriminatory intent rule for equal protection claims likewise applied to Fifteenth Amendment race-based voting discrimination claims.[143] The Court then turned to the available evidence regarding governmental motivation. Professor Ian Haney López described the Court's technique as reflecting "evidentiary disaggregation," in which each piece of "disassembled evidence" was deemed "individually incapable

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[134] 570 U.S. 529 (2013).

[135] "The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s." *Id.* at 551.

[136] *Id.* at 556–57.

[137] *Id.* at 555.

[138] *Id.* at 553.

[139] *Id.* at 552–54.

[140] 446 U.S. 55 (1980).

[141] *Id.* at 59–60.

[142] Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 310 (1997).

[143] *Bolden*, 446 U.S. at 62–65.

of showing the actual thinking of an identified state actor."[144] This technique does not reflect the holistic and contextual approach the Court suggested it would deploy in *Washington*[145] and *Arlington Heights*;[146] instead, it reflects the same kind of deference to institutions and institutional actors, and skepticism about the existence of racist decision-making, that has ultimately come to define *McCleskey*.[147]

Perhaps the most damning illustration of the Court's willful blindness is in what it said about the evidence demonstrating "that the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services."[148] The Court characterized this evidence as only "the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices."[149] Perhaps that conclusion makes some sense when the evidence is viewed in isolation, but, as the Court itself acknowledged, there is a "substantial history of official racial discrimination in Alabama."[150] When current officials engage in racial discrimination, and when those current officials are elected under a system created by former officials who undeniably engaged in racial discrimination, a holistic view suggests a voting apparatus rotten inside and out. Yet, again, the Court seemed to have more concern about shielding the government from the consequences of, as the Court oversimplified it, "past discrimination" and "original sin."[151]

Today, mechanisms designed with either the purpose or effect of suppressing minority votes have taken new forms. Some commonly alleged examples include prohibiting or limiting early voting, reducing voting locations, prohibiting volunteers from giving water to voters waiting in long lines, and purging recently inactive voters from voter rolls. Canvassing the scope and form of alleged voter suppression tactics—particularly in the wake of former President Trump's unfounded allegations of voter fraud following the 2020 Presidential election—is well beyond the scope of this Article. Instead, the Article focuses on perhaps the most common and high-profile voting rights controversy of the post-millennium era: voter identification laws.

The Supreme Court first addressed the validity of voter identification laws in the 2008 case, *Crawford v. Marion County Election Board*.[152] At issue in *Crawford* was an Indiana law requiring in-person voters in both primary and general elections to present government-issued photo identification.[153] A suit challenging the law was brought on behalf of "elderly, disabled, poor, and minority voters."[154] The claimants

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[144] Haney-López, *supra* note 105, at 1840–41.
[145] Washington v. Davis, 426 U.S. 229 (1976).
[146] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).
[147] McCleskey v. Kemp, 481 U.S. 279 (1987).
[148] *Bolden*, 446 U.S. at 73.
[149] *Id.* at 74.
[150] *Id.*
[151] *Id.*
[152] 553 U.S. 181 (2008).
[153] *Id.* at 185.
[154] *Id.* at 187.

alleged that the voter ID law imposed an unconstitutional burden on the right to vote as protected by the Equal Protection Clause. To evaluate that claim, courts were to "weigh the character and magnitude of asserted injury to [the right to vote] . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule."[155] In other words, a balancing test governs most equal protection challenges to facially race-neutral voting rights laws.

But why not challenge the voter ID law as enacted in part due to race-based motivations? At the time, the claimants did not formally "question the legitimacy of the interests the State ha[d] identified."[156] Further, as Deuel Ross, Assistant Counsel at the NAACP explains, "the Court did not have before it any record evidence of the law's impact on particular groups of voters."[157] In short, *Crawford* was an early test case of an alleged voter suppression tactic that was still relatively new when this litigation began in 2005. Prior to the Supreme Court's disposition of the case, however, Judge Terence T. Evans in the Seventh Circuit opinion below previewed the crux of the argument in the battles yet to come amidst the rapid proliferation of restrictive voter ID laws: "The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[158] Judge Richard Posner, who wrote the Seventh Circuit's majority opinion upholding the voter ID law, retreated from *Crawford* in a later case in which he discussed empirical evidence tending to show that voter ID laws "highly correlated with a state's having a Republican governor and Republican control of the legislature and appear to be aimed at limiting voting by minorities, particularly blacks."[159] Even Justice Stevens, the author of the Supreme Court's *Crawford* majority opinion, later characterized the decision as "unfortunate," and he could not say for sure whether he would vote the same way if given the opportunity.[160]

Now armed with decades of empirical data regarding whom voter ID laws most directly impact, civil rights attorneys and activists are better prepared to demonstrate why inferences of discriminatory intent are appropriate in challenges to voter ID

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[155] Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal quotation marks omitted).

[156] *Crawford*, 553 U.S. at 191.

[157] Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 386 (2014).

[158] Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting). Judge Evans further implies that Indiana's asserted interest in preventing voting fraud is pretextual since "no one—in the history of Indiana—had ever been charged" with voter fraud. *Id.* at 955.

[159] Frank v. Walker, 773 F.3d 783, 792 (7th Cir. 2014) (Posner, J., dissenting) (dissenting on denial of rehearing *en banc* in a case regarding Wisconsin's voter ID law).

[160] Robert Barnes, *Stevens Says Supreme Court Decision on Voter ID Was Correct, But Maybe Not Right*, WASH. POST (May 15, 2016, 3:44 PM), https://www.washingtonpost.com/politics/courts_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62_story.html [https://perma.cc/K5G5-RGQF].

laws.[161] Nevertheless, the Court's consistently rigid application of intent rules in equal protection claims may prove an insurmountable barrier.

II. FREE EXERCISE AND THE NEWLY ENHANCED ROLE OF DISCRIMINATORY INTENT IN PROTECTING CHRISTIAN CLAIMANTS

The Supreme Court's ideological project for interpreting the Equal Protection Clause in ways that shield systematically entrenched racial hierarchies from meaningful constitutional review is all but complete. The story of discriminatory intent outlined above[162] is one leg of the journey. A near-totalizing understanding of the Equal Protection Clause as "colorblind" is another; in June 2023 the Court issued an opinion [163] that effectively ended race-conscious admissions in higher education.[164]

Elsewhere in Constitutional jurisprudence, other efforts to cement social hierarchies and restrictive liberties from a bygone era are just beginning. One area in which these efforts have materialized with increasing frequency and public visibility is in the First Amendment's Religion Clauses. This Part first outlines the history and—at least for now—relatively quiet revolution in free exercise doctrine. Today, the Free Exercise Clause is having a renaissance and has become a key tool in conservative battles against pro-LGBTQ law and policy.[165] The Court's renewed interest in robust free exercise protection will presumably offer greater protection for minority religious beliefs, but the catalysts and primary benefactors thus far tend to be conservative Christians.[166]

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[161] *See, e.g.*, Emily Chiang, *The New Racial Justice: Moving Beyond the Equal Protection Clause to Achieve Equal Protection*, 41 FLA. ST. U. L. REV. 83, 880 n.245 (2014) (providing examples of empirical data supporting the claim that voter ID laws disproportionately impact people of color).

[162] *See supra* Part I.

[163] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141 (2023).

[164] *See* Nina Totenberg, *Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admissions*, NPR (June 29, 2023, 7:52 PM), https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision [https://perma.cc/BZ43-AY8R].

[165] *See* Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 342–47 (2021) (explaining that both free speech and free exercise claims serve as the primary sources for conservative dissenters to seek carve-outs or exemptions from seemingly generally applicable laws that prohibit discrimination against sexual minorities and gender nonconformists).

[166] *See* Asma T. Uddin, *Religious Liberty Interest Convergence*, 64 WM. & MARY L. REV. 83, 94 (2022) (describing the now "common" argument "even in mainstream legal and political discourse" that "the rights secured by conservative, white Christians in some of today's most prominent religious liberty cases directly contravene the rights of marginalized minorities").

A. A Brief Free Exercise History: From Reynolds *Through* Smith

The First Amendment's Free Exercise Clause is the primary source of Constitutional protection for individual religious liberty claims. The Supreme Court has oscillated on the Clause's meaning and scope over time—often reflecting ambivalence or hostility to minority religious beliefs, but sometimes reflecting an admirable commitment to religious pluralism. This Part sketches the contours of the Court's religious liberty evolution and demonstrates how the Court's near paranoia about presumed anti-Christian bias has transformed the discriminatory intent doctrine into a workhorse rarely seen in the equal protection context.

The Supreme Court's first major free exercise decision was not particularly friendly to minority religious adherents. In *Reynolds v. United States*,[167] the Court entertained a free exercise challenge brought by a Mormon man who had been convicted under a criminal bigamy statute for having more than one wife.[168] The Court's analysis was brief and conclusory. In rejecting the free exercise challenge, the Court explained:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices . . . because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[169]

The Court's practical concerns about what ruling in favor of the religious adherent in *Reynolds* would mean for the rule of law resulted in an all-or-nothing approach: the government may not enact laws with discriminatory religious intent (i.e., targeting religion) without triggering searching judicial scrutiny, but religiously neutral laws that merely burden religious beliefs are not sufficient to support a free exercise claim. The Court deployed similar reasoning in a 1905 case (with high contemporary post-pandemic relevance), *Jacobson v. Massachusetts*,[170] regarding a compulsory vaccination law. The claim in *Jacobson* was rooted in the Fourteenth Amendment's guarantee of "liberty" rather than the Free Exercise Clause due to a technical quirk in the law at the time.[171] Regardless, the Court rejected the assertion

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[167] 98 U.S. 145 (1878).

[168] *Id.* at 161.

[169] *Id.* at 167.

[170] 197 U.S. 11 (1905).

[171] In 1905, the Court had not yet interpreted the Free Exercise Clause as applicable to states through the Fourteenth Amendment's incorporation principle. The Court first applied the Free Exercise Clause as a constraint on state power in *Cantwell v. Conn.*, 310 U.S. 296 (1940). There, the Court reversed state criminal convictions of Jehovah's witnesses—convictions based on little more than door-to-door proselytizing—on free exercise grounds

that the "execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person."[172] Pursuant to reasoning nearly identical to that in *Reynolds*, the Court concluded that "society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under" such a principle.[173] Pragmatic as this limited view of viable Free Exercise harms may be, the reality for religious minorities in the United States was a life in which their religious practices could be regulated or prohibited with relative legal ease.

In *Sherbert v. Verner*,[174] the Court seemingly shifted its approach to Free Exercise claims and provided a newly "thick conception of religious freedom."[175] *Sherbert* came down in 1963, near the beginning of arguably the most liberal seven-year streak of the infamously liberal Warren Court due to the confirmation of two President Kennedy nominees.[176] At issue in *Sherbert* was the denial of unemployment benefits to a Seventh Day Adventist who had: (1) been fired because she would not work on Saturday in observation of her faith's Sabbath Day; and (2) could not find another job for the same reason.[177] The *Sherbert* Court surprisingly ruled in the claimant's favor—reversing and remanding for a determination on whether accommodating her Sabbath Day observation would undermine the state's interests.[178] Just two years earlier, by contrast, the Court had been unwilling to reconsider its approach to religious liberty amidst a civil rights push to conceptualize the Free Exercise Clause as protecting substantive rather than simply formal religious equality.[179]

To rule in favor of the religious claimant's free exercise claim, the Court did at least three important things. First, the Court did not disrupt the well-settled rule that laws enacted or enforced with discriminatory religious intent are presumptively unconstitutional.[180] Second, the Court went out of its way to distinguish *Reynolds*,

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as it applies to states through the Fourteenth Amendment's guarantee of "liberty." *Id.* at 301–04.

[172] *Jacobson*, 197 U.S. at 26.

[173] *Id.*

[174] 374 U.S. 398 (1963).

[175] Gilad Abiri, *The Distinctiveness of Religion as a Jeffersonian Compromise*, 125 PENN ST. L. REV. 95, 145 (2020).

[176] COHEN, *supra* note 65, at xxi.

[177] *Sherbert*, 374 U.S. at 399–401.

[178] *Id.* at 408–10.

[179] *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (ruling against an Orthodox Jew who sought an exemption from a law requiring businesses to close on Sundays despite a tenet of his faith prohibiting work from Friday to Saturday evening rather than on Sunday). *See also* Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101, 1124–30 (2012) (criticizing the 1961 "Sunday Closing Law" cases as demonstrating an unwillingness to go far enough in protecting religious minorities' rights).

[180] *Sherbert*, 374 U.S. at 404.

Jacobson, and several other earlier free exercise cases[181] as factually unique from *Sherbert* because each involved conduct that "invariably posed some substantial threat to public safety, peace or order."[182] Finally, and most consequentially, the Court opened the door to free exercise claims when a religiously neutral and generally applicable law imposes a substantial burden on an individual's sincerely held religious belief.[183] Under this species of free exercise claim, it becomes the government's burden to demonstrate that "no alternative forms of regulation"[184] other than applying the law to the religious adherent would achieve the government's compelling interest.[185] In other words, the core question is whether an exemption or an accommodation to an individual religious adherent would undermine the law's objective.[186]

At least in theory, *Sherbert* represented a victory for minority religious adherents and for a theory of the Free Exercise Clause that embraced religious equity as opposed to mere formally neutral treatment. The reality, however, was more complicated. In the twenty-seven years between *Sherbert* and *Smith*,[187] the Court's

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[181] The Court also cited to *Prince v. Massachusetts*, 321 U.S. 158 (1944) (rejecting a free exercise exemption from a law prohibiting child labor) and *Cleveland v. U.S.*, 329 U.S. 14 (1946) (rejecting a Mormon polygamist's free exercise defense to criminal charges stemming from a federal law that prohibited transporting a woman across state lines for immoral purposes).

[182] *Sherbert*, 374 U.S. at 403. Even if today's Court were to overrule or depart from *Employment Division v. Smith*, 494 U.S. 87 (1990) (rejecting the "substantial burden" test that *Sherbert* seemingly approved), the harm principle uniting these early cases may still be a constitutionally sufficient basis upon which to deny certain kinds of free exercise requests for exemptions and accommodations to laws that burden sincerely held religious beliefs. For example, granting a free exercise exemption to a law prohibiting so-called "conversion therapy" for LGBTQ minors may be inappropriate because of the social and psychological harms conversation therapy have been scientifically shown to cause. For a comprehensive look at the many facets of and debates about conversion therapy, see generally Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793 (2017).

[183] *Sherbert*, 374 U.S. at 406–08.

[184] *Id.* at 407.

[185] There is some debate among scholars and Supreme Court Justices about this aspect of the "strict scrutiny" test. It is not clear whether *Sherbert* required the government to achieve its compelling interest using the "least restrictive means" possible or whether applying the law to the religious adherent need only be a "narrowly tailored" way to achieve its interest. *See, e.g.*, Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1182–83 (2009) (describing the confusion). *Cf.* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.") *with* City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (declaring that the "least restrictive means requirement . . . was not used in the pre-*Smith* jurisprudence").

[186] *See* Jesse H. Choper, *In Favor of Restoring the* Sherbert *Rule-With Qualifications*, 44 TEX. TECH L. REV. 221, 222 (2011).

[187] Emp. Div. v. Smith, 494 U.S. 872 (1990).

next major pronouncement on the meaning of the Free Exercise Clause, very few religious claimants won their cases before the Supreme Court when challenging a religiously neutral and generally applicable law that allegedly burdened their religious beliefs.[188] Such claimants won in three unemployment compensation cases that were factually like *Sherbert*.[189] In only one other case, *Wisconsin v. Yoder*,[190] did a religious claimant win at the Supreme Court, and scholars tend to characterize *Yoder* as an "outlier."[191]

Yoder involved Wisconsin's version of a common compulsory education law requiring children to attend high school until they reach the age of sixteen.[192] The claimants in *Yoder* were Amish parents who religiously objected to sending their children to high school because doing so was "contrary to the Amish religion and way of life" and "would endanger their own salvation and that of their children . . . ."[193] The Court seemingly agreed that states have compelling interests in educating children,[194] but, in this case, "an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests."[195] In other words, an exemption or accommodation was warranted because it would not significantly undermine the government's interests. Whether that analysis was sound then or now is irrelevant;[196] the point is that *Yoder* is a clear yet unusual application

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[188] *See* Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1675 (2011) (identifying just four cases during this period in which the religious claimant won).

[189] *See* Frazee v. Ill. Dept. of Emp. Sec., 489 U.S. 829, 831–35 (1989) (ruling for Christian belonging to no religious sect who was denied unemployment benefits due to his refusal to work on Sundays); Hobbie v. Unemp. App. Comm'n of Fla., 480 U.S. 136, 138–46 (1987) (ruling for Seventh Day Adventist who was denied unemployment benefits due to her refusal to work on her Friday evenings and Saturdays); and *Thomas*, 450 U.S. at 715–20 (ruling for Jehovah's witness who was denied unemployment benefits after quitting a job that required him to participate in the production of weapons in conflict with his religious beliefs).

[190] 406 U.S. 205 (1972) (holding that the First Amendment prevented a state from requiring Amish children to attend school after eighth grade).

[191] *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW, 131 (2005). *See also* Mary Anne Case, *Why "Live-and-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 480–81 n.61 (2015) (noting that "most scholars" view *Yoder* as an outlier and "problematic"); Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 327 (1997) (characterizing *Yoder* as "not unprecedented" but "an outlier in modern free exercise jurisprudence").

[192] *Yoder*, 406 U.S. at 207.

[193] *Id.* at 209.

[194] *Id.* at 221.

[195] *Id.* at 222.

[196] For a comprehensive discussion of why and how the *Yoder* decision may harm Amish children, see generally Gage Raley, Note, Yoder *Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned*, 97 VA. L. REV. 681 (2011).

of strict scrutiny in the post *Sherbet* jurisprudence regarding burdens imposed by religiously neutral and generally applicable laws.

By contrast, such claimants lost in the thirteen other free exercise cases the Court heard during this period.[197] In rejecting these requests for accommodations and exemptions, the Court either determined the law did not substantially burden the claimants' religious beliefs[198] or reasoned than an exemption would undermine a compelling governmental interest. [199] In authoritarian military and prison environments, the Court eschewed strict scrutiny altogether and employed a mere rationality analysis.[200] This Article does not take a position on whether the Court decided these cases rightly or wrongly. Again, the point is simply that the Court's heightened concern for religious minorities as seen in *Yoder* and the unemployment benefits cases does not appear in the majority of its religious liberty disputes between *Sherbert* and *Smith*. One explanation is that in 1969 the more ideologically conservative Burger Court replaced the short-lived liberal Warren Court majority that decided *Sherbert*. As other scholars have noted, the Burger Court and Rehnquist Courts exhibited less generosity to minority interests[201] and more often ruled in favor of those with power who were still clinging to a bygone social order.

In 1990, the Court in *Smith*[202] made express what had been implicit in most of the post-*Sherbert* case law: under the Free Exercise Clause, the government need

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[197] *See* Micah Schwartzman, Nelson Tebbe, & Richard Schragger *The Costs of Conscience*, 106 KY. L.J. 781, 801 n.95 (2018) (noting that religious claimants won only four of the seventeen free exercise cases the Supreme Court heard during this period); James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 app. at 1458–59 (1992) (compiling the free exercise claims that won and lost between 1963 and 1990).

[198] *See, e.g.*, Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988) (declining to apply strict scrutiny to the government's proposed timber harvesting and road construction on land deemed sacred to three Native American tribes because the burden on religion was not substantial enough); Bowen v. Roy, 476 U.S. 693 (1986) (declining to apply strict scrutiny to the government's requirement that welfare applicants obtain a valid Social Security number because the burden on Native American religious beliefs was not substantial enough). *See also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1176, 1214–15 (1996) (explaining that the Court during this period was neither clear nor consistent on what kinds of governmental burdens were substantial enough to trigger strict scrutiny).

[199] *See* Ryan, *supra* note 197, at 1414–15.

[200] *See, e.g.*, O'Lone v. Est. of Shabazz, 482 U.S. 342 (1987) (rejecting, under a deferential rationality review, Muslim inmates' free exercise request for an accommodation that would allow attendance at Friday religious services); Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting, under a deferential rationality review, an Orthodox Jewish Air Force officer's free exercise request for an accommodation to wear a yarmulke while in uniform).

[201] *See, e.g.*, U.S. v. Lee, 455 U.S. 252 (1982) (rejecting an Amish employer's free exercise request for an exemption from tax collection because such an exemption would undermine the government's compelling interest in the uniform application of tax law).

[202] Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

not grant religious exemptions to neutral and generally applicable laws.[203] *Smith* involved yet another denial of unemployment benefits to minority religious adherents.[204] In contrast to previous unemployment cases, however, the *Smith* claimants were denied benefits because they ingested peyote—"for sacramental purposes at a ceremony of the Native American Church"—in violation of Oregon's criminal controlled substances law.[205] In rejecting the request for a free exercise exemption, the Court resurrected the pragmatic rule of law concerns expressed in cases like *Reynolds* and *Jacobson*:

> To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,' . . . —contradicts both constitutional tradition and common sense.[206]

The Court concluded by acknowledging that its newly announced rule would leave minority religious adherents at a "relative disadvantage," but characterized that disadvantage as an "unavoidable consequence" of majority rule in a democracy.[207] Professor René Reyes argues that, in this way, *Smith* mirrored the Court's protection of the status quo in its equal protection jurisprudence; "The main difference in this context is that the privileged majority is not only white, but also Christian."[208]

A swift national rebuke followed the *Smith* decision from politicians, activists, and concerned citizens spanning the ideological spectrum,[209] culminating in two rare congressional attempts to statutorily overrule *Smith* and restore the *Sherbert* framework.[210] For legal scholars, much of the backlash stemmed from allegations of

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[203] *Id.* at 885.

[204] *Id.* at 874.

[205] *Id.*

[206] *Id.* at 885 (citations omitted) (citing Reynolds v. U.S., 98 U.S. 145, 167 (1878)).

[207] *Id.* at 890.

[208] René Reyes, *Religious Liberty, Racial Justice, and Discriminatory Impacts: Why the Equal Protection Clause Should Be Applied At Least as Strictly as the Free Exercise Clause*, 55 IND. L. REV. 275, 282 (2022).

[209] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (documenting the immediate yet unsuccessful request for rehearing "joined by an unusually broad-based coalition of religious and civil liberties groups from right to left and over a hundred constitutional law scholars").

[210] Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4); Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc-2000cc-5). While the Court ultimately ruled that Congress exceeded its Fourteenth Amendment enforcement power by attempting to overrule *Smith* as it applies to free exercise claims stemming from most state and local action, *City of Boerne v. Flores*, 521 U.S. 507 (1997), much of the federal statutory framework survives

intellectual dishonesty regarding the Court's treatment of its own past precedent.[211] For many others, the backlash arose out of socially liberal concerns for minority religious rights.[212] As LGBTQ rights became more socially palatable, democratically protected, and judicially enforced, however, socially conservative interests increasingly began to seize on *Smith* as an impediment to safeguarding "religious liberty" from encroaching progressive ideals.[213]

B. The Court's Careful Search for Anti-Christian Discriminatory Intent Under Smith's *"Neutrality" Rule*

In the aftermath of *Smith*, the Constitutional terrain for free exercise claims included at least four possible paths, only one of which expressly focused on the government's intent. First was the so-called "hybrid rights" path, which today is a dead-end in most jurisdictions.[214] Second, a claimant could prove that a law is not religiously "neutral" because it targets religion—potentially proven vis-à-vis

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and triggers strict scrutiny "in a large number of cases." Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 280 (2017).

[211] *See, e.g.*, James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 718–26 (2019) (explaining the various inaccuracies, omissions, and misleading statements about past precedent in Justice Scalia's majority opinion).

[212] *See, e.g.*, Toni M. Massaro, *Religious Freedom and "Accommodationist Neutrality": A Non-Neutral Critique*, 84 OR. L. REV. 935, 949–52 (2005) (noting that *Smith* "stunned observers" given the "very weak protection" that its neutrality theory of free exercise provides to minority religious practices).

[213] *See generally, e.g.*, Steve Sanders, *RFRAs and Reasonableness*, 91 IND. L.J. 243 (2016) (pointing to the proliferation of state-enacted Religious Freedom Restoration Acts post-*Smith* as part of the conservative response to LGBTQ rights).

[214] The *Smith* Court attempted to distinguish *Yoder* as an unusual "hybrid rights" case given that both religious liberty and parental rights were implicated. Emp. Div. v. Smith, 494 U.S. 872, 881–82 (1990). This "hybrid rights" approach has been subject to withering academic and judicial criticism. *See* Steven H. Aden & Lee J. Strang, *When A "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 587–605 (2003) (surveying federal opinions regarding free exercise claims in the decade following *Smith* and concluding that "appellate courts have been thoroughly unreceptive to hybrid right claims"). "Some commentators treat the use of prior precedent and the hybrid rights discussion as merely a disingenuous and strained effort to distinguish individual cases that were problematic for the majority's new holding." Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1327 (2017). Justice Scalia himself, the "hybrid rights" architect, "seems to have given up on the idea." Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 631–32 (2003). Lund notes that Justice Scalia concurred with the majority's holding in *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 171 (2002) (Scalia, J., concurring), but rejected the argument that an ordinance requiring a permit before individuals engage in certain kinds of speech is invalid because of the interaction between expressive and religious liberty concerns. *Id.* at 632 n.23.

evidence of discriminatory intent—and therefore triggers strict scrutiny. Third, a claimant could prove that a law is not "generally applicable" and therefore triggers strict scrutiny. Finally, if a court rejects these arguments and finds the applicable law to be religiously neutral and generally applicable, deferential rationality review applies, which seldom results in courts deeming laws invalid. While these rules ostensibly reflect the formal religious equality theory of free exercise that dominated jurisprudence in all but four pre-*Smith* cases, the Court in recent years has manipulated them in ways that arguably favor mainstream religious interests and conservative Christianity in particular.

In 1993, the Court issued a major decision involving *Smith*'s "neutrality" rule regarding discriminatory religious intent. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[215] the Court began by noting the extreme rarity of cases involving the "impermissible object" of "suppress[ing] religious belief or practice."[216] The background in this unusual case involved a small town's apparent hostility to a church and its congregants who practiced the Santeria religion.[217] After learning that part of the Santeria faith involves animal sacrifice, the city council took a number of steps with the apparent intent to make it much harder for the congregants to establish themselves in the local community—including by enacting new ordinances prohibiting animal sacrifice.[218]

In ruling in favor of the church, the Court rejected the city's arguments that any discriminatory intent motivating the passage of a law is irrelevant and that only a law's text matters.[219] Citing to and discussing *Arlington Heights*,[220] the landmark equal protection decision outlining forms of direct and circumstantial evidence relevant in assessing discriminatory intent, the Court easily found the ordinances at issue not religiously neutral because they "had as their object the suppression of religion."[221] Importantly, the Court then separately addressed the companion *Smith* rule that laws must be "generally applicable" to avoid triggering strict scrutiny.[222] While finding that the animal sacrifice ordinances likewise violated this rule, the Court explained that it "need not define with precision the standard used to evaluate whether a prohibition is of general application."[223] At its core, the rule seems to limit the government's ability to "impose burdens only on conduct motivated by religious belief."[224] In a practical sense, the neutral and general applicability analyses in most cases are likely to blur given that a non-neutral law targeting religion cannot reasonably be deemed generally applicable. Nevertheless, the Court's separate treatment of general applicability suggests that the rule has the capacity to address

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[215] 508 U.S. 520 (1993).
[216] *Id.* at 523–24 (citing only two past examples).
[217] *Id.* at 525–26.
[218] *Id.* at 526–28 (recounting the factual record).
[219] *Id.* at 524.
[220] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977).
[221] *Church of Lukumi*, 508 U.S. at 542.
[222] *Id.*
[223] *Id.* at 543.
[224] *Id.*

less overt forms of religious discrimination.[225] The potential power of the dual-pronged approach has become more apparent as the Court navigates amidst rightwing calls for a course correction.[226]

In 2021, the Court granted certiorari in a case in which religious claimants expressly asked the Court to overrule *Smith*.[227] Some Justices appeared ready to take the plunge, but, as Justice Gorsuch noted, the majority "sidestep[ped]" the question[228]—at least for now. Instead of formally abandoning *Smith*, the Court in the post-Trump era has instead injected legal steroids into both the (1) "neutral" and (2) "generally applicable" *Smith* requirements, giving them power previously unseen. Unlike the Court's concern for religious minorities in *Sherbert*, however, the Court's renewed interest in religious liberty seems to be about protecting "Christians and Christian institutions from even a whiff of discrimination."[229]

The free exercise revolution began in earnest in 2017 when the Court decided *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[230] At issue in *Trinity Lutheran* was a Missouri Department of Natural Resources program that awarded grant money to schools and other nonprofits to resurface their playgrounds with recycled rubber.[231] The program categorically excluded religious organizations due to concerns about violating establishment principles under both state and federal constitutional law.[232]

For reasons more fully discussed below,[233] the government's Establishment Clause concerns about impermissibly advancing and promoting religion seemed—until recently—sufficient to avoid a neutrality problem under *Smith*.[234] Nevertheless, the Court characterized the playground resurfacing program in *Trinity Lutheran* as "unremarkably" governed by *Lukumi* because it "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely

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[225] *See, e.g.*, Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 7 (2016) ("General applicability is a distinct requirement; it does not depend on targeting, gerrymandering, discrimination, legislative motives, or the object of laws.").

[226] *See, e.g.*, Aden & Strang, *supra* note 214, at 581 ("Conservatives bemoan the decision as an assault on religious belief leaving religion, more than ever, subject to the caprice of an ever more secular nation that is increasingly hostile to religious belief as an oppressive and archaic anachronism.").

[227] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021).

[228] *Id.* at 1926 (Gorsuch, Thomas, & Alito, JJ., concurring).

[229] Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and the Politic of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507, 541 (2022).

[230] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[231] *Id.* at 2017.

[232] *Id.*

[233] *Infra* Part III.B.

[234] Contemporaneous with the Court's renewed interest in the Free Exercise Clause, the Establishment Clause was undergoing a jurisprudential revolution of its own that was rapidly rendering irrelevant governmental fear of advancing religion via spending and other means.

because of their religious character."[235] This conclusory statement made sense only in the context of the Court's simultaneous shift in Establishment Clause jurisprudence, departing from a theory prohibiting the appearance of religious favoritism and arriving instead at a theory permitting religious accommodation. This was a shift that the Court largely ignores and downplays.[236]

Discriminatory intent played a starring role in the Court's next major free exercise case, 2018's *Masterpiece Cakeshop*.[237] *Masterpiece Cakeshop* squarely teed up the raging culture war long waged by religious conservatives against LGBTQ rights. Having lost the war against same-sex marriage in 2015, conservative Christians increasingly turned to anti-LGBTQ exclusionary marketplace tactics in efforts to resist progressive change regarding queer legal rights and social acceptance.[238] The legal predicate for this specific dispute was the Colorado Anti-Discrimination Act which prohibited discrimination due to sexual orientation in places of public accommodation.[239] The religious claimant, a "devout Christian," operated a bakery offering a variety of products, including "custom-designed cakes for birthday parties, weddings, and other events."[240] Because of his "religious opposition to same-sex marriage," the claimant declined to bake a cake for a same-sex couple's wedding.[241] The couple subsequently filed a complaint with the Colorado Civil Right Division, the body charged with initially investigating the complaint and referring credible claims to the Colorado Civil Rights Commission.[242] The Division indeed found the couple's claim credible, which triggered the Commission's review.[243] Under relevant Colorado law, the Commission must hold a public hearing and deliberative session.[244]

The religious claimant's petition for certiorari in *Masterpiece Cakeshop* raised several monumental doctrinal questions. For example, is baking a wedding cake sufficiently expressive to warrant protection under the Free Speech Clause? If so, does an antidiscrimination law requiring a baker to bake a cake communicating a message with which the baker disagrees constitute "compelled speech" thus triggering strict scrutiny under the Free Speech Clause? Should commercial

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[235] *Trinity Lutheran*, 137 S. Ct. at 2021.

[236] *Id.* at 2023. *See also* Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 641–42 (2019) (characterizing the Court's Establishment Clause analysis as "perfunctory," unduly deferential to the parties' stipulations, and dismissive of the history and traditions regarding governmental cash grants to religious institutions).

[237] Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n., 138 S. Ct. 1719 (2018).

[238] *See* Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, 12 U.C. IRVINE L. REV. 907, 922 (2022) (further characterizing such efforts as "neoliberal" in their demonization of governmental safety nets).

[239] *Masterpiece Cakeshop*, 138 S. Ct. at 1725.

[240] *Id.* at 1724.

[241] *Id.*

[242] *Id.* at 1725.

[243] *Id.* at 1726.

[244] *Id.* at 1725.

compelled speech be treated differently than private compelled speech? And, most importantly for this Article's purposes, are religious adherents entitled under the Free Exercise Clause to an accommodation or an exemption to neutral and generally applicable anti-discrimination laws if compliance would burden their religion? The Supreme Court ultimately answered none of these questions. Instead, the Court narrowly focused on what it characterized as evidence of discriminatory intent towards the religious claimant in the Commission's adjudication of the same-sex couple's claim.

The Court began its analysis by invoking *Smith*'s neutrality rule and characterizing the proceedings during the public hearings as demonstrating "clear and impermissible hostility toward the sincere religious beliefs that motivated" the claimant's objection to baking the wedding cake.[245] The Court went on to interpret some of the commissioners' comments as endorsing "the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community." [246] Acknowledging that the cited comments could be interpreted in two ways—one suggesting that personal views should not justify denying service to a gay person, and one suggesting an "inappropriate" and "dismissive" "lack of due consideration" for the claimant's religious "dilemma"—the Court concluded that the latter interpretation "seem[ed] the more likely."[247]

The Court's generous inference of discriminatory intent in the government's dealings with a conservative Christian in *Masterpiece Cakeshop* rarely extends to claimants of color in equal protection challenges. Most damning from the Court's perspective seemed to be a statement from one commissioner at a subsequent hearing in which the commissioner highlighted instances in which historical bad actors used religion to harm others, including during slavery and the Holocaust.[248] The commissioner described these bad faith religious invocations as "despicable,"[249] which, candidly, seems self-evident given the two cited examples. Nevertheless, the Court defensively interpreted the commissioner's comments as "disparaging" in two ways: by (1) describing *the claimant's* religion as despicable and (2) characterizing *the claimant's* religion as rhetorical. Charitably, the Court could have misread the factual record since the commissioner's comments appear to be about how others manipulated religion in the past.[250] Less charitably, the Court was perhaps blinded by pitched political battles in which rightwing forces recast anti-LGBTQ Christians

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[245] *Id.* at 1729.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] For a similar discussion about how the Court through Justice Kennedy's majority opinion "ignores well-established facts" and is "overly rooted" in "personal intuition," *see* Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1067–68 (2019).

as the true victims.[251] Regardless, *Masterpiece Cakeshop* is a highly unusual example of the Court going out of its way to find evidence of discriminatory intent—against Christians.

C. The Court's Careful Search for Even the Possibility of Anti-Christian Discriminatory Intent or Impact Under Smith's *"Generally Applicable" Rule*

The Court's special concern for religious conservatives became even more apparent in the wake of the 2020 pandemic. In response to stay-at-home orders, social distancing, mask mandates, and other measures designed to address a public health crisis, religious plaintiffs brought a series of federal free exercise challenges aided by robust and newly invigorated theories of religious discrimination.[252] In these COVID-era cases, the "generally applicable" *Smith* rule began to assert greater dominance, unlike in past cases in which the "neutrality" rule performed the greatest share of the work. *Masterpiece Cakeshop* demonstrated that neutrality prohibits the government from targeting religion for adverse treatment through discriminatory intent. But after *Masterpiece Cakeshop*, it remained unclear whether the "general applicability" rule is: (1) a narrow extension of the neutrality rule that examines whether, in a discrete instance, a facially religion-neutral law is applied in a way suggesting discriminatory intent; or (2) a broad rule requiring laws to facially treat religious interests as favorably as virtually all secular interests.[253] The answer seems to be a bit of both.

In September of 2020, less than two months before a contentious presidential election that would see Donald Trump lose to Joe Biden, liberal Justice Ruth Bader Ginsburg died from cancer-related complications.[254] One week before the election and well after early voting had already begun, the Senate confirmed Amy Coney Barrett, President Trump's third nominee, to the Supreme Court.[255] The change in free exercise jurisprudence was almost immediate.

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[251] For a robust discussion of how today's politics of victimization and grievance animate conservative rhetoric and legal strategies, see Luke A. Boso, *Rural Resentment and LGBTQ Equality*, 71 FLA. L. REV. 919, 921–26 (2019).

[252] *See* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1071 (2022) (characterizing the success of these claims before Republican-appointed judges—and their failure before Democrat-appointed judges—as an aspect of free exercise partisanship, made possible by "indeterminate doctrine" that creates room for partisan preferences to shape outcomes).

[253] *Id.* at 1091–92.

[254] *See* Mark Sherman, *Supreme Court Justice Ruth Bader Ginsburg Dies at 87*, WASH. POST (Sept. 18, 2020, 7:41 p.m.), https://www.washingtonpost.com/politics/courts_law/supreme-court-justice-ruth-bader-ginsburg-dies-at-87/2020/09/18/6e309e10-fa08-11ea-85f7-5941188a98cd_story.html [https://perma.cc/XB3L-BBKL].

[255] *See* Seung Min Kim, *Senate Confirms Barrett to Supreme Court, Cementing Its Conservative Majority*, WASH. POST (Oct. 26, 2020, 9:26 PM), https://www.washingtonpost.com/politics/courts_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8_story.html [https://perma.cc/L3XH-WLAV].

In November of 2020, the Court granted emergency injunctive relief to religious claimants in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[256] At issue in *Roman Catholic Diocese* was a New York Executive Order imposing an attendance cap on religious services that differed from area-to-area depending on the risk of COVID transmission.[257] The Executive Order prohibited churches and synagogues from admitting more than ten persons in high risk zones, while "businesses categorized as 'essential' [could] admit as many people as they wish[ed]."[258] Included in the list of secular businesses that could admit more than ten persons were, for example, "acupuncture facilities, camp grounds, garages," and "transportation facilities."[259] In a medium risk zone, churches and synagogues could admit twenty-five persons, while "even non-essential businesses [could] decide for themselves how many persons to admit."[260] Even though many of the regulated secular entities meaningfully differed from religious entities in both the length of time attendees typically gathered and the kinds of contact people had during those gatherings, the Court's new 5-4 conservative majority summarily concluded that "the challenged restrictions are not 'neutral' and of 'general applicability'" and thus triggered demanding strict scrutiny review.[261] In other words, according to the Court, the Executive Order treated religious institutions less favorably than "similarly situated" secular institutions.[262] Perhaps because *Roman Catholic Diocese* came to the Court on a request for emergency injunctive relief rather than on appeal following full adjudication of the merits, the Court said little more about the meaning of the *Smith* rules it applied. Or perhaps the Court was just getting started.

In April of 2021, as pandemic-era restrictions on gatherings were beginning to soften, the Supreme Court again ruled in favor of religious claimants seeking emergency injunctive relief in *Tandon*.[263] At issue in *Tandon* was a California Executive Order imposing a "blanket restriction on at-home gatherings," precluding those that included more than three households.[264] The Court found the Order problematic because it "treat[ed] some comparable secular activities more favorably than at-home religious exercise," allowing "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor

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[256] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020).

[257] *Id.* at 65–66.

[258] *Id.* at 66.

[259] *Id.*

[260] *Id.*

[261] *Id.* at 67.

[262] In laws differently regulating religious and secular entities, a baseline question is what "similarly situated" means. "Are the actors who are exempt from the regulation comparable to the religious actors who are bringing the claim, with respect to the government's interest?" Nelson Tebbe, *The Principal and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2403 (2021) (further noting that "businesses like grocery stores and gymnasiums" may be "less dangerous to public health than congregations or schools because they are not designed as gathering places").

[263] Tandon v. Newsom, 141 S. Ct. 1294 (2021).

[264] *Id.* at 1298 (Kagan, Breyer, & Sotomayor, JJ. dissenting).

restaurants" to include more than three households.[265] Unlike in *Roman Catholic Diocese*, here the Court announced a new definitional rule: "[G]overnment regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise." [266] "Comparable," the Court further clarified, "must be judged against the asserted government interest that justifies the regulation at issue."[267] Applying these new rules, the Court explained that private at-home religious events are comparable to public businesses because gatherings of more than three households at both pose a risk of transmission.[268] The fact that some secular entities were treated less favorably than comparable religious entities was irrelevant.[269] In a notable dissent, Justices Kagan, Breyer, and Sotomayor accused the majority of applying the wrong comparator.[270] Instead of comparing "apples and watermelons," they quipped, the Court should be comparing the government's treatment of at-home religious and at-home secular gatherings.[271]

As one scholar recently noted, the Court's "revolutionary" pronouncement in *Tandon* regarding the meaning of religiously neutral and generally applicable laws is likely to have "startling" "ramifications" because "[v]irtually all laws and regulations include at least some exceptions."[272] Further, *Tandon* seems to suggest that even one secular exemption, exception, or accommodation from a law governing both religious and secular entities will trigger strict scrutiny.[273] While this maximalist theory of free exercise is not without its academic supporters,[274] its recent ascent to doctrinal rule demonstrates how far a newly constituted conservative Court has gone to protect the Christians who come before it. Some question whether the Court may go even further by applying strict scrutiny to claims premised on disparate religious impact—even where the challenged law facially treats all

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[265] *Id.* at 1297.

[266] *Id.* at 1296 (emphasis in original).

[267] *Id.*

[268] *Id.* at 1297.

[269] *Tandon*, 141 S. Ct. at 1297.

[270] *Id.* at 1298.

[271] *Id. Cf.* Erwin Chemerinsky & Michele Goodwin, *Civil Liberties in a Pandemic: The Lessons of History*, 106 CORNELL L. REV. 815, 843 (2021) (discussing the Court's pandemic-era cases and rejecting its conclusions that the government was "treating religious institutions differently or worse than comparable secular ones").

[272] Alexander Gouzoules, *Clouded Precedent:* Tandon v. Newsom *and Its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87, 104 (2022).

[273] *Id. See also* Rothschild, *supra* note 252, at 1124 ("Even a single secular exemption could render a law unconstitutional as applied to religious activity."). There is even some question as to whether the Court may go further still.

[274] *See* Laycock & Collis, *supra* note 225, at 10 ("Even limited exceptions can make a law less than generally applicable, triggering strict scrutiny.").

religious and secular entities the same.[275] Others question whether the Court is effectively already there.[276]

The Court's "most favored nation"[277] definition of general applicability in *Tandon* may at first seem distinct from the discriminatory intent analysis more closely tied to neutrality. The Court more directly wed the two concepts, however, in its most recent free exercise case in which the mere possibility of conscious or implicit religious persecution serves as the foundation for a general applicability foul. In June of 2021, the Court in *Fulton*[278] again positioned itself in the middle of the raging culture war between religious conservatives and LGBTQ rights. The religious claimant in *Fulton* was a foster care agency, Catholic Social Services, that had for years worked under contract with the city of Philadelphia to place children with foster families.[279] As attitudes and the legal landscape regarding same-sex marriage changed, Catholic Social Services garnered local media attention for its apparent refusal to place children with foster parents who were in a same-sex marriage.[280] The City Council launched an investigation, confirmed the allegation, and severed the partnership with Catholic Social Services because of its refusal to certify parents in same-sex marriages.[281] The city explained that Catholic Social Services stance violated the non-discrimination provisions in both the applicable contract and the city's Fair Practices Ordinance—although it appeared that no same-sex couple had ever applied for and been denied foster parent certification.[282] Catholic Social Services, in turn, filed a federal lawsuit alleging that the city's refusal to renew its contract absent a commitment to abide by the nondiscrimination terms violated the Free Exercise Clause.[283]

The religious claimant had clearly paid attention to the Court's evolving free exercise jurisprudence given its bold ask for the Court to overrule *Smith*.[284] Although

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[275] *See*, *e.g.*, Toni M. Massaro, Justin R. Pidot & Marvin J. Slepian, *Pandemics and the Constitution*, U. ILL. L. REV. 229, 263 (2022).

[276] *See, e.g.*, Reyes, *supra* note 208, at 290 (characterizing *Tandon* as "restor[ing] a version of disparate impact liability for religious claimants").

[277] Prior to Amy Coney Barrett's confirmation, the Supreme Court on multiple occasions rejected similar COVID-era challenges brought by religious claimants. In one challenge, *Calvary Chapel Dayton Valley v. Sisolak*, Justice Kavanaugh penned a dissent in which he argued for an interpretation of free exercise that the majority ultimately adopted in *Tandon*, and he cites to scholarship written by Professor Laycock characterizing the approach as "something analogous to most-favored nation status." 140 S. Ct. 2603, 2609, 2612 (2020), (Kavanaugh, J., dissenting) (citing to Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50 (1990)).

[278] Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

[279] *Id.* at 1874–75.

[280] *Id.* at 1875.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 1876.

[284] *Fulton*, 141 S. Ct. at 1876.

six of the current Justices have "openly expressed dissatisfaction with *Smith*,"[285] the *Fulton* Court punted on *Smith's* longer-term future. With a viable alternative still in flux, the Court instead leaned into its newfound interest in *Smith's* general applicability rule. According to the Court, Philadelphia's problem from a general applicability perspective was that the relevant contractual non-discrimination provision allowed for the possibility of "an exception" in individual cases at the "sole discretion" of the city Commissioner.[286] The availability of an individual exception creates two problems under the Court's new jurisprudence: (1) It raises the possibility that secular interests will be treated more favorably than religious interests even if the secular interests similarly undermine the government's interests;[287] and (2) it allows for insidious motivations because it "invites the government to decide which reasons for not complying with the policy are worthy of solicitude."[288] Importantly, the evidence in *Fulton* demonstrated that the Commissioner had not once granted an individualized exception.[289] No matter. The mere risk that discriminatory intent may creep into individualized decision-making was enough for the Court to view the city's non-discrimination policy with the utmost suspicion of strict scrutiny.[290]

The Court's requirement that the government treat religion as favorably as different-in-kind secular entities, and its evidence-free assumption that the government *may* intentionally discriminate against religious adherents when exercising discretionary power have "transform[ed] free exercise into a sprawling and unbounded religious equality right."[291] The new vision of substantive free exercise equality appears even more radical when juxtaposed against the Court's approach to racial equality under the Equal Protection Clause. Consider again *McCleskey*,[292] where the Court deemed credible the evidence that Black criminal defendants were more likely to receive the death penalty in Georgia than white defendants,[293] yet declined to find an equal protection violation because "discretion is essential to the criminal justice process," and "we would demand exceptionally clear proof before we would infer that the discretion has been abused."[294]

The *McCleskey* Court was reticent to attribute discriminatory intent to *any* actor in Georgia's criminal justice system—despite proof of discriminatory results—

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[285] Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 J.L. & RELIGION 72, 80 n.51 (2022).

[286] *Fulton*, 141 S. Ct. at 1878.

[287] *Id.* at 1877.

[288] *Id.* at 1879 (internal brackets and quotation marks omitted).

[289] *Id.*

[290] *Id.* at 1881.

[291] Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1107 (2022) (internal quotation marks omitted).

[292] McCleskey v. Kemp, 481 U.S. 279 (1987).

[293] *Id.* at 291 n.7 (assuming that the study showing racial disparities in application of the Georgia death penalty "is valid statistically.").

[294] *Id.* at 297.

perhaps because doing so would have threatened existing systems of racial power[295] and triggered white resentment.[296] Conversely, assuming discriminatory religious intent in clashes between religious adherents and LGBTQ equality effectively maintains traditional systems of power in which majoritarian religious interests have long influenced the regulation of sexuality and gender.

III. ESTABLISHMENT AND THE FALL OF DISCRIMINATORY INTENT IN SERVICE OF PROTECTING CHRISTIAN CLAIMANTS

While the Court's overhaul of free exercise rules has arguably been subtle given its resistance so far to expressly overrule *Smith*, its Establishment Clause transformation has been more transparently aggressive. A full accounting of how establishment rules have changed over time is beyond the scope of this Article. Instead, this Part primarily addresses the Court's use of and seeming departure from questions about the government's intent or purpose. Evaluating these jurisprudential changes in light of the Court's free exercise revolution illustrates the depth and breadth of the Court's ideological project in the post-Trump era to protect a version of America in which conservative Christian religious beliefs enjoy special solicitude and outsized political power.

A. A Brief History of Discriminatory Intent's Role in Protecting Religious Minorities and Nonbelievers

Until around the halfway point of the Twentieth Century, the Supreme Court addressed very few establishment issues because it had not yet applied the Establishment Clause to state and local governments through the Fourteenth Amendment's liberty guarantee. That changed in a 1947 case called *Everson v. Board of Education of the Township of Ewing*[297] in which the Court ruled unconstitutional a school board's policy that: (1) denied reimbursement to parents who used public busses to send their children to parochial schools, but (2) granted reimbursement to parents who used public bussing to send their children to secular schools.[298] The *Everson* Court described the Establishment Clause as "erect[ing] a

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[295] *See* Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1715 (1993) (noting that the "core characteristic" of racial subordination in the wake of Jim Crow's dismantling remains the "legal legitimation of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination").

[296] *See, e.g.*, ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION 9 (2019) (suggesting that those in power are hesitant to "determine that someone else has acted out of malice" because it "shames the wrongdoer publicly as a bigot or oppressor" and may "trigger anger and recrimination").

[297] Everson v. Bd. Of Educ. Of Ewing Twp., 330 U.S. 1 (1947).

[298] *Id.* At 3, 17.

wall of separation between church and state,"[299] but the dissent also explained that the government must be "neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[300] Thus, two theories of establishment were born.

As other scholars have noted, there is tension between separation and neutrality because separation may sometimes require the government to treat religion differently;[301] neutrality, on the other hand, typically requires the government to treat religious and secular interests the same.[302] One way to reconcile this difference is to impose stricter separation limits on the government's involvement with religion when it conveys its own religious messages or when private religious messages could be attributed to the government, while granting the government more breathing room to equally accommodate and acknowledge both private and religious interests in public spaces.[303] Cases spanning nearly forty years involving prayers in school,[304] bible reading in school,[305] and prayers at public school events when the school directly facilitated the prayers[306] seem to support the theory that more stringent establishment rules apply when the government is conveying its own religious message—at least when impressionable children are present.[307] Still, perhaps because of competing values, conflicting historical evidence, and difficult line drawing, the Court has failed to coalesce around just one test to evaluate all

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[299] *Id.* at 16 (internal quotation marks omitted) (citing to Reynolds v. U.S., 98 U.S. 145, 164 (1878)).

[300] *Id.* at 18.

[301] *See, e.g.*, Frederick Mark Gedicks, *A Two-Track Theory of Establishment*, 43 B.C. L. REV. 1071, 1073 (2002) (noting that separation "may result in religion's being subjected to legal and regulatory burdens not imposed on secular activities, or relieved from burdens that are generally imposed on such activities").

[302] *Id.* at 1074.

[303] *See* Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139, 1147 (2002) (characterizing the school prayer cases as representative of this divide).

[304] Engel v. Vitale, 370 U.S. 421 (1962) (finding state composed prayers and their recitation in public school classrooms to violate the Establishment Clause).

[305] Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (striking down a state law mandating bible readings in public school classrooms as a violation of the Establishment Clause).

[306] Lee v. Weisman, 505 U.S. 577 (1992) (finding a public school's practice of inviting a rabbi to give an invocation and benediction at a high school graduation ceremony to violate the Establishment Clause); Santa Fe Indep. Sch. Dist. V. Doe, 530 U.S. 290 (2000) (striking down a high school policy of beginning football games with a prayer led by a student chosen through the school's nominating system as a violation of the Establishment Clause).

[307] *See* Marianna Moss, *How Are Reasonable Children Coerced? The Difficulty of Applying the Establishment Clause to Minors*, 10 U.C. DAVIS J. JUV. L. & POL'Y 379, 396–97 (2006) (highlighting an "unacknowledged" "adult-child" dichotomy in the Court's coercion test application). *See also* Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 589 (2014) (suggesting that the indirect coercion test the Court applied in *Lee* and *Santa Fe* is inapplicable to adults).

alleged establishment violations.[308] The number of possible Establishment Clause tests seems to range between three and seven.[309]

Despite the Court's inconsistency and lack of clarity on which standard governs and when, the most important and most often applied test is *Lemon*—widely understood to embody a neutrality theory of establishment.[310] The blueprint for *Lemon* first appeared in 1963's *Schempp* in which the Court cited "purpose" and "effect" as the relevant lines of establishment analysis.[311] Then, in 1971, the Court in *Lemon* refined the inquiry as a three-part test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[312] In the five decades since, "Establishment Clause jurisprudence has been dominated by applications of and retreats from the *Lemon* test."[313]

The Burger Court's formal adoption of a purpose prong in its principal establishment test temporally coincides with its reinvigorated use of discriminatory intent in race-based equal protection questions.[314] And when the Court applied *Lemon* in subsequent decades, the purpose prong often performed the heaviest analytical lift. Two important examples are worth highlighting: 1985's *Wallace v. Jaffree*[315] and 2005's *McCreary County v. ACLU of Kentucky*.[316]

In *Wallace*, the Court addressed three Alabama statutes dealing with prayer and moments of silence in school.[317] One statute guaranteed a moment of silence in public schools "for meditation" and was nonproblematic,[318] and another authorizing teacher-led prayers to God was facially impermissible under the Court's prior school

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[308] Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417, 417–18, 420 (2009) (explaining that, while "several members of the Court favor some version of the coercion test," the Court has never been clear about whether coercion must always be direct or whether indirect coercion "will suffice").

[309] *See* Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1556–57 (2010) (listing *Lemon*, coercion, endorsement, and an originalist history and tradition analysis as the primary tests); Stephen G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1883 n.67 (2003) (listing six possible tests but omitting the originalist history and tradition test applied in more recent cases).

[310] *See generally* Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986).

[311] Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963).

[312] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal citations and quotation marks omitted).

[313] Stephanie H. Barclay, Brady Earley, & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 525 (2019).

[314] Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973). *See also supra* Part I.A.

[315] Wallace v. Jaffree, 472 U.S. 38 (1985).

[316] McCreary Cnty. V. ACLU of Ky., 545 U.S. 844 (2005).

[317] *Wallace*, 472 U.S. at 40.

[318] *Id*. at 40–41.

prayer cases.[319] The *Wallace* Court focused on a third statute authorizing a moment of silence for "meditation or voluntary prayer."[320] In theory, a statute like this could be interpreted as simply accommodating or acknowledging prayer's importance in the lives of many students who could personally choose to do with that moment what they wished. However, Alabama had overtly stated its religious motivation for enacting such a law.[321]

In striking down the statute, the Court explained that, under *Lemon*, it is unnecessary to even address the effect and entanglement prongs "if a statute does not have a clearly secular purpose."[322] The Court acknowledged that *some* religious motivation behind a law is acceptable[323]—a likely nod to the reality that different lawmakers in a diverse governing body have different motivations. A "statute must be invalidated," however, "if it is entirely motivated by a purpose to advance religion."[324] Applying these rules, the Court examined the relevant legislative history and noted that the bill's sponsor included in the record, "without dissent," a statement explaining that "the legislation was an 'effort to return voluntary prayer' to the public schools."[325] The Court easily concluded that the "evidence of legislative intent" paired with the law's structural and textual relationship with the two related statutes demonstrated the law's "sole purpose" to express Alabama's religious endorsement.[326] In her concurrence, Justice O'Connor addressed *Lemon's* purpose prong and urged a "deferential and limited" approach; a "court has no license to psychoanalyze the legislators," and courts "should generally defer" to a legislature's "plausible" stated secular purpose.[327] No other Justice joined O'Connor's concurrence.

In *McCreary County*, the Court addressed three subsequent iterations of Ten Commandments displays in Kentucky courthouses.[328] After the ACLU sued the Kentucky counties for the first Ten Commandments displays,[329] "the legislative body of each County authorized a second, expanded display" with other accompanying religious documents, imagery, and explanations about why the Ten Commandments constituted "the precedent legal code upon which the civil and criminal codes of Kentucky [were] founded."[330] Following an unfavorable court ruling, the counties installed a third more muted Ten Commandments display accompanied by various other items steeped in Americana.[331]

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[319] *Id.*
[320] *Id.*
[321] *Id.* at 41.
[322] *Id.* at 56.
[323] *Id.*
[324] *Id.*
[325] *Id.* at 56–57.
[326] *Id.* at 58–60.
[327] *Id.* at 74–75 (O'Connor, J., concurring).
[328] McCreary Cnty. V. ACLU of Ky., 545 U.S. 844 (2005).
[329] *Id.* at 852.
[330] *Id.* at 853 (internal quotation marks and ellipses omitted).
[331] *Id.* at 856.

When the Court granted certiorari, the Kentucky counties—seemingly seizing on Justice O'Connor's *Wallace* concurrence—urged the Court to recalibrate *Lemon's* purpose prong;[332] "The Counties ask for a different approach here by arguing that official purpose is unknowable and the search for it inherently vain."[333] The Court declined the request. In explaining why purpose matters, the Court invoked concerns for minority interests, explaining that a governmental purpose favoring religion sends the message to religious minorities and nonbelievers that they are outsiders and not full members of the civic community.[334] It then cited examples of how questions of intent or purpose proliferate throughout constitutional law[335]—in the Equal Protection Clause,[336] in the Dormant Commerce Clause,[337] and the Free Exercise Clause.[338] Rather than retreating from purpose and unsettling vast swaths of constitutional law in the process, the Court instead fortified the inquiry into purpose by explaining that it must "be genuine, not a sham, and not merely secondary to a religious objective."[339] Rejecting the contention that it should ignore the historical trajectory leading to the more muted Ten Commandments display,[340] the Court concluded that, given the "context,"[341] there was "ample support" for a conclusion that the third display was motivated by a "predominantly religious purpose."[342]

B. Whither Discriminatory Intent to Cement a Christian Nation

In decades past, when the Court was more moderate, some of its most conservative members voiced lonely calls to interpret the Establishment Clause in ways that would give federal and state governments more leeway to accommodate and acknowledge majoritarian religious beliefs due to their historical importance in

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[332] *Id.* at 859.

[333] *Id.*

[334] *Id.* at 860. The Court's discussion here evokes the "endorsement" test Justice O'Connor first articulated in *Lynch v. Donnelly*, 465 U.S. 668 (1984). "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688 (O'Connor, J., concurring). Subsequently, a Court majority folded the endorsement test into *Lemon* by explaining that the problem with a non-neutral purpose or effect is that the government has endorsed religion. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592 (1989). Rather than a separate test, then, endorsement is better understood as "a clarification of the *Lemon* test in cases involving visual religious displays." Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 829 (2014).

[335] *McCreary Cnty.*, 545 U.S. at 861.

[336] *Id.* (citing Washington v. Davis, 426 U.S. 229 (1976)).

[337] *Id.* (citing Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333 (1977)).

[338] *Id.* (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)).

[339] *Id.* at 864.

[340] *Id.* at 866.

[341] *Id*. at 874.

[342] *Id.* at 881.

American life. For example, Justice Rehnquist in his *Wallace* dissent argued that an originalist reading of the Establishment Clause should permit the government to favor religion over irreligion.[343] Justice Scalia pushed even further in his *McCreary County* dissent, urging the Court to adopt an understanding of establishment that would permit the government to publicly honor mainstream monotheistic religions—including by displaying of the Ten Commandments.[344] Justice Thomas went further still in his 2014 *Town of Greece, N.Y. v. Galloway* concurrence in which he argued that the Court had long erred in interpreting the Establishment Clause as a constraint on states and not only the federal government.[345] Were the Court to adopt Thomas's analysis as controlling law, it would effectively permit states to declare official state religions if they so choose.[346]

Today, ideas that once lived in the fringes are now becoming accepted tenets of constitutional law. Admittedly, this recalibration has been in the works for decades. In several cases, the Court declined to apply or even cite *Lemon* as controlling precedent. For example, in 1983's *Marsh v. Chambers*,[347] the Court found no constitutional problem with Nebraska's practice of beginning each legislative session with a chaplain-led prayer. In an early portend of the originalist turn to come, the Court noted that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[348] Omitting a *Lemon* analysis, the Court concluded that legislative prayers are "part of the fabric of our society" and not violative of the Establishment Clause.[349] A similar analysis unfolded in 2014's *Town of Greece*,[350]

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[343] "The Establishment Clause did not require government neutrality between religion and irreligion . . . . There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized" in prior cases. Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

[344] "Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion." *McCreary Cnty.*, 545 U.S. at 894 (Scalia, J., dissenting). Justice Scalia further clarifies that the "three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic" and thus share this belief in a single creator. *Id.*

[345] 572 U.S. 565, 604–07 (2014) (Thomas, J., concurring in part) (explaining why due to Constitutional structure, the Establishment Clause should only constrain Congress and not individual states). According to Justice Thomas, "the First Amendment was simply agnostic on the subject of state establishments; the decision to establish or disestablish religion was reserved to the States." *Id.* at 606.

[346] For a non-exhaustive list of actions that disincorporation would allow states to take that "would rework the landscape of American church/state relations in ways that were unthinkable" until recently, see Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 674–75 (2013).

[347] 463 U.S. 783, 795 (1983).

[348] *Id.* at 786.

[349] *Id.* at 792.

[350] Town of Greece v. Galloway, 572 U.S. 565, 565 (2014).

in which the Court upheld a town's practice of opening board meetings with sectarian clergy-led prayers. Even though the prayers had been overwhelmingly Christian, the Court reasoned that history and tradition support the constitutional permissibility of governmental prayers "given in the name of Jesus, Allah, or Jehovah."[351] And in 2005's *Van Orden v. Perry*,[352] the Court found it constitutionally permissible for Texas to display a Ten Commandments monument as one of seventeen monuments on the grounds of the twenty-two-acre state capitol. A plurality expressly declined to apply *Lemon*,[353] and instead explained that "acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America."[354]

Perhaps in those cases the governmental context or specific religious exercise and displays presented sufficiently unique circumstances to warrant a *Lemon* exception. Regardless, the Court in those cases neither overruled *Lemon* nor ignored available evidence of animus towards minority religious beliefs and adherents. Times have changed, and the establishment revolution is here. *Trump*[355] and *Kennedy*[356] are instructive.

During his first run for president, Donald Trump made anti-Muslim rhetoric a key selling point of his campaign. Importantly, he "pledged that, if elected, he would ban Muslims from entering the United States."[357] He issued a formal statement on his campaign website "calling for a total and complete shutdown of Muslims entering the United States."[358] During rallies, interviews, and presidential debates, he made persistent disparaging and stereotyped comments about Muslims and the religion of Islam.[359] He reiterated his plans to create a "Muslim registry or ban" one month before the election.[360] Just one week after taking office, he issued an Executive Order, "Protecting the Nation From Foreign Terrorist Entry Into the United States," and, while signing it, he looked up and told the audience, "We all know what this means."[361] In response to several unfavorable federal court decisions, President Trump ultimately revised and issued two subsequent Executive

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[351] *Id.* at 583.

[352] 545 U.S. 677, 691–92 (2005).

[353] *Id.* at 685–86. Justice Breyer, the fifth vote to uphold the display, concurred in the judgment but reasoned that a *Lemon*-like rationale supports the outcome. *Id.* at 700 (Breyer, J., concurring in the judgment).

[354] *Id.* at 688.

[355] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[356] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[357] *Trump*, 138 S. Ct. at 2435 (Sotomayor & Ginsburg, JJ., dissenting).

[358] *Id.*

[359] *Id.* at 2435–36 (describing some of the factual record on this point).

[360] *Id.* at 2436.

[361] *Id.*

Orders restricting entry by foreign nationals into the United States from seven countries[362]—five of which had majority Muslim populations.[363]

The question before the Court in *Trump v. Hawaii* was whether the third Executive Order ("EO") violated the Establishment Clause. In the face of an overwhelming evidentiary record indicating President Trump's animus towards Muslims, the Court's analysis and conclusions are nothing short of shocking. First, the Court characterized the EO as "neutral on its face" because its terms did not single out Islam.[364] Second, the Court distinguished the EO at issue from the Court's large body of establishment jurisprudence because the order concerned a "national security directive."[365] Third, because a President's plenary authority to deal with foreign affairs and national security was at issue, the Court applied a deferential rationality review rather than any of the usual establishment tests.[366] Finally, the Court acknowledged that, under rationality review, the government rarely loses, except for when animus motivated the government's action,[367] and the EO here was rationally related to a legitimate national security interest.[368]

There are many possible problems with the Court's efforts to avoid the usual establishment rules. Accepting for the sake of argument that rational basis was the correct test, however, why did the Court decline to find illegitimate animus? For one, the Court reasoned that an "inference of religious hostility" was not warranted because the EO only affected eight percent of the world's Muslim population.[369] Disfavoring religion, however, does not necessarily mean that the government must disfavor every similarly situated religious adherent at the same time and in the same way. It is also important to note that in *Masterpiece Cakeshop*,[370] decided less than one month earlier, the Court inferred religious hostility to Christians based on a stunningly sensitive reading of a thin factual record.[371]

Moreover, according to the Court, Donald Trump made many of his most incendiary anti-Muslim statements "before the President took the oath of office."[372] It is unclear whether the Court intended this statement to suggest an exclusionary rule of evidence regarding campaign statements as they relate to questions of discriminatory governmental intent. It is clear, however, that the Court wanted to

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[362] *Id.* at 2403–06 (majority opinion) (describing the sequence of events leading to the third executive order before the Court).

[363] *Trump*, 138 S. Ct. at 2421.

[364] *Id.* at 2418.

[365] *Id.*

[366] *Id.* at 2419–20.

[367] *Id.* at 2420 (citing Dept. of Ag. v. Moreno, 413 U.S. 528 (1973) (animus against "hippies"); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (animus against individuals with intellectual disabilities); and Romer v. Evans, 517 U.S. 620 (1996) (animus against gay, lesbian, and bisexual people)).

[368] *Id.* at 2423.

[369] *Id.* at 2421.

[370] Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct.1719 (2018).

[371] *See supra* Part II.B for a discussion of the Court's analysis.

[372] *Trump*, 138 S. Ct. at 2418.

minimize the discussion of discriminatory intent and animus, defensively declaring that the issue before the Court was not whether to denounce the statements.[373] It is hard to imagine a Court so eager to duck this issue if the President had championed and implemented some version of a Christian rather than Muslim ban. Professor Robert Tsai suggests that "[m]aybe the judges didn't like the prospect of tarring a president with the inflammatory label of religious bigotry so early in his tenure."[374] Whatever the reason, the Court's traditional Establishment Clause concern about discriminatory purpose is noticeably absent in a case so strongly reeking of anti-Muslim animus.

In the years since *Trump*, the Court's conservative Justices continued to call for *Lemon*'s express overruling. For example, in 2019, in *American Legion v. American Humanist Association*, the Court held that the display of a thirty-foot tall cross on public land as a veteran memorial did not violate the Establishment Clause.[375] *American Legion* produced seven total opinions, many of which criticized the beleaguered test, but "one of the few points of consensus is that the decision did not expressly overrule *Lemon* in its entirety."[376] It was not until after Amy Coney Barrett's confirmation in 2020 that the Court's conservative wing had enough votes to achieve a long-sought goal.

In 2022's *Kennedy v. Bremerton*,[377] the Court disagreed over the precise facts at issue as evidenced by the dissent's pointed accusation that the majority "misconstrue[d] the facts."[378] For purposes of this Article, the facts matter far less than the doctrinal changes the Court made to establishment doctrine. The crux of the *Kennedy* dispute centered around a public high school football coach who prayed on the football field after games.[379] In numerous exchanges between the coach and school officials, the school district expressed concerns that the coach's prayers posed establishment liability issues for the school.[380] The coach's prayers sparked media attention, public comments from the school, and the school's pointed directive to the coach to avoid engaging in "overtly religious conduct" in public.[381] Nevertheless, the coach persisted in praying after games in view of students, parents, and other spectators.[382] The school finally took disciplinary action, and the coach "did not return" for the next season.[383]

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[373] *Id.*

[374] TSAI, *supra* note 296, at 76.

[375] 139 S. Ct. 2067, 2090 (2019) (plurality opinion) (offering a variety of reasons for why the cross display is permissible, none of which being that it survives the *Lemon* test).

[376] Amanda Harmon Cooley, *The Persistence of* Lemon, 47 U. DAYTON L. REV. 411, 429 (2022). Instead, the Court issued a more incremental contraction by holding that *Lemon* no longer applies to "public religious displays and monuments." *Id.*

[377] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[378] *Id.* at 2434 (Sotomayor, Breyer, & Kagan, JJ., dissenting).

[379] *Id.* at 2415 (majority opinion).

[380] *Id.* at 2416–18.

[381] *Id.* at 2418.

[382] *Id.*

[383] *Id.* at 2419.

Kennedy represents the culmination of the shifting landscape in both free exercise and establishment jurisprudence. Recall from this Article's free exercise discussion that the Court in *Trinity Lutheran*[384] held that the government cannot exclude religious adherents from a financial grant program available to secular entities. That holding required the Court to significantly depart from an establishment theory that required something close to "strict separation" of government and religion in the context of direct financial aid to religious entities.[385] *Trinity Lutheran* represents an emerging theory of establishment that instead requires nondiscrimination, understood to mean at least a baseline of formal equal treatment. The Court has also recently applied this formal equality approach to questions about parochial school tuition assistance.[386]

In *Kennedy*, the Court went furthest yet in shifting the contours of neutrality. The school disciplined the coach because it did not want to appear biased in favor of religion pursuant to the old neutrality rules concerned with whether the purpose or effect of government action was to favor or endorse religion. In the past, those concerns were likely a sufficiently compelling reason for the government to treat religion differently. Not anymore. Characterizing *Lemon* as an "abstract" and "ahistorical" approach with many "shortcomings," the Court declared that it had "long ago abandoned *Lemon* and its endorsement test offshoot."[387] In its place, the Court explained that it must look to the "understanding of the Founding Fathers."[388] "An analysis focused on original meaning and history," the Court elaborated, "has long represented the rule" and not some "exception" to establishment analysis.[389]

Following the sunsetting of *Lemon*, it is unclear what role governmental purpose and discriminatory intent will play—if any—in Establishment Clause jurisprudence. The reason courts asked about discriminatory purpose was out of a commitment to inclusion for religious minorities and nonbelievers in our pluralistic body politic. Looking only to what white, landowning, primarily Christian men in 1791 understood to cross the establishment line is an invitation to exclude. Replacing constitutional concern for religious minorities and nonbelievers is an Establishment Clause interpretation that will require the government to

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[384] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2012 (2017).

[385] *See*, *e.g.*, Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913, 932–35 (2018) (characterizing the "no-direct-aid" doctrine as stemming from a *Lemon* neutrality theory but describing neutrality in this context as concerned with indirect taxpayer coercion).

[386] *See* Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (invalidating a Maine tuition assistance program that excluded sectarian religious schools as violating the neutrality rule of free exercise); Espinoza v. Mont. Dep't. of Revenue, 140 S. Ct. 2246, 2262–63 (2020) (invalidating a provision of the Montana Constitution barring governmental financial assistance to religious schools for violating the neutrality rule of free exercise).

[387] *Kennedy*, 142 S. Ct. at 2427 (first citing Am. Legion v. Am. Humanist Ass'n., 139 S. Ct. 2067, 2079–81 (2019) (plurality opinion); and then citing Town of Greece v. Galloway, 572 U.S. 565, 575–577 (2014)).

[388] *Id.* at 2428.

[389] *Id.*

acknowledge, accommodate, and sometimes even favor Christian beliefs and practices.[390] Originalism and the fall of discriminatory intent doctrine in establishment work together as tools to cement a waning Christian status quo.

IV. MANIPULATING DISCRIMINATORY INTENT RULES TO ACHIEVE CONSERVATIVE OUTCOMES

Questions about the government's intent, motivation, and purpose have long been relevant across disparate constitutional areas. In addition to invidious intentionality issues relevant in equal protection and religion-based claims, the Supreme Court has also instructed the federal judiciary, for example, to probe governmental purpose in claims involving the Dormant Commerce Clause[391] and free speech.[392] Ostensibly, the task of examining express and implicit motivations behind governmental action should function in the same way and serve the same basic goal regardless of the specific constitutional claim at issue: ensuring that a constitutional norm or right has not been violated.

For Dormant Commerce Clause claims, probing intent safeguards the constitutional structure of dual federalism, threatened when states engage in economic protectionism. For free speech claims, examining intent protects the individual liberty to speak and express without the fear of censorship. For equal protection claims, examining evidence of intent—at least in theory—protects against the creation and perpetuation of state-sanctioned social hierarchies in which people are treated differently due to immutable traits irrelevant to skill or merit. And for claims involving religion, discriminatory intent analysis historically prevented the government from creating religious insiders and outsiders.

The irregularities in how and when the Court examines evidence of intent are concerning for a variety of reasons. Most simply, using the same evidentiary tool in sometimes starkly different ways is logically inconsistent. Inconsistency is of course not inherently alarming if the issues at hand are not similarly situated; different problems often require different, nuanced approaches and solutions. The Court, however, has never forthrightly explained that discriminatory intent has different definitions or that its mechanics operate differently in the many contexts in which it arises. Discriminatory intent is often deployed as a rule with well-settled meanings

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[390] *See, e.g.*, Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 SYRACUSE L. REV. 893, 906 (1991) (explaining that an accommodationist theory of establishment "permits government cooperation with religious programs so long as there is never the establishment of an *official* state religion") (emphasis added).

[391] In its Spring 2023 term, the Court reaffirmed the Dormant Commerce Clause rule that "no State may use its laws to discriminate purposefully against out-of-state economic interests." Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1150 (2023).

[392] *See* Reed v. Town of Gilbert, 576 U.S. 155, 166 (2015) (explaining that a speech regulation can target subject matter or viewpoint, therefore triggering strict scrutiny, either on its face by its very terms "or when the *purpose* and justification for the law are content based") (emphasis added).

and applications, yet the reality does not reflect a unified theory. For students of the Constitution, this inconsistency can sometimes feel like gaslighting,[393] and gaslighting further undermines the public's faith in the government and its institutions at an already precarious moment of disillusionment.

This logical inconsistency in function and application suggests that the Court's understanding of constitutional norms and rights is rapidly changing. While the goal of safeguarding constitutional norms and rights may indeed remain a constant in the deployment of intent rules, the content of those norms and rights has shifted. In short, the Court is using and manipulating discriminatory intent rules in pursuit of a conservative ideological agenda to insulate the Constitution from progressive social change.

This manipulation began with the Burger and Rehnquist Courts' willingness to dismiss and ignore evidence of discriminatory intent in equal protection claims seeking to dismantle the structural and institutional oppression of women and people of color. Soon, this conservative project made its way into free speech jurisprudence. Initially, the Court had been skeptical that governmental intent mattered or was discernible in speech regulations,[394] and it once relied on that skepticism to uphold the conviction of anti-war protesters who conveyed a symbolic message by burning their draft cards.[395] Later, the Court changed course in cases discussing whether speech regulations are content-neutral or content-based. It explained, for example, that the "government's purpose is the controlling consideration" in questions of content neutrality;[396] in characterizing part of a hate speech ordinance as impermissibly content-based, the Court scolded the government for regulating speech "based on hostility—or favoritism—towards the underlying message expressed."[397] But on multiple occasions when the Court encountered sexual expressions it seemed to find distasteful and immoral, it manipulated discriminatory intent rules to uphold the regulations at issue.[398] The effect has been to fortify

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[393] *See, e.g.*, Kyle C. Velte, *The Supreme Court's Gaslight Docket*, (forthcoming 2024) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4405367 [https://perma.cc/5D6V-957Q] (describing "gaslighting" as "manipulation and lies intended to make its victim doubt their capacity, attitude, and/or reality").

[394] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) (explaining that "[i]nquiries into congressional motives are or purposes are a hazardous matter," and declining to strike down "an otherwise constitutional statute on the basis of an alleged illicit legislative motive").

[395] *See id.* at 388.

[396] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that a municipal noise ordinance was a content-neutral time, place, and manner regulation).

[397] R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (striking down provisions in a hate crime statute because the governmental purpose was to suppress disfavored views).

[398] *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–49 (1986) (holding that an ordinance regulating the location of adult movie theaters was constitutional because the government's "predominate" intent was to regulate the non-communicative "secondary effects" of such establishments); City of Erie v. Pap's A.M., 529 U.S. 277, 296–301 (2000) (reasoning that courts should effectively defer to the government's concerns

traditional status quos around sexual speech that conservatives seek to suppress and censor.

Today, the Court is once again relying on discriminatory intent rules to achieve new conservative understandings of constitutional norms and rights. Since Amy Coney Barrett's controversial confirmation amidst an ongoing presidential election, the intent revolution has found a new home in cases about religion. In claims stemming from the Free Exercise Clause, the Court has gone out of its way to infer even the possibility of bias against Christian claimants when the government has sought their compliance with pandemic-era public health measures and LGBTQ-inclusive antidiscrimination laws. In Establishment Clause claims involving if and how the government is limited in its ability to acknowledge, accommodate, and even favor religion, the Court has altogether abandoned rules that prohibited discriminatory religious purpose. Instead, the Court in *Kennedy* quietly announced—with dramatic implications—that federal courts must now ask whether majoritarian founding-era practices support the government's religious involvement.

Presidential elections have profound consequences for the direction of the nation and the fabric of U.S. society given the president's ability to appoint judges to the federal judiciary. Republican presidents, of course, have not been shy about their preferences for nominating conservative jurists, and the battle between living constitutionalism and originalism has been perhaps the highest-profile example of how Republican versus Democratic appointments play out in constitutional jurisprudence. The Republican Party and conservative judges seemingly favor an originalist approach in part because it may allow the federal judiciary to maintain traditional status quos and freeze constitutional meaning at moments long since passed. In effect, this approach makes it increasingly difficult for minority interests to secure constitutional protections that could alter the existing social order.

Less attention has been paid, however, to the ways in which the judicial manipulation of intent rules can achieve similar results. The Court's contemporary reliance on intent in service of conservative ends is in some ways more radical than its express embrace of originalism. With discriminatory intent as its analytical armor, the Court can shroud the conservative outcomes it seeks in the cloak of normalcy and legitimacy with well-established rules that evoke civil rights movements of the past. Professor Kyle Velte makes a similar point in arguing that the Court has had to develop tactics "to convince its audience (the American people) that what we are seeing—the implicit or explicit reversal of rights grounded not in principled legal analysis but rather in rank partisanship and an adherence to white Christian values and business interests above other values—isn't *actually* what is happening."[399] The Court's renewed interest in discriminatory rules has the potential to be an increasingly potent and insidious obfuscation tactic for rolling back rights and protecting the majoritarian interests of a former era.

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about secondary effects without requiring proof that the concerns are real or that the secondary effects exist).

[399] Velte, *supra* note 393, at 20.

CONCLUSION

At various junctures in its history, the Supreme Court failed to protect society's most vulnerable from discrimination, and it has failed to safeguard the liberty interests of those who live outside of mainstream norms. Often, the Court's failures have been spectacular, widely condemned, and eventually overruled. Famous past examples include *Plessy v. Ferguson*,[400] approving the doctrine of "separate but equal" under the Equal Protection Clause, or *Korematsu v. U.S.*,[401] permitting the federal government to blanketly intern Japanese Americans under the flimsy premise of promoting national security.[402] These failures represent examples of the Court's starring role in efforts to protect racial status quos social hierarchies from cultural upheaval.

At different historical moments, the Court has relied on different doctrinal mechanisms to achieve similar ends. Cases like *Dobbs* illustrate how the Court's formal embrace of originalism can do this work. Because of the radical shift *Dobbs* represents for reproductive rights and women's dignity interests, it also offered nonlawyers and the American public an opportunity to learn about, discuss, and critique the conservative ideological project growing within a federal judiciary heavily shaped by President Trump.

This Article identifies the discriminatory intent doctrine as another mechanism the Court has used to safeguard status quos of past and present. The promise of the Constitution as a governing document with the power to protect non-conformists and dismantle social caste systems is quickly fading. The Court in the post-Trump era seems poised to effectuate a rightwing vision of the country that will hamper or prevent governmental efforts to promote anti-racism, diversity, equity, and inclusion. It is important to identify the various mechanisms that today's Court is employing to achieve these ends—particularly because its methods deceivingly sound in notes of equality and antidiscrimination. This Article is intended to help lawyers, judges, and activists understand the current limitations of constitutional law in achieving equity and justice, and to help those engaged in social justice movements develop responsive strategies for the future.

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[400] 163 U.S. 537 (1896).

[401] 323 U.S. 214 (1944).

[402] Ironically, the Court finally overruled *Korematsu* at the precise moment that it shielded President Trump's Islamophobia from meaningful judicial scrutiny in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.") (citation and internal quotation marks omitted).