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Ruth Colker, Christian Domination, 73 AM. U. L. REV. 1717 (August 2024).

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Ruth Colker, Christian Domination, 73 Am. U. L. Rev. 1717 (2024).

APA 7th ed.

Colker, Ruth. (2024). Christian domination. American University Law Review, 73(6), 1717-1788.

Chicago 17th ed.

Ruth Colker, "Christian Domination," American University Law Review 73, no. 6 (August 2024): 1717-1788

McGill Guide 9th ed.

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AGLC 4th ed.

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MLA 9th ed.

Colker, Ruth. "Christian Domination." American University Law Review, vol. 73, no. 6, August 2024, pp. 1717-1788. HeinOnline.

OSCOLA 4th ed.

Ruth Colker, 'Christian Domination' (2024) 73 Am U L Rev 1717

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# CHRISTIAN DOMINATION

RUTH COLKER\*

*It is hard to deny that the United States is a Christian nation despite the First Amendment's promise that the legislature will not establish a religion. The United States is not a Christian nation merely because of the religious beliefs that many people privately hold. It is a Christian nation, in part, because the courts and legislatures have facilitated that development. Moreover, as this Article will argue, Christian favoritism within the political and legal system has developed in sharp contrast to the treatment of Black people, women, the LGBTQ+ community, and disabled people.*

*This Article explores the development of Christian domination through the tentacles of one case—Employment Division v. Smith—which involves the denial of unemployment benefits to two individuals who smoked peyote at a Native American Church religious ceremony. It makes four points. First, this Article argues that the courts misframed Smith as one about a neutral state law that had an adverse religious impact, missing the evidence of overt religious bias faced by the plaintiffs. Second, this misframing, in turn, caused Congress to overreact by enacting a law—the Religious Freedom Restoration Act (RFRA)—that gave unprecedented protection to religious adherents. Third, even when RFRA does not apply, the Supreme Court has done constitutional gymnastics to protect Christian adherents despite the holding in Smith. Fourth, the Court used the unconstitutional overreach of some aspects of RFRA to fashion a constitutional rule that has done nothing to limit protections for Christians but has dramatically cut back Congress's ability to enact civil rights legislation.*

*This is quite a story of the spread of Christian domination from the denial of protection to two participants in a Native American Church ceremony. Telling*

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\* Distinguished University Professor and Heck-Faust Memorial Chair in Constitutional Law, *The Ohio State University Moritz College of Law*. I would like to thank Moritz law librarian Stephanie Ziegler for her assistance with this Article. I would also like to thank Professors César Cuauhtémoc García Hernández, Margaret Kwoka, David Levine, and Ric Simmons for their constructive suggestions on an earlier draft, as well as the helpful participants at the *Moritz College of Law* workshop held on July 5, 2023.

*this story may help us re-frame the discussion of religious discrimination to understand the extraordinary case law that has protected Christians in sharp contrast to, and sometimes at the expense of, the treatment of various historically disadvantaged groups in society.*

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#### INTRODUCTION

This Article reflects an unconventional discussion of the free exercise of religion.<sup>1</sup> It does not discuss the history of the First Amendment nor parse its text. Instead, it discusses how modern free exercise cases have played a large role in strengthening Christian domination at the expense of, and in contrast to, the treatment of Black people, women, the LGBTQ+ community, and disabled people. Simply put, these civil rights plaintiffs have not received the solicitude to their claims of discrimination that Christians now receive. While

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1. The free exercise of religion is protected both by the First Amendment and statutes such as the Religious Freedom Restoration Act. See U.S. CONST. amend. I (referencing the “free exercise” of religion); Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (protecting the free exercise of religion).

others have noted the role that religion cases have recently played in suppressing civil rights claims,<sup>2</sup> this Article tells a further story of Christian exceptionalism. A Supreme Court that is insistent that racial remedies cannot be used to overcome a history of racial subordination<sup>3</sup> is also insistent that Christians receive special exemptions from abiding by antidiscrimination laws.<sup>4</sup> Further, this Court has strongly enforced the Religious Freedom Restoration Act<sup>5</sup> (RFRA) while tying the hands of Congress to enhance civil rights protections.<sup>6</sup> That is a frightening but true story.

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2. Attention to this tension has been publicly discussed since at least 2016, when the U.S. Commission on Civil Rights published a report entitled *Peaceful Coexistence*. U.S. COMM’N ON CIV. RTS., PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 3 (2016), [https://securisync.intermedia.net/us2/s/file?public\\_share=0Nv7dtHYDIwpoLI4da77wl](https://securisync.intermedia.net/us2/s/file?public_share=0Nv7dtHYDIwpoLI4da77wl).

3. See, e.g., *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023) (overturning affirmative action programs for admission at Harvard and the University of North Carolina as violating the Equal Protection Clause).

4. See, e.g., *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308, 2321–22 (2023) (permitting website owner not to comply with Colorado’s antidiscrimination law because compliance would compel her to convey on her website messages about marriage inconsistent with her religious belief that marriage should be reserved to unions between one man and one woman).

5. 42 U.S.C. §§ 2000bb–2000bb-4.

6. See Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 80, 103 (2001) (arguing that the Court’s invalidation of federal civil rights laws departs from settled precedent of giving broad authority to Congress under § 5 of the Fourteenth Amendment to enact civil rights legislation).

Despite the anti-establishment clause,<sup>7</sup> Christianity dominates U.S. laws and traditions.<sup>8</sup> Christmas is the only religious federal holiday.<sup>9</sup> Public entities may display lights and depictions of Santa Claus on public property. If public entities want to display a more religious symbol, such as a crèche,<sup>10</sup> they merely need to add “a little tinsel, a few reindeer or candy cane figures” to survive constitutional review.<sup>11</sup> Courts oddly confer “nonreligious” status to Christmas trees, reindeers, and holiday lights,<sup>12</sup> even though those symbols are associated exclusively with the Christian holiday of Christmas, which commemorates the birth of Jesus Christ. Further, a state can display the Ten Commandments (that are followed by Christians and Jews) in a county courthouse.<sup>13</sup> A coach can engage students in “voluntary”

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7. The First Amendment to the U.S. Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. CONST. amend. I.

8. Some people use the term “Christian nationalism” to describe “the anti-democratic notion that America is a nation by and for Christians alone.” Guthrie Graves-Fitzsimmons & Maggie Siddiqi, *Christian Nationalism Is ‘Single Biggest Threat’ to America’s Religious Freedom*, CTR. FOR AM. PROGRESS (Apr. 13, 2022), <https://www.americanprogress.org/article/christian-nationalism-is-single-biggest-threat-to-americas-religious-freedom> [<https://perma.cc/FMT4-SWD4>]; see Andrew L. Seidel, Amanda Tyler, Samuel L. Perry, Katherine Stewart, Jemar Tisby & Andrew L. Whitehead, *Christian Nationalism and the January 6, 2021 Insurrection*, BAPTIST JOINT COMM. FOR RELIGIOUS LIBERTY, [https://bjconline.org/wp-content/uploads/2022/02/Christian\\_Nationalism\\_and\\_the\\_Jan6\\_Insurrection-2-9-22.pdf](https://bjconline.org/wp-content/uploads/2022/02/Christian_Nationalism_and_the_Jan6_Insurrection-2-9-22.pdf) [<https://perma.cc/J99R-FDT9>] (last visited Apr. 26, 2023) (discussing the role of Christian nationalism in intensifying the attack on the U.S. Capitol on January 6, 2021).

9. One might also argue that Thanksgiving is a religious holiday because it was originally proclaimed as a day of public thanksgiving and prayer. See *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (noting that both Presidents and Congress have announced Thanksgiving as a national holiday “in religious terms”).

10. See *id.* at 670–71 (considering the question of whether the Establishment Clause prohibits a municipality from displaying a crèche).

11. Rebecca S. Markert, *Religious Holiday Displays on Public Property*, FREEDOM FROM RELIGION FOUND. (2008), <https://ffrf.org/faq/state-church/item/14019-religious-holiday-displays-on-public-property> [<https://perma.cc/KHF7-Z84P>].

12. See, e.g., *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 620–21 (1989) (permitting display of eighteen-foot menorah and forty-five-foot Christmas tree on government property and reasoning that they did not promote or endorse any religious beliefs).

13. See *ACLU v. Mercer Cnty.*, 432 F.3d 624, 626 (6th Cir. 2005) (finding that display of the Ten Commandments in a county courthouse did not violate the Establishment Clause because it had a legitimate secular purpose); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (holding that a display of the Ten Commandments outside

postgame Christian prayers on a football field.<sup>14</sup> The Chief Justice of the Alabama Supreme Court can breezily insist that the Alabama Constitution should be interpreted with reference to the Christian Bible.<sup>15</sup> Although the Alabama legislature quickly moved to reverse the specific holding about the legality of providing IVF treatment,<sup>16</sup> it did not seek to overrule the biblically-based conclusion that embryos at all stages of development are “children” even if they are kept outside a pregnant person’s body.<sup>17</sup> And, not surprisingly, no President of the United States has publicly identified as a member of a non-Christian denomination.<sup>18</sup> Donald Trump has deliberately infused Christianity

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of the Texas State Capitol is constitutional). *But see McCrae Cnty. v. ACLU*, 545 U.S. 844, 869 (2005) (finding that a display of the Ten Commandments at a county courthouse likely violated the Establishment Clause because the evidence supported the conclusion that the counties’ purpose was to “emphasize and celebrate the Commandments’ religious message”).

14. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2416 (2022) (holding that the school district impermissibly burdened an employee’s free exercise rights by suspending him for praying at the midfield of the football field and that his suspension was not necessary to avoid an Establishment Clause violation); *see also Town of Greece v. Galloway*, 572 U.S. 565, 569–70 (2014) (holding that beginning a public government meeting with a prayer does not violate the Establishment Clause). *But see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294, 317 (2000) (striking down public-school policy that permitted the broadcasting of a prayer over the public address system before each football game).

15. *See LePage v. Ctr for Reprod. Med.*, Nos. SC-2022-0515 & SC-2022-0579, 2024 WL 656591, at \*1, \*11 (Ala. Feb. 16, 2024) (quoting *Genesis* and other biblical passages in opinion discussing IVF in Alabama).

16. *See Lauren Mascarenhas & Isabel Rosales, Alabama Clinics Resume Treatment Under New IVF Law, but Experts Say it Will Take More Work to Protect Fertility Services*, CNN, <https://www.cnn.com/2024/03/06/us/alabama-ivf-fertility-protection/index.html> [<https://perma.cc/Z7XF-X2C9>] (Mar. 7, 2024, 12:04 PM) (describing new legislation that retroactively protects providers and patients from criminal liability for destruction or damage to embryos during the in vitro process).

17. *See LePage*, 2024 WL 656591, at \*1 (noting that “the Wrongful Death of a Minor Act applies to all unborn children, regardless of their location”).

18. *See Religious Affiliation*, POTUS, <https://potus.com/presidential-facts/religious-affiliation> [<https://perma.cc/9AFU-F6B9>] (last visited May 1, 2023) (noting that only three Presidents did not have any religious affiliation). Barack Obama was accused of being a Muslim during the 2008 Presidential campaign even though Republican candidate John McCain tried to counter such false accusations. *See Michael D. Giardina, Barack Obama, Islamophobia, and the 2008 U.S. Presidential Election Media Spectacle*, 346 COUNTERPOINTS 135, 146 (2010) (summarizing a campaign event at which McCain tried to correct a member of the audience who said Obama was an “Arab,” likely associating him with being Muslim).

into his 2024 presidential campaign, recognizing the sway that Christians hold over American life.<sup>19</sup>

The domination of Christianity in American life has its origins in the colonial era,<sup>20</sup> but Christian domination has strengthened in the last several decades without much resistance from the courts.<sup>21</sup> Ironically, Christian domination has grown despite evidence that the percentage of Americans who associate with religion has decreased significantly in the last decade.<sup>22</sup> Possibly, Christians have increasingly sought to use the legal and judicial system to protect and increase their domination as they feel more resistance from the public to their viewpoints.<sup>23</sup>

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19. See Michael C. Bender, *The Church of Trump: How He's Infusing Christianity into His Movement*, N.Y. TIMES (Apr. 1, 2024), <https://www.nytimes.com/2024/04/01/us/politics/trump-2024-religion.html> [https://perma.cc/WZ58-SUG2] (“Even more than in his past campaigns, [Trump] is framing his 2024 bid as a fight for Christianity, telling a convention of Christian broadcasters that ‘just like in the battles of the past, we still need the hand of our Lord.’”).

20. See *Religion in Colonial America: Trends, Regulations and Beliefs*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/resource-library/religion-colonial-america-trends-regulations-beliefs> [https://perma.cc/RYX8-DEAV] (Mar. 14, 2016) (reporting that most British colonies had Christian religious groups that instituted strict religious observance, including requirements to supply funds to the Christian churches and ministers).

21. Zalman Rothschild has documented the increasing partisan level of rulings in the free exercise area between January 2016 and December 2020. See Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1082 (2022) (finding a 49% differential between the likelihood that a Democratic-appointed judge would side with a religious plaintiff and that a Republican-appointed judge would do so). While Rothschild does not focus on the religious practices of the plaintiffs in these cases, others have observed that the winners during the Roberts Court have largely been Christians while the winners during the Warren Court were mostly members of minority religions. See Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES, (Apr. 5, 2021), <https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html> [https://perma.cc/MU9A-GZXU] (noting that under Chief Justice Rehnquist, the court supported religion 58% of the time, while that figure has grown to just over 81% under Chief Justice Roberts).

22. See Ryan Burge, *The Religious Landscape is Undergoing Massive Change. It Could Decide the 2024 Election.*, POLITICO (May 14, 2023, 7:00 AM), <https://www.politico.com/news/magazine/2023/05/14/democrats-religion-census-secular-00095858> [https://perma.cc/5ZPE-ZT8Q] (“One of the most significant shifts in American politics and religion just took place over the past decade and it barely got any notice: the share of Americans who associate with religion dropped by 11 points.”).

23. See Alvin Chang, *Are White Christians Under Attack in America? No, but the Myth is Winning*, GUARDIAN (Mar. 18, 2022, 6:00 AM), <https://www.theguardian.com/commentisfree/2022/mar/18/are-white-christians-under-attack-in-america-no-but-the-myth-is-winning> [https://perma.cc/AV7L-5NTE] (arguing that the belief that white Christians are an aggrieved group can help explain political mobilization like the January 6, 2021 protests).

The growth of Christian domination has not merely impacted the religious arena. It has also impacted the protection of civil rights. While the courts and legislatures have crafted an extraordinarily broad set of protections for religious adherents, they have also overseen the use of religious exemptions to water down civil rights laws.<sup>24</sup> Moreover, the courts have dramatically cut back on Congress's power to enact civil rights laws.<sup>25</sup> Civil rights laws have become the sacrificial lamb of religious protectionism, particularly the protection of Christianity.

This Article will focus on how the tentacles of *Employment Division v. Smith*<sup>26</sup> have substantially contributed to Christian domination within our system of law and politics. This is a surprising result for a case that has seemingly nothing to do with Christianity. In *Smith*, the Court declined to apply strict scrutiny to a case involving the loss of unemployment compensation benefits to two employees of a drug counseling center in Oregon after they admitted they had used peyote during a Native American Church ceremony.<sup>27</sup> Because peyote use was illegal in Oregon (with no exceptions for sacramental use) and the law applied to everyone, the Court held that the state action was only subject to rational basis scrutiny and was constitutional.<sup>28</sup> The court decision upheld the right of the state to deny unemployment compensation to the plaintiffs when they were fired for engaging in allegedly illegal conduct by using peyote during a religious ceremony.<sup>29</sup> This Article will argue that the misframing and overreaction to *Smith* have produced a sequence of negative consequences for the protection of civil rights.

Many people are likely aware that the decisions in cases like *Masterpiece Cakeshop v. Colorado Civil Rights Commission*<sup>30</sup> both facilitated Christian domination and harmed enforcement of a civil rights law at the statutory level by allowing Christians to avoid compliance with a sexual orientation nondiscrimination statute on the basis of their

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24. See, e.g., *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1882 (2021) (exempting Catholic charities that refused to send foster children to same sex couples from city's sexual orientation nondiscrimination policy).

25. See, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000) (concluding that Congress exceeded its constitutional authority under § 5 of the Fourteenth Amendment in enacting parts of the Americans with Disabilities Act).

26. 494 U.S. 872 (1990).

27. *Id.* at 874, 885–86.

28. *Id.* at 885–86, 890.

29. *Id.* at 890.

30. 138 S. Ct. 1719 (2018).

religious beliefs.<sup>31</sup> Focusing on the *Smith* decision, this Article makes an additional connection between religious protectionism and civil rights, arguing that the case law facilitating Christian domination has also led directly to a substantial diminution in Congress's constitutional ability to enact civil rights legislation. While others have noticed the relationship between religious protectionism and a decline in civil rights enforcement,<sup>32</sup> no one else has connected the rise in Christian domination to a decline in Congressional power to enact civil rights legislation.

This Article discusses four ways in which the *Smith* case promoted Christian domination and harmed the protection of civil rights: the misframing of *Smith* as a case about neutral state laws, an overreaction by Congress to the *Smith* decision, constitutional gymnastics by the courts to protect religious claimants, and the Court's limiting Congress's authority to enact civil rights protection. Those are amazingly strong tentacles from a case denying unemployment compensation benefits to two individuals who attended a Native American Church ceremony.

Part I develops the misframing observation. *Smith* should be understood as a case about overt religious animus rather than the neutral application of a state unemployment compensation law and its drug laws. One should understand the *Smith* plaintiffs as having been treated adversely because they participated in a ceremony of a minority, non-Christian religion,<sup>33</sup> not because they received a neutral

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31. *Id.* at 1723, 1732 (2018) (overturning the application of Colorado's anti-discrimination statute against the owner of a cakeshop due to the Commission's hostile comments towards religion as a violation of the Free Exercise Clause). While decided on free speech rather than free exercise of religion grounds, *303 Creative LLC v. Elenis* continues this trend. 143 S. Ct. 2298 (2023). As in *Masterpiece Cakeshop*, the Court exempted the Christian plaintiff from compliance with Colorado's anti-discrimination policy. *Id.* at 2321.

32. See Rothschild, *supra* note 21, at 1071 (showing "how religious opponents of recent progressive initiatives, such as LGBTQ rights and contraception mandates, have invoked free exercise as a means for securing exemptions from any enforced participation in the progressive initiatives").

33. When *Smith* was decided, a columnist argued that the result in *Smith* was not surprising because "it wasn't Catholics or Jews or Methodists who suffered. It was members of the tiny Native American Church." Stephen Chapman, *Supreme Court Decision on Oregon Church Forces Congressional Action*, OREGONIAN, Feb. 5, 1991, at B11 (on file with author). He further notes that "even during Prohibition, the sacramental use of wine was legal. The difference is that Christians and Jews, who needed wine to perform religious ceremonies, had the political power to make sure they got it. Native Americans, who need peyote for similar purposes, don't." *Id.*

application of state law. Their employer probably singled them out for adverse treatment because they were affiliated with the Native American Church. The state of Oregon also likely continued to outlaw sacramental use of peyote (at the time of their firing) because of the lack of political power of Native Americans in the state. Oregon was an outlier in continuing to ban sacramental use of peyote in the late twentieth century.<sup>34</sup>

Part I demonstrates that the Roberts Court has bent over backwards to conclude that seemingly neutral laws that adversely affected Christians were not, in fact, religiously neutral, while also inviting an invitation to reconsider *Smith*.<sup>35</sup> A Christian plaintiff has never had to worry about being fired for sacramental use of alcohol during a religious service because drug and alcohol laws have always created exemptions for Christian religious practices, even during Prohibition.<sup>36</sup> Prior discussions of *Smith* have ignored the evidence of religious animus that led to the plaintiffs' disfavorable treatment by their employer and the state. *Smith* never should have been framed as a case about a neutral, non-religious-animus application of a state law. Their religious practice was not exempted from state law because it was non-Christian. Christians need not worry about that kind of problem. They always get exempted.

Part II argues that the misframing of *Smith*, in turn, led to an overreaction by Congress. Fearful that the *Smith* decision could imperil their own desire to practice their religion, Congress rushed to enact RFRA on a bipartisan basis.<sup>37</sup> RFRA created a blueprint for religious protectionism that is unparalleled in civil rights nondiscrimination protection. RFRA allows plaintiffs to be successful without

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34. See *Smith*, 494 U.S. at 912 n.5 (Blackmun, J., dissenting) (noting that twenty-three states and the federal government had created exemptions for the use of peyote for religious purposes).

35. See, e.g., *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring) (arguing that *Smith* should be overturned). Justices Barrett and Kavanaugh also expressed an interest in overturning *Smith* but did not delineate what should replace it. See *id.* at 1882–83 (Barrett, J., concurring) (Justice Breyer did not join their full concurrence).

36. See National Prohibition Act of Oct. 28, 1919, ch. 85, title II, § 6, 41 Stat. 310 (repealed 1935) (permitting sacramental wine with the appropriate authorization while generally criminalizing alcohol).

37. See Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 416 (2016) (“President Clinton quipped at the signing ceremony that perhaps only divine intervention could explain such an unusual meeting of the minds.”).

demonstrating proof of anti-religious animus; it provides exemptions for religious adherents that apply to no other group in society.<sup>38</sup> While the courts' racial discrimination strict scrutiny test is a very high standard that can virtually never be overcome,<sup>39</sup> RFRA's version of strict scrutiny is even more stringent and has been successfully deployed by Christian plaintiffs.<sup>40</sup> The extraordinary stringency of the RFRA standard, in comparison to the race discrimination version of strict scrutiny, has, until now, received insufficient consideration.<sup>41</sup>

Part II traces the devastating impact of the Roberts Court's extreme solicitude to claims of religious discrimination by Christians. Because RFRA applies at the federal level, it has been a powerful tool to undermine federal legislation such as the Affordable Care Act<sup>42</sup> (ACA).<sup>43</sup> Consequently, there is a vast mismatch in which religious discrimination claims by Christians result in truck-sized exemptions to generally applicable laws that have no discriminatory purpose, whereas race and gender discrimination claims, as is discussed in Part III, are nearly impossible to prove regardless of the invidiousness of the laws.

Part III argues that the Court has done constitutional gymnastics to get around *Smith* so that Christian plaintiffs can receive exemptions from the application of seemingly neutral state laws. The Court has crafted special rules about religious animus and neutrality to support the application of strict scrutiny in these cases; these rules have no parallel in the civil rights arena.<sup>44</sup> In other words, the Court has treated claims of religious discrimination by Christians more favorably than

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38. *Id.* at 417 (RFRA codified a "statutory standard that judges would be required to apply to an undifferentiated and unknown array of future claims for exemptions to every generally applicable law in the land").

39. *See infra* Section II.B.

40. *See infra* Section II.C. For example, Christians have successfully used RFRA to challenge religiously neutral rules and obtain exemptions so as not to have to follow laws regarding access to contraception and life-saving medication for gay men. *See infra* Section II.C. These exemptions do not merely assist the plaintiffs but have an adverse impact on the civil rights of others, such as people who seek to use birth control or take life-saving medication.

41. *But see* Derek W. Black, *When Religion and the Public-Education Mission Collide*, 132 YALE L.J.F. 559, 596 (2022) (arguing that "the Court's evolving jurisprudence suggests that even if religion has not achieved formal elevated status, as a practical matter, religious challenges just keep winning and something resembling superstition is the next logical step").

42. 14 U.S.C. § 18001.

43. *See infra* Section II.A.

44. *See infra* Part III.

claims of race or gender discrimination by racial minorities<sup>45</sup> or women.<sup>46</sup> Previous scholarship has insufficiently documented that contrasting treatment.

Part IV breaks new ground by examining how this line of cases has broadly curtailed Congress's power under Section Five of the Fourteenth Amendment in *City of Boerne v. Flores*<sup>47</sup>. At first blush, it might appear that *City of Boerne* was a loss for a Christian Church that unsuccessfully sought to use RFRA<sup>48</sup> to expand the size of its church. But closer examination reveals that the Church's loss in *City of Boerne* was short-term and resulted in a cavalcade of state laws protecting religious entities.<sup>49</sup> It also served as a precedent to dramatically roll back Congress's power to enact civil rights legislation through its Section Five powers under the Fourteenth Amendment.<sup>50</sup> In other

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45. Although most of the race examples in this article involve discrimination against Black people, the undercutting of civil rights laws extends to all racial minorities. The plaintiffs in *Smith*, of course, were associated with the Native American Church. See John R. Hermann, *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), FREE SPEECH CTR., <https://firstamendment.mtsu.edu/article/employment-division-department-of-human-resources-of-oregon-v-smith> [https://perma.cc/CPV6-6FNS] (Feb. 18, 2024). One of them, Alfred Smith, was Native American. *Id.*

46. See, e.g., Tex. Dep't of Cnty. Affs. v. Burdine, 450 U.S. 248, 250–51, 260 (1981) (ruling against a female employee of the Texas Department of Community Affairs after she alleged her termination was unlawful gender discrimination).

47. 521 U.S. 507, 512 (1997) (involving a Christian archbishop seeking to expand his church in violation of local zoning laws by relying on RFRA's protection against state action).

48. RFRA can be confusing to understand. As originally enacted, it contained two key aspects. One aspect allowed strict scrutiny to apply when a federal law arguably had a negative impact on religious practice. David Schultz, *Religious Freedom Restoration Act of 1993*, FREE SPEECH CTR., <https://firstamendment.mtsu.edu/article/religious-freedom-restoration-act-of-1993> [https://perma.cc/RD63-JFK8] (May 6, 2024). Another aspect allowed strict scrutiny to apply when a state law arguably had a negative impact on religious practice. *Id.* *City of Boerne* overturned the state aspect of RFRA as exceeding Congress's authority but left intact the federal aspect. *Id.* For a good explanation of RFRA, see *id.*

49. Twenty-eight states have passed their own religious freedom statutes, making reliance on the federal RFRA unnecessary to protect Christians from the application of neutral state statutes that allegedly negatively impact their religious practices. See *Religious Freedom Restoration Act Information Central*, BECKET: RELIGIOUS LIB. FOR ALL, <https://www.becketlaw.org/research-central/rfra-info-central> [https://perma.cc/7JMF-WVMM] (last visited Apr. 5, 2024) (noting that RFRA was created to protect religious minorities).

50. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

words, the *Smith* case led to a loss for the members of the Native American Church; the *City of Boerne* case led to a short-term loss by the Catholic Church while also leading to the weakening of the ability of Congress to protect the civil rights of racial minorities, women, the LGBTQ+ community, and disabled people. No other commentator has connected the threads to see how the *Smith* decision led to this constriction of Congress's power to enact civil rights legislation.

The Supreme Court is on the brink of overturning *Employment Division v. Smith* and inserting RFRA's extraordinary degree of protection as being required by constitutional law.<sup>51</sup> Overturning *Smith* will not undo the massive harm that has resulted from the *City of Boerne* decision and will, instead, prove to be a powerful weapon at all levels of government to exempt Christians from complying with many laws, including civil rights laws. Overturning *Smith* will mean that Christian adherents will attain more constitutional protection than any other group in society including those whose ancestors were formerly enslaved.

This development is frightening. A state that purports to be neutral with respect to religion cannot be a state that decisively favors Christianity over all other religions and over the claims of other groups in society such as racial minorities, women, disabled people, and the LGBTQ+ community. In theory, other religious adherents could also seek to take advantage of this development but, so far, it has only been Christians who have boldly tried to imprint their religious practices on others by denying access to contraception, abortion, or HIV preventive care.<sup>52</sup>

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51. See, e.g., *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring) (“This case presents an important constitutional question that urgently calls for review: whether this Court’s governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.”).

52. While scholars have suggested that there should be a free exercise of religion right to have an abortion, the courts have failed to embrace that view. See Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. GENDER & L. 1, 4 (2022) (arguing for recognition of pro-abortion religion claims under RFRA); see also Pierre Thomas, *Justice Alito, in secretly recorded audio, apparently agrees nation needs to return to place of 'godliness'*, ABC NEWS (June 11, 2024, 10:34 AM), <https://abcnews.go.com/Politics/justice-alito-secretly-recorded-audio-apparently-agrees-nation/story?id=111014360> [https://perma.cc/N85Z-FR6C] (reporting that Justice Alito agreed that Christians must keep fighting “to return our country to a place of godliness”). But see

Part V concludes by arguing that the damage wrought by *Smith* and its progeny may be irreversible. Understanding its impact, however, may help us prevent civil rights laws being the sacrificial lamb for the protection of religious liberty. We are not a theocracy (yet).<sup>53</sup>

### I. THE MISFRAMING OF SMITH

This Part argues that *Smith* should be understood as a case about two participants in a minority religious ceremony who faced adverse treatment from their employer and the state because of their religious beliefs. Instead, the litigants and courts treated the case as one about a religiously neutral state law that had an adverse impact on the plaintiffs' sacramental use of peyote.<sup>54</sup> This misframing, in turn, caused Congress to overreact to *Smith* by rushing to pass RFRA to provide more protection to religious adherents who faced an adverse impact from a neutral state law.<sup>55</sup> The enactment of RFRA did nothing for the *Smith* plaintiffs but has protected many Christians from needing to comply with religiously neutral laws that they contend adversely affect their religious practices.

Because *Smith* was not litigated as a case about overt religious bias, it is admittedly difficult to fully document that bias. The ignored evidence of religious bias, however, is important because it likely reflects that the plaintiffs were participants in a minority religion whose religious practices were viewed skeptically. In recent years, the Roberts Court has bent over backwards to find evidence of religious

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Individual Members of the Med. Licensing Bd. of Indiana v. Anonymous Plaintiff, No. 22A-PL-2938, 2024 WL 1452489, at \*1, \*7 (Ind. Ct. App. Apr. 4, 2024) (finding that Hoosier Jews for Choice have associational standing to challenge aspects of Indiana's abortion laws as violating Indiana's religious freedom statute).

53. Some members of the Christian right seek to turn the United States into a theocracy, but that view has not yet received majority support in the courts or legislature. See Alex Morris, *Michael Flynn and the Christian Right's Plan to Turn America into a Theocracy*, ROLLING STONE (Nov. 21, 2021), <https://www.rollingstone.com/politics/politics-features/michael-flynn-cornerstone-church-christian-theocracy-1260606> [https://perma.cc/ZVZ4-RT66] (detailing Michael Flynn's statements at Cornerstone Church in San Antonio that “[i]f we are going to have one nation under God, which we must, we have to have one religion”).

54. Emp. Div. v. Smith, 494 U.S. 872, 883 (1990).

55. See Rothschild, *supra* note 21, at 1084 (describing the outrage from the *Smith* decision that led to the bipartisan passage of RFRA “to resurrect the interpretation of religious freedom the Court rejected in *Smith*”). No one ever describes the outrage over the *Smith* decision as stemming from a lack of consideration of the evidence of religious animus.

bias in cases brought by Christians;<sup>56</sup> no such leaning can be found in *Smith*.

In *Smith*, there were two arenas of potential religious bias. First, the plaintiffs' employer singled them out for adverse treatment after it learned of their plan to ingest peyote in a religious ceremony.<sup>57</sup> Second, the fact that sacramental use of peyote was illegal in Oregon reflected a longstanding national history of mistreatment of Native Americans who used peyote as part of their religious exercise.<sup>58</sup> During the *Smith* litigation, the state was given an opportunity to eliminate that adverse treatment but chose, instead, to defend it.<sup>59</sup>

#### A. Employer's Religious Animus

The *Smith* case emerged as a response to the adverse treatment of plaintiffs Galen Black and Alfred Smith by their employer.<sup>60</sup> Their employer fired them because they admitted use of peyote during a ceremony of the Native American Church.<sup>61</sup> Their employer then successfully challenged their eligibility for unemployment insurance due to their alleged participation in illegal drug use.<sup>62</sup> Their legal cases began as appeals of their unemployment insurance denials.<sup>63</sup>

Galen Black, who participated in activities of the Native American Church, was a resident assistant at a drug and alcohol treatment clinic.<sup>64</sup> When Black's employer learned about his use of peyote at the religious ceremony, it insisted that he participate in an intensive program of personal counseling at a residential care facility because of his prior history of drug use.<sup>65</sup> In other words, his employer thought that his sacramental use of peyote demonstrated a likelihood of

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56. See *infra* Part III.

57. *Smith*, 494 U.S. at 874.

58. *See id.* at 876 (noting that the Oregon Supreme Court affirmed its position that the religious use of peyote is prohibited).

59. *See id.* at 875–76 (noting that the Supreme Court remanded the case back to the Oregon Supreme Court to decide whether sacramental use of peyote is protected, and the state solidified that there is no exception for sacramental use).

60. *Id.* at 874.

61. *Id.*

62. See, e.g., *Black v. Emp. Div.*, 707 P.2d 1274, 1276 (Or. App. 1985) (en banc) (firing petitioner for disagreeing that his taking of peyote constituted a relapse of his alcohol addiction and refusing to enter treatment).

63. *See id.*; *Smith v. Emp. Div.*, 721 P.2d 445, 445 (Or. 1986), *vacated*, 485 U.S. 660 (1988), *remanded to 307 Or. 68* (Or. 1988), *rev'd*, 494 U.S. 872 (1990).

64. *Black*, 707 P.2d at 1276.

65. *Id.*

becoming a drug addict. Black refused to engage in the counseling program because he did not feel that his actions were a sign of a drug relapse.<sup>66</sup> His employer then fired him for intentionally violating the rules of his employer by engaging in illegal drug use.<sup>67</sup>

Alfred Smith, who was a Klamath Indian and a member of the Native American Church, worked for the same treatment center.<sup>68</sup> After the treatment center fired Black, the executive director warned Smith that he would be terminated if he also ingested peyote at a Native American Church ceremony.<sup>69</sup> The treatment center fired Smith the day after he admitted to having used peyote, again under the argument that his peyote use suggested he was at heightened risk of becoming a drug addict.<sup>70</sup>

The argument that their sacramental use of peyote posed a risk of drug addiction was weak. Because the peyote plant is extremely bitter and many people find that its consumption causes indigestion or nausea, it is not a popular drug.<sup>71</sup> As noted by the *Smith* dissent, peyote's "distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country."<sup>72</sup>

The employer's argument that the drug use subjected the plaintiffs to prosecution was also not a strong one because Oregon had not attempted to prosecute them or anyone else for sacramental peyote use.<sup>73</sup> Further, the drug rehabilitation center had no reason to believe that the sacramental use of peyote would prompt the user to ingest other illegal and addictive drugs.<sup>74</sup>

While the record is limited, it supports the argument that the employer reacted to the plaintiffs' admitted use of peyote during a

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66. *Id.*

67. *Id.*

68. *Smith*, 721 P.2d at 445–46.

69. *Id.* at 446.

70. *Id.*

71. Emp. Div. v. Smith, 494 U.S. 872, 914 n.7 (1990) (Blackmun, J., dissenting).

72. *Id.* at 916.

73. See Emp. Div. v. Smith, 485 U.S. 660, 673–74 (1988) (remanding for determination whether religious use of peyote was illegal in Oregon).

74. See Anna Schaefer & Haley Weiss, *Peyote 101*, HEALTHLINE, <https://www.healthline.com/health/peyote-101> [https://perma.cc/WL43-DG32] (Apr. 18, 2022) ("Research on peyote addiction is limited. But the [National Institute on Drug Abuse] notes that mescaline, like most hallucinogenic drugs, does not prompt drug-seeking behavior with repeated use.").

religious ceremony in a way that suggested religious bias.<sup>75</sup> If the record had been more fully developed, it is possible that the plaintiffs could have had a claim of religious discrimination under federal law.<sup>76</sup> One can speculate that the plaintiffs did not have the resources to pursue such a claim.<sup>77</sup> The fact that they did not pursue such a claim of religious discrimination, however, should not cause us to ignore that historical aspect of the case. *Smith* should not be framed as a case that began because of a neutral application of an employment policy against illegal drug use; it should be framed as a case about two participants in a ceremony of the Native American Church facing harsh sanctions by their employer because of their association with a minority religion. By contrast, as we will see in Part III, the Roberts Court is eager to find religious animus in cases involving Christians and protect them from adverse treatment.

### B. State's Religious Animus

Like the evidence of religious animus by the employer, the evidence of religious animus by the state was not well developed in the record, because the case was litigated as one in which a neutral state policy had a disparate impact on the plaintiffs' religious practices.<sup>78</sup> This Article seeks to reframe the case as one emerging from both a historical and contemporary reality of treating members of the Native American Church adversely because of their sacramental use of peyote. Even during Prohibition, the sacramental use of alcohol by Christians was

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75. That kind of overreaction may have been common in the 1980s during the heyday of the racially tinged war on drugs. See generally Darren Lenard Hutchinson, "*With All the Majesty of Law*": Systematic Racism, Punitive Sentiment, and Equal Protection, 110 CAL. L. REV. 371 (2022) (arguing that Court's intentional discrimination doctrine is ill-equipped to respond to the deep racial inequality in criminal justice policies).

76. Title VII of the Civil Rights Act of 1964 bans religious discrimination. 42 U.S.C. § 2000e-2(a).

77. In an interview, Black, at age 43, indicated that he spent about \$10,000 on legal fees and has not been able to find further work as a counselor. *Oregon Peyote Law Leaves 1983 Defendant Unvindicated*, N.Y. TIMES, July 9, 1991, at A14, <https://www.nytimes.com/1991/07/09/us/oregon-peyote-law-leaves-1983-defendant-unvindicated.html> [hereinafter *Oregon Peyote Law*]. Smith, at age 71, worked as a freelance counselor in Oregon. *Id.*; see also Garrett Epps, *Elegy for a Hero of Religious Freedom*, ATLANTIC (Dec. 9, 2014), <https://www.theatlantic.com/politics/archive/2014/12/elegy-for-an-american-hero-al-smith-smith-employment-division-supreme-court/383582> [https://perma.cc/ST8P-9MCZ] (discussing Smith's work to legalize the use of peyote during religious ceremonies).

78. Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

exempt from prosecution.<sup>79</sup> But, in 1990, the state of Oregon had not chosen to exempt the sacramental use of peyote from their drug laws.<sup>80</sup>

Consideration of the history of the criminalization of peyote use reveals the anti-Native American animus that justified its criminalization. Beginning with the Spanish Inquisition in 1620, Spaniards subjected those who ingested peyote as part of their religious practices to centuries of religious persecution.<sup>81</sup> Bringing these attitudes to North America, policymakers banned the use of peyote while also seeking to exterminate many Native Americans.<sup>82</sup> While Congress did not establish the Oregon Territory until 1848,<sup>83</sup> Native Americans had long inhabited the area and would have practiced the Native American religion.<sup>84</sup>

Over time, many states chose to disentangle themselves from the mistreatment of the Native American Church. Twenty-three states (but not Oregon) chose to exempt the sacramental use of peyote from criminal penalties by the time *Smith* was decided.<sup>85</sup> One can understand the twenty-three states that decided to exempt the sacramental use of peyote from the criminal law as trying to overcome this history of animus against Native Americans.

When offered the opportunity to clarify its laws about peyote use for sacramental purposes, Oregon chose to stand on the side of criminal enforcement.<sup>86</sup> Rather than join the twenty-three states that

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79. See National Prohibition Act of Oct. 28, 1919, ch. 85, title II, § 6, 41 Stat. 310 (repealed 1935) (allowing the manufacturing, selling, transporting, and possessing of sacramental wine with appropriate permits).

80. See *Smith*, 494 U.S. at 875 (1990) (noting how the parties disputed whether or not sacramental peyote use was included in Oregon's controlled substance law).

81. *Leading Cases*, 104 HARV. L. REV. 129, 198 (1990).

82. *Id.*

83. *Formation of the Oregon Territory*, NAT'L PARK SERVICE, <https://www.nps.gov/places/formation-of-the-oregon-territory.htm> [https://perma.cc/RS77-R44N] (last visited May 31, 2023).

84. See *Native American Culture: Indigenous People Have Lived in Oregon Since Time Immemorial*, TRAVEL OREGON, <https://traveloregon.com/things-to-do/culture-history/native-american-culture/> [https://perma.cc/39GH-CTNA] (last visited May 31, 2023) (discussing fifty tribes that inhabited Oregon).

85. See *Smith*, 494 U.S. at 917 (Blackmun, J., dissenting) ("Almost half the States, and the Federal Government, have maintained an exemption for peyote use for many years").

86. Oregon law made it a Class B felony for anyone to possess a controlled substance listed on Schedule I. *Id.* at 874. Schedule I included the drug peyote. *Id.* The Oregon Supreme Court concluded that all peyote use was illegal under the state statute because it made no exception for sacramental use of the drug. *Id.* at 876.

interpreted their state laws to exempt sacramental use of peyote, the Oregon Supreme Court interpreted their drug laws to ban all uses of peyote and thereby uphold the denial of unemployment compensation to the plaintiffs.<sup>87</sup> When the plaintiffs were fired in 1983 for their peyote use and the Oregon courts upheld their denial of unemployment insurance for their alleged violation of state drug laws,<sup>88</sup> the Oregon legislature took no steps to immediately craft a sacramental peyote exemption. The contemporaneous decision of the courts and legislature in Oregon to maintain the illegality of sacramental peyote use should cause us to understand that this case was about intentional religious animus rather than one about a neutral drug law that unintentionally negatively impacted a religious practice. Oregon's legislature knowingly interpreted and retained its law to harm practitioners of the Native American religion. The choice to reaffirm that classification was a knowing affirmation of the original religiously-biased choice.

Unsurprisingly, the U.S. Supreme Court decided the case in the context in which it was framed—what constitutional rule should apply to a situation in which a religiously neutral state policy has an adverse impact on someone's ability to practice their religion?<sup>89</sup> The plaintiffs argued that “governmental actions that substantially burden a religious practice must be justified by a ‘compelling governmental interest.’”<sup>90</sup> The Court, in an opinion authored by Justice Scalia, rejected the compelling interest test, concluding that creating a private right to ignore generally applicable laws would be a “constitutional anomaly”<sup>91</sup> and “court[] anarchy.”<sup>92</sup> The Court expressed concern that the rule proposed by the plaintiffs would “open[] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”<sup>93</sup> The Court decided to limit the application of the highest level of judicial scrutiny to situations where the state banned conduct only when it was engaged in for religious

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87. *Id.* at 876. But the Oregon Supreme Court did conclude that banning all uses of peyote violated the First Amendment. *Id.*

88. See *Black v. Emp. Div.*, 707 P.2d 1274, 1277 (Or. App. 1985) (en banc) (noting that Black's employment was terminated in 1983).

89. See *Smith*, 494 U.S. at 901.

90. *Id.* at 882–83.

91. *Id.* at 885–86.

92. *Id.* at 888.

93. *Id.*

reasons, not when it was banned for all.<sup>94</sup> In other words, the Court held that strict scrutiny was not appropriate because people who used peyote for nonreligious purposes would be treated the same as those who used it for religious purposes.<sup>95</sup>

The Court's holding only makes sense if one is willing to accept the proposition that peyote bans have an impact on people who are not members of the Native American Church. History shows us that such bans were put in place for the purpose of harming members of the Native American Church.<sup>96</sup> History also shows us that the state of Oregon persisted in criminalizing peyote even when it learned that its action harmed members of the Native American Church (and no one else).<sup>97</sup> The universe of people who used peyote for nonsacramental purposes was a null set.<sup>98</sup> Although state law did not indicate that it was banning a practice exclusive to those who practiced the Native American religion, that was, in fact, what it did.<sup>99</sup> The Court too quickly swallowed the premise that banning peyote could ever be considered a religiously neutral practice.

While the courts missed the religious bias behind Oregon's banning of peyote, the state legislature eventually became aware of that bias. Within a year of Oregon winning the case in the Supreme Court, the Oregon state legislature amended its state drug statute to exempt people from prosecution if they used peyote with "good faith practice of a religious belief."<sup>100</sup> This action likely reflected the state's late

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94. *Id.* at 877–78 (noting that a State could not ban "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display" but said this was not such a case because the state law was "concededly constitutional as applied to those who use the drug for other reasons").

95. *See id.* at 888 (describing the application of the "compelling interest" test as "courting anarchy" and that society cannot afford the luxury of the standard being applied to every regulation of conduct that concerns religion).

96. *See* Paul E. Lawson & Jennifer Scholes, *Jurisprudence, Peyote, and the Native American Church*, 10 AM. INDIAN CULTURE & RSCH. J. 13, 14 (1986) (discussing how states banned peyote to suppress Native American behavior viewed as Christian sin).

97. *See Smith*, 494 U.S. at 916 (Blackmun, J., dissenting) (noting that contrary to the State's interest in abolishing drug trafficking, peyote is not a popular drug, yet it historically has been seized on a higher rate than other popular drugs used for a non-religious purpose).

98. *See id.* at 914 n.7 (describing the unique and bitter taste of peyote which makes it "self-limiting" in its use for a nonsacramental purpose).

99. *See id.* at 874 (noting the consequence of the illegalization of peyote on Native Americans who use it for religious practice).

100. *See Oregon Peyote Law, supra* note 77 (reporting that while peyote is criminalized in Oregon, the Oregon law provides a defense for sacramental use).

recognition of its sordid history with respect to the Native American Church,<sup>101</sup> but its decision came too late for Smith or Black. Their case began in 1983; the state changed its laws on peyote use in 1991.<sup>102</sup>

The Supreme Court's decision in *Smith* presumed that the state was "neutral" in its treatment of religion because the drug laws did not invidiously single out anyone for different treatment.<sup>103</sup> But, as Justice Souter pointed out in his concurrence in a different case, we should closely examine this concept of "neutrality." In a telling example, he says:

A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.<sup>104</sup>

But such an inquiry was never necessary because, even during Prohibition, federal law exempted wine for sacramental purposes from prosecution.<sup>105</sup>

In other words, Oregon only amended its drug laws to protect Native American practitioners *after* it prevailed in *Smith*. Oregon should have repealed its peyote statute long before 1991. Oregon has the eleventh highest Native American population by state, which constitutes about 1.3% of its population, yet it maintained a ban on religious use of peyote.<sup>106</sup> By contrast, even during Prohibition, there was an exemption for religious use of alcohol.<sup>107</sup> While Justice Souter uses

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101. The legislative history of this statute is sparse. In the Oregon Senate Judiciary Committee, Representative Kevin Mannix explained that he supported the amendment because of "cultural misunderstandings." *Public Hearing on H.B. 3039 Before the Or. S. Comm. on Judiciary*, 66th Leg. Assembly, Reg. Sess. (Or. 1991) (statement of Kevin Mannix, Or. Juv. Dir.'s Ass'n). He said, "We need to be careful of cultural biases." *Id.*

102. See *Oregon Peyote Law*, *supra* note 77 (providing that the new Oregon law would allow a defense for those who use peyote in "good faith practice of a religious belief").

103. *Smith*, 494 U.S. at 881–82.

104. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561 (1993) (Souter, J., concurring).

105. *Id.* at 561 n.2 (citing National Prohibition Act of Oct. 28, 1919, ch. 85, title II, § 3, 41 Stat. 308 (repealed 1935)).

106. Ellen DeWitt, *States with the Biggest Native American Populations*, STACKER (Feb. 10, 2023), <https://stacker.com/history/states-biggest-native-american-populations> [<https://perma.cc/BZB7-H9B2>].

107. National Prohibition Act of Oct. 28, 1919, ch. 85, title II, § 6, 41 Stat. 310 (repealed 1935).

Judaism as an example in explaining this exemption, it is unlikely that concern about Jewish practice motivated this exemption, because Jews constituted about 3.2% of the population in 1918,<sup>108</sup> and faced horrific Anti-Semitism.<sup>109</sup> By contrast, Catholics constituted about 17% of the population in 1920.<sup>110</sup> The 1920 exemption likely reflects a pro-Christian bias in U.S. laws that could even survive nationwide support for Prohibition. By contrast, Oregon could ignore the practices of the Native American Church until it faced adverse publicity following the *Smith* opinion.<sup>111</sup>

This bias against a non-Christian religion is buried in the *Smith* case while the Court argued over the rules that should apply to a state's *neutral* treatment of a religion. But from the beginning of this story, there was nothing neutral about the state's treatment of the *Smith* plaintiffs. Christians have never faced that kind of adverse treatment for the sacramental use of alcohol, even during Prohibition.<sup>112</sup> When offered an opportunity to exempt peyote use from criminal sanction during the course of this litigation, the state refused.<sup>113</sup>

The misframing of *Smith* as a case about neutral state laws with an adverse religious effect has had an enormous impact. Congress accepted that misframing of *Smith*. As we will see in Part II, Congress rushed to provide exactly the kind of protection that Justice Scalia warned in *Smith* could lead to "anarchy" and "exemptions from civic obligations of almost every conceivable kind."<sup>114</sup> Congress did not seek to provide greater protection to members of the Native American Church. Instead, Congress sought to provide greater protection to religious adherents who might be adversely affected by neutral state

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108. See The Bureau of Jewish Social Research, *Statistics of Jews*, 23 AM. JEWISH Y.B. 279, 280 (1921).

109. David Grubin, *Anti-Semitism in America*, PBS, [https://www.pbs.org/jewishamericans/jewish\\_life/anti-semitism.html](https://www.pbs.org/jewishamericans/jewish_life/anti-semitism.html) [https://perma.cc/72U4-Q2VW] (last visited June 9, 2024).

110. THEODORE CAPLOW, LOUIS HICKS & BEN J. WATTENBERG, *THE FIRST MEASURED CENTURY* 111 (2001).

111. See *infra* Part II (discussing how Congress quickly passed the RFRA to counter the *Smith* decision).

112. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561 (1993) (Souter, J., concurring) (noting that the test of "religion neutrality" in Prohibition was never applied to the use of sacramental alcohol by Christians).

113. See *Smith*, 494 U.S. at 875–76 (discussing how the U.S. Supreme Court remanded the issue of exempting peyote, only for the State to affirm its decision of making it illegal).

114. *Emp. Div. v. Smith*, 494 U.S. 872, 888 (1989).

policies. That overreaction through an exemption process has provided unprecedented protection for Christians and the weakening of civil rights protections.

## II. THE OVERREACTION TO *SMITH*

This Part discusses the second adverse effect of *Smith*—the enactment of RFRA as an overreaction to *Smith*. Section II.A shows how RFRA employs a version of strict scrutiny that requires exemptions from generally applicable laws to protect religious practitioners without evidence of anti-religious animus. Section II.B contrasts that version of strict scrutiny with the version used in race and sex discrimination cases. Section II.C demonstrates how this zealous protection of Christian claimants has harmed the enforcement of civil rights laws. RFRA is a sledge-hammer response to a case about two people who wanted to use peyote as part of their religious exercise.

### A. RFRA

Congress enacted RFRA to reverse *Smith*; it passed the House on a voice vote and passed the Senate in a 97-3 vote.<sup>115</sup> President Bill Clinton signed it into law on November 16, 1993.<sup>116</sup> RFRA was a striking example of bipartisanship.<sup>117</sup> Ironically, some of the few groups to oppose RFRA were anti-abortion proponents who were concerned that the Jewish religious tenet requiring an abortion to save the life of the pregnant woman would interfere with the government's ability to ban abortions.<sup>118</sup> But the current legal and political climate shows that such concerns were largely unfounded. No group claiming that their religion requires the availability of abortion has yet succeeded in challenging abortion bans under state versions of RFRA.<sup>119</sup>

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115. H.R. 1308—*Religious Freedom Restoration Act of 1993*, 103rd Cong. (1993-1994), CONGRESS, <https://www.congress.gov/bill/103rd-congress/house-bill/1308/actions> (last visited June 7, 2024).

116. *Id.*

117. *Id.* It was supported by a broad coalition “with widely divergent views.” See Paul S. Zilberfein, Note, *Employment Division, Department of Human Resources of Oregon v. Smith: The Erosion of Religious Liberty*, 12 PACE L. REV. 403, 441, 441 n.274. (1992) (discussing how RFRA was broadly supported by both Congress and religious and civil rights communities).

118. *Id.* at 441 n.273.

119. Religious arguments to overturn abortion bans have been filed in Florida, Indiana, Kentucky, Missouri, Utah and Wyoming. Mabel Felix, Laurie Sobel & Alina

RFRA legislated a rule that was similar to the one proposed by the *Smith* dissenters. RFRA states:

Sec. 3. Free Exercise of Religion Protected

- (a) In General – Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
- (b) Exception – Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person –
  - (1) is in furtherance of a compelling governmental interest; and
  - (2) is the least restrictive means of furthering that compelling governmental interest.<sup>120</sup>

This rule is unusual and has rarely been studied carefully. Although described as strict scrutiny,<sup>121</sup> this rule goes far beyond typical strict scrutiny. RFRA’s protections are triggered by a mere allegation of a “substantial burden” (with no proof of invidious intent), and it imposes a strict exception-based version of strict scrutiny that does not otherwise exist in constitutional law.<sup>122</sup> As Section II.C will

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Salganicoff, *Legal Challenges to State Abortion Bans Since the Dobbs Decision*, KFF (Jan. 20, 2023), <https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision> [https://perma.cc/44MK-W8JJ]. The only case to proceed successfully has been in Indiana where plaintiffs have argued that their sincere religious beliefs (Judaism, Islam, and Unitarian Universalism) would be substantially burdened if the ban went into effect. *Anonymous Plaintiff v. Individual Members of the Med. Licensing Bd. of Ind.*, No. 49D01-2209-PL-031056, at 2, 43 (Marion Super. Ct. Dec. 2, 2022). In this case, the judge issued an order granting plaintiffs’ motion for a preliminary injunction. *Id.* at 43. Because the state’s abortion ban had already been enjoined on September 22, 2022, the December ruling had no immediate impact on abortion rights in Indiana. See *Court Temporarily Blocks Indiana Abortion Ban*, ACLU (Sept. 22, 2022), <https://www.aclu-in.org/en/press-releases/court-temporarily-blocks-indiana-abortion-ban> [https://perma.cc/LE3U-5GU2]; *Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff*, 233 N.E.3d 416, 458–59 (Ind. Ct. App. 2024) (reaffirming the trial court’s decision to grant plaintiffs’ request for a preliminary injunction to halt enforcement of the Abortion Law).

120. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1.

121. See Schultz, *supra* note 48 (describing RFRA as being enacted “to mandate that the courts use strict scrutiny when examining laws that substantially affect religious freedom”).

122. The only exception to this statement involves another case involving a Christian plaintiff in which the Court used the First Amendment’s “compelled speech” doctrine to exempt the Christian website designer from having to comply with Colorado’s anti-discrimination law. See *303 Creative LLC v. Elenis*, 143 S. Ct. 2298,

demonstrate, this is not the version of strict scrutiny that the courts have applied in the race context.

Subsection (a) starts by turning *Smith* on its head. *Smith* presumed that everyone needs to comply with rules of general applicability even if they cause disparate impact against some religious practitioners.<sup>123</sup> Subsection (a) starts with the premise that government *cannot* impose rules of general applicability that have a religious disparate impact unless it meets an exceptionally high standard of proof.<sup>124</sup> Rather than the presumption being *for* government; it is now *against* government unless it can meet what is listed in the “except” clause of subsection (b).

Subsection (b) then creates an extremely high burden on the government to enforce its law of general applicability. First, government must demonstrate that its law serves a “compelling” interest—the highest standard recognized by law.<sup>125</sup> Second, even if that compelling interest is demonstrated, the law will only survive scrutiny if it is being applied in the “least restrictive” way.<sup>126</sup> In practice, that second rule has required government to exempt individuals from the application of the law because an exemption is considered to be the least restrictive practice.<sup>127</sup> The rule itself is not struck down for everyone; instead, an exemption is provided only for the Christian plaintiffs. While, in theory, the least restrictive means test could benefit non-Christian plaintiffs, in practice, it has not.

The subsection (b) legal standard is in sharp contrast to the doctrine that the Supreme Court has applied when members of minority religions have sought to be exempted from rules of general applicability. In 1878, the Supreme Court ruled that a state need not grant an exemption from polygamy laws for a member of the Church of Jesus Christ of Latter-Day Saints who claimed that his religion permitted that practice.<sup>128</sup> While mandatory Sunday closing laws reflect

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2308, 2321–22 (2023) (exempting website owner from compliance with Colorado’s antidiscrimination law).

123. See *Emp. Div. v. Smith*, 494 U.S. 872, 878 (describing how if some religious practitioners are affected with a generally applicable law, then it does not violate the First Amendment).

124. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a).

125. *Id.* § 2000bb-1(b).

126. *Id.*

127. Section II.C will provide examples of how the least restrictive means rule has allowed Christian employers to be exempt from federal regulations in the health care area while requiring all other employers to comply with such rules.

128. *Reynolds v. United States*, 98 U.S. 145, 161, 166 (1878).

the imposition of Christian values on merchants and their customers, the Supreme Court concluded that states were not required to exempt Jewish merchants from such laws so that they, too, could be in business every day of the week except their Sabbath.<sup>129</sup> Conscientious objectors could not be exempt from military service due to their religious beliefs.<sup>130</sup> In *Wisconsin v. Yoder*,<sup>131</sup> the Court rejected a request by an Amish parent to be exempted from the state's compulsory education law.<sup>132</sup> Similarly, in *United States v. Lee*,<sup>133</sup> the Court rejected a request by a member of the Old Order Amish not to pay social security taxes for other Amish people who worked on his farm and in his carpentry shop, even though payment of those taxes conflicted with his religious beliefs.<sup>134</sup>

As we will see in Section II.C, the relief provided under RFRA Section 3(b) has been dramatic because it has allowed religious adherents to receive exemptions from rules of general applicability even when those exemptions have had a negative impact on people outside their religion. This kind of relief is atypical under U.S. constitutional law. Usually, when individuals claim that they have faced unconstitutional discrimination from the application of state or federal legislation, the remedy that is sought is to have the law struck down in whole or in part. We saw application of that principle in *National Federation of Independent Business v. Sebelius*,<sup>135</sup> a case challenging various provisions of the ACA as violating the Commerce Clause and the Spending Clause.<sup>136</sup> The Court held that Congress violated the Spending Clause in authorizing a penalty for those states that objected to Medicaid expansion.<sup>137</sup> The Court held that the government could not withdraw existing Medicaid funds from states that failed to comply with the Medicaid expansion obligation.<sup>138</sup> The

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129. See *Braunfield v. Brown*, 366 U.S. 599, 601, 609 (1961) (holding that the Pennsylvania law requiring all businesses to close on Sundays was not unconstitutional as it advanced the government's secular interests).

130. See *Gillette v. United States*, 401 U.S. 437, 439, 454–55 (1971) (holding that the government has a neutral and secular interest to limit the exemption to conscientious objectors to war).

131. 406 U.S. 205 (1972).

132. *Id.* at 207.

133. 455 U.S. 252 (1982).

134. *Id.* at 254–55.

135. 567 U.S. 519 (2012).

136. *Id.* at 530–31, 536–37.

137. *Id.* at 584–85.

138. *Id.* at 585.

difficult remedial issue for the Court was whether to strike the entire statute or just those provisions.<sup>139</sup> It never considered offering relief only for those plaintiffs who brought suit.<sup>140</sup> The Court ruled that the federal government could not penalize any state that chose not to expand Medicaid; the penalty itself was found to be unconstitutional.<sup>141</sup>

But RFRA provides a different remedial scheme than this standard scheme. For example, the Court ruled in *Burwell v. Hobby Lobby Stores, Inc.*<sup>142</sup> that employers who professed certain religious beliefs should be exempted under RFRA from some of the ACA rules regarding coverage of contraceptives; all other employers would be bound by them.<sup>143</sup> This exemption route possibly helps the Court maintain its integrity because it is not seen as invalidating the entire ACA or even the contraceptive mandate. But it supports Christian domination.

The leading supporter of the exemption approach is Professor and former judge Michael McConnell. McConnell chided the *Smith* Court for not giving adequate weight to the text of the First Amendment.<sup>144</sup> This is a surprising argument because the language of the First Amendment is absolutist—“Congress shall make no law”—suggesting the ratifiers of the First Amendment intended to craft a rule that could not harbor exemptions.<sup>145</sup> But McConnell cleverly took the absolutist nature of the language to mean the opposite of what it says. Because it is written in absolute terms, he argued it is important to consider whether other words used in the text might imply the necessity for exemptions.<sup>146</sup> He focused on the use of the verb “prohibiting” to suggest that a legislature could not take action that makes a religious practice illegal.<sup>147</sup> Of course, concluding that the legislature cannot take such an action does not dictate the appropriate remedy. He did

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139. *Id.* at 586–87.

140. *Id.*

141. *Id.* at 587.

142. 573 U.S. 682 (2014).

143. *Id.* at 688–91; see *infra* Section II.C (discussing examples of how the Court broadly interprets RFRA).

144. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1116 (1990).

145. U.S. CONST. amend. I.

146. McConnell, *supra* note 144, at 1116.

147. *Id.* at 1115. The relevant text of the First Amendment is: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. CONST. amend. I.

not explain why the text requires a court to carve out an exemption for religious practitioners rather than invalidate the entire statute.

McConnell offered some historical analysis to justify the exemption remedy. He examined the colonial period and concluded that the “idea of exemptions had deep roots in early colonial charters” when neutral state policies had a disparate impact against certain religious adherents.<sup>148</sup> He acknowledged that these exemptions were rarely used because most inhabitants were Protestant Christians so that “clashes between conscience and law were rare.”<sup>149</sup> But, nonetheless, he argued that his proposed exemption rule had a strong foundation in U.S. history during the colonial period.<sup>150</sup>

McConnell also described the movement towards religious exemptions, which arguably occurred during the colonial period, as favoring minority religions. He said, for example: “It is noteworthy that from the beginning it was thought that the solution to the problem of religious minorities was to grant exemptions from generally applicable laws.”<sup>151</sup> While acknowledging that these exemptions were “rare,”<sup>152</sup> he did not cite to any authority to support the assertion that any exemptions had occurred at all for religious minorities.<sup>153</sup> His only citation to examples from this period referenced an article he published in the Harvard Law Review in 1990.<sup>154</sup> In that article, his examples of religious exemptions from neutral laws involved Christians, not minority religions.<sup>155</sup>

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148. McConnell, *supra* note 144, at 1118.

149. *Id.*

150. *See id.* (arguing that despite being rarely applied, it is significant that the exemptions were used when conflicts arose).

151. *Id.*

152. *Id.*

153. The “rare” sentence has no citation to authority. *Id.*

154. *Id.* at 118 n.41.

155. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (discussing a series of cases concerning exemptions for Christian religions). The first example involved a priest who did not want to have to testify about a confession *Id.* at 1410–11. Other exemptions involve other branches of Christianity such as Huguenots, German Lutherans, Mennonites, Quakers, and Anglicans. *Id.* at 1467–69. But, of course, these are branches of Christianity, even if minority branches. There are no examples involving atheists or non-Christians or Native American practitioners. Exemptions may have served an interest in Christian plurality, but it is hard to describe them broadly as serving “religious minorities,” if the term “religious minorities” is intended to include non-Christians.

Thus, even the strongest proponent of the religious exemption model is not able to demonstrate how it would benefit anyone other than Christians. And, to the extent that McConnell tries to strengthen his argument through originalist methodology, he offers no consideration of whether the Civil War Amendments should change this historical gloss on the meaning of the Constitution. While these views may be weakly supported by experiences in colonial America, they are not supported by experiences in the modern era.

As we will see below, the strict scrutiny that applies to race discrimination claims looks nothing like the rule crafted by RFRA or suggested by McConnell without recourse to RFRA.<sup>156</sup> The comparison with the racial framework helps us see the wildly inappropriate nature of the RFRA remedial scheme that may soon be embedded in constitutional law if the Court decides to overrule *Smith*.

### *B. Contrast with Racial Strict Scrutiny*

When the *Smith* Court declined to use strict scrutiny to assess the constitutionality of a neutral law that produced adverse impact, there was a firestorm of protest, culminating in the quick, bipartisan enactment of RFRA. Congress sought to reverse the impact of *Smith* through RFRA by enacting a version of strict scrutiny that, as this Section will demonstrate, has no parallel in civil rights law. And there has been a concerted attempt to overturn *Smith* and employ RFRA-like strict scrutiny under the Constitution to all cases involving religious adverse impact from neutral state laws.<sup>157</sup> By contrast, when the Court

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156. See *infra* Section II.B.

157. Well-respected legal scholars argued that *Smith* was wrongly decided and should be reconsidered immediately after it was decided. See, e.g., McConnell, *supra* note 144, at 1111 (criticizing the opinion's use of text, history, and precedent); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & RELIGION 99, 101 (1990) (calling for a rehearing of the *Smith* decision because Respondents and amici could not anticipate and respond to the Court's broad decision). The Roberts Court has increasingly expressed support for those views. See, e.g., *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring) ("This case presents an important constitutional question that urgently calls for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected."); *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) (observing that "*Smith* remains controversial in many quarters"); *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1748 (2018) (Thomas, J., concurring) (expressing concern that enforcement of antidiscrimination laws could "vilify Americans who are unwilling to assent to the new orthodoxy").

declined to use strict scrutiny to assess the constitutionality of a neutral law that produced racial adverse impact, there was no parallel storm of protest. Over the years, the Court has made it more difficult to attack such racially neutral laws while making it easier to attack religiously neutral laws. This development began in 1976 and has increased over the years.

In *Washington v. Davis*,<sup>158</sup> the Supreme Court significantly weakened plaintiffs' ability to attain relief from race discrimination under the Constitution in a case involving the racial adverse impact of an employment testing policy.<sup>159</sup> Although *Smith* (weakening religious discrimination protections) and *Davis* (weakening race discrimination protections) have doctrinal parallels, there has been no movement to reverse *Davis* while *Smith* has been seriously weakened and will likely be soon overturned. The effect, as we will see, is to better protect Christians, the religious majority, while making it increasingly difficult for racial minorities to challenge laws with an adverse racial impact. So, let's closely examine that comparison.

In *Davis*, plaintiffs challenged the constitutional validity of a qualifying test (Test 21) administered to applicants for police officer positions with the District of Columbia Metropolitan Police Department.<sup>160</sup> They argued that the qualifying test had "a highly discriminatory impact in screening out [B]lack candidates" and bore no relationship to predicting job performance.<sup>161</sup> Their claim of discrimination was similar to the claim made by the *Smith* plaintiffs—that a neutral law had an adverse impact and should be subjected to strict scrutiny.<sup>162</sup>

In *Davis*, the Fifth Circuit ruled for the plaintiffs.<sup>163</sup> It said that "discriminatory intent in designing and administering Test 21 was irrelevant; the critical fact was rather that a far greater proportion of [Black people]—four times as many—failed the test than did whites."<sup>164</sup> That disproportionate impact was sufficient to shift the burden of proof to the defendants to prove that the test was an

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158. 426 U.S. 229 (1976).

159. See *id.* at 239 (explaining the Supreme Court has never applied the Equal Protection Clause to conduct that has a racially discriminatory impact).

160. *Id.* at 232.

161. *Id.* at 235.

162. *Id.* at 235–36; see *Emp. Div. v. Smith*, 494 U.S. 872, 875–76 (1989) (relying on a series of cases where the Court applied strict scrutiny).

163. *Davis*, 426 U.S. at 236–37 (1976).

164. *Id.* at 237.

adequate indictor of probable success in the police training program.<sup>165</sup> The D.C. Circuit found that the police department could not meet that burden and therefore directed that partial summary judgment be granted for the plaintiffs.<sup>166</sup> On appeal to the Supreme Court, the sole issue was whether the lower courts had properly interpreted the Due Process Clause of the Fifth Amendment which, in turn, is the same anti-discrimination standard as the Equal Protection Clause under the Fourteenth Amendment.<sup>167</sup>

The Supreme Court reversed the Fifth Circuit.<sup>168</sup> Even though the issue was not raised in the certiorari petition, the Court held that the legal standards applicable to Title VII cases did not apply to constitutional claims of race discrimination in employment.<sup>169</sup> The Court ruled that “our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”<sup>170</sup> It insisted that the courts should only declare a law as unconstitutional on the basis of race if the law can “ultimately be traced to a racially discriminatory purpose.”<sup>171</sup>

That holding, in turn, raised the question of what it means for an action to have a “discriminatory purpose.” *Davis* answered that question to suggest that it would not be exceedingly difficult to prove discriminatory purpose.<sup>172</sup> It said that a “law’s disproportionate impact is [not] irrelevant.”<sup>173</sup> Further, it said that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one

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165. *Id.*

166. *Id.*

167. The Fourteenth Amendment’s Equal Protection Clause only prohibits “states” from denying individuals the equal protection of the laws. *See U.S. CONST. amend. XIV, § 1.* When individuals seek to sue the federal government or the District of Columbia (which is not a state) for race discrimination, they do so under the Fifth Amendment’s Due Process Clause. *See Davis*, 426 U.S. at 239 (“[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.”).

168. *Davis*, 426 U.S. at 238.

169. *Id.*

170. *Id.* at 239. The Court, however, had to acknowledge that “[t]here are some indications to the contrary in our cases.” *Id.* at 242.

171. *Id.* at 240.

172. *See id.* at 241 (declaring that a discriminatory racial purpose does not need to be express or appear on the face of the statute).

173. *Id.*

race than another.”<sup>174</sup> Applying that test, the Court concluded that the facts did not demonstrate such a racially discriminatory purpose due to efforts the city had made to recruit Black officers as well as the relationship of the test to the training program.<sup>175</sup>

Despite a seemingly measured decision in *Davis*, a year later, the stringency of the discriminatory purpose test became more evident. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,<sup>176</sup> plaintiffs challenged the local government’s refusal to change the zoning designation from single-family to multi-family as racially discriminatory under the Equal Protection Clause of the Fourteenth Amendment.<sup>177</sup> Reversing the district court, the Seventh Circuit found that the zoning denial must be examined in light of its “historical context and ultimate effect.”<sup>178</sup> It found a racially discriminatory purpose relying on evidence that the Village had been exploiting the longstanding tradition of residential segregation, allowing it to become a nearly all white community by refusing all requests for more affordable housing.<sup>179</sup>

The Supreme Court reversed.<sup>180</sup> The Court, sounding facially reasonable, interpreted *Davis* not to require a plaintiff to prove that the challenged action rested “solely” on a discriminatory purpose.<sup>181</sup> The Court said that it was enough for plaintiffs to prove “that a discriminatory purpose has been a motivating factor” so that strict scrutiny applies.<sup>182</sup> And how is a “motivating factor” demonstrated? While recognizing that discriminatory impact, unexplainable on grounds other than race, can be adequate to meet the motivating factor test, the Court also cautioned that “such cases are rare,” citing only two that have historically met this test.<sup>183</sup> The Court also recognized that the historical background of the decision can be a helpful evidentiary source along with the sequence of events leading up to the challenged action.<sup>184</sup> Departures from normal procedures,

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174. *Id.* at 242.

175. *Id.* at 246.

176. 429 U.S. 252 (1977).

177. *Id.* at 254.

178. *Id.* at 260 (quoting *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 527 F.2d 409, 413 (7th Cir. 1975)).

179. *Id.*

180. *Id.* at 271.

181. *Id.* at 265.

182. *Id.* at 265–66.

183. *Id.* at 266.

184. *Id.* at 267.

for example, could constitute such evidence. As an example, the Court posited a town changing the zoning designation when it learned of a plan to build integrated housing.<sup>185</sup> Applying that standard, the Court found that there was insufficient evidence of a discriminatory purpose to invoke strict scrutiny in this case.<sup>186</sup> Arlington Heights had been zoned single-family for over a decade, and statements from various governmental officials demonstrated no invidious purpose.<sup>187</sup>

While the *Arlington Heights* decision may have ambiguously heightened the standard for showing discriminatory purpose, two years later, the Court made clear in *Personnel Administrator of Massachusetts v. Feeney*<sup>188</sup> that the bar is so high that it is nearly impossible to prove a discriminatory purpose.<sup>189</sup> The issue in the case was whether the Massachusetts veterans' preference statute violated the Equal Protection Clause of the Fourteenth Amendment because it discriminated against women.<sup>190</sup> Massachusetts gave veterans an "absolute lifetime" preference that the Supreme Court described as among the most generous in the United States.<sup>191</sup> For jobs that required a candidate to take a civil service exam, the state ranked all veterans above all non-veterans so long as the veterans received a passing score on the civil service exam.<sup>192</sup> Plaintiff Helen Feeney did very well on a number of civil service exams but, because lower scoring veterans were always placed above her, she was not one of the three individuals certified to be considered.<sup>193</sup> When she commenced her litigation, 98% of the veterans in Massachusetts were men; only 1.8% were women.<sup>194</sup> As the Court noted, the impact of the veteran's preference system on women's employment opportunities was "severe."<sup>195</sup>

Because the statute, on its face, was gender neutral, the Court concluded that the *Davis-Arlington Heights* doctrine should apply in

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185. *Id.*

186. *Id.* at 270.

187. *Id.*

188. 442 U.S. 256 (1979).

189. *Id.* at 279 (holding intent as "volition" or "awareness of consequences" is not enough to show discriminatory purpose).

190. *Id.* at 259.

191. *Id.* at 261–62.

192. *Id.* at 263.

193. *Id.* at 264.

194. *Id.* at 270.

195. *Id.* at 271.

assessing the constitutionality of the state statute.<sup>196</sup> In other words, the discriminatory purpose doctrine applied to claims of race and gender discrimination under the U.S. Constitution. The Court asked whether “the adverse effect reflects invidious gender-based discrimination.”<sup>197</sup> While recognizing that impact provides an “important starting point,” the Court also emphasized that purposeful discrimination is “the condition that offends the Constitution.”<sup>198</sup>

Feeney had many arguments to prove purposeful discrimination that the Court rejected. She argued that the discriminatory impact was so overwhelming that it could only be maintained out of a desire to harm women.<sup>199</sup> She further argued that Massachusetts could have achieved its intention to benefit veterans by constructing a weaker version of a veterans’ preference (as had most other states).<sup>200</sup> She asserted that the legislature would be aware that federal law limited women’s historical opportunities to serve in the military and become veterans; thus, the law builds on another discriminatory practice.<sup>201</sup> As the Court said, her ultimate argument rested “upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions.”<sup>202</sup>

While recognizing that Feeney could prevail under a foreseeable consequences argument, the Court rejected that argument as demonstrating discriminatory purpose. The Court insisted that discriminatory purpose “implies more than intent as volition or intent as awareness of consequences.”<sup>203</sup> Instead, the Court said that a plaintiff would need to demonstrate that a government entity “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.”<sup>204</sup> Feeney could not meet that standard because “nothing in the record demonstrates that this preference for veterans was

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196. *Id.* at 272.

197. *Id.* at 274.

198. *Id.*

199. *Id.* at 278 (rejecting the argument that intent is demonstrated by the recognition that “cutting-off of women’s opportunities was an inevitable concomitant of the chosen scheme”); *see id.* at 277 (noting that district court concluded that “absolute veterans’ preference was not originally enacted or subsequently re-affirmed for the purpose of giving an advantage to males”).

200. *Id.* at 276.

201. *Id.*

202. *Id.* at 278.

203. *Id.* at 279.

204. *Id.*

originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.<sup>205</sup> In other words, she needed a smoking gun of direct evidence of discriminatory intent; no inference could be drawn from a longstanding practice that was known to have a dramatic adverse effect on women's employment opportunities. The state had maintained its generous veterans' preference program "in spite of" its adverse impact on women, not "because of" that impact.<sup>206</sup>

Unlike *Smith*, this decision—upholding Massachusetts's practice but bringing attention to its social consequences—did not result in the state, chagrined, changing its veterans' preference statute to have a less adverse impact against most women's employment opportunities. The plaintiff, Helen Feeney, could find employment, but she could not successfully compete for promotions.<sup>207</sup> In fact, Feeney's lack of job mobility was so significant that she was laid off from her position in March 1975.<sup>208</sup> At the same time, three other women also brought suit claiming that the Massachusetts veterans' preference statute unconstitutionally discriminated against them on the basis of sex in their attempt to secure jobs as attorneys.<sup>209</sup> In response to that case, the Massachusetts legislature amended its veterans' preference statute so as not to apply to legal positions, and the lawsuit was dismissed as moot.<sup>210</sup> In other words, the Massachusetts legislature was willing to eliminate the adverse impact against women from one narrow job category but was not willing to lessen the impact on the majority of women, like Helen Feeney, demonstrating that it was aware of and

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205. *Id.*

206. *See id.* (declaring that the history of the benefit of the veterans' preference to "any person" who was a veteran demonstrated no discriminatory intent).

207. *See Eloise Taylor, Equal Protection; Sex Discrimination Veterans' Preference Statutes, Feeney v. Massachusetts*, 12 AKRON L. REV. 557, 558–59 (1979) (revealing that the plaintiff was ranked behind male veterans despite scoring higher than them on the civil service examination).

208. *Id.* at 559 (asserting Feeney "would have been certified" for other positions "but for the veterans' preference" and was laid off from her existing role at the Civil Defense Agency).

209. *Anthony v. Massachusetts*, 415 F. Supp. 485, 487 (D. Mass. 1976), *vacated mem.*, 434 U.S. 884 (1977).

210. *See Jeanne M. Cochran, Comment, Feeney v. Massachusetts*, 7 HOFSTRA L. REV. 215, 228 (1978). (stating "amendment... removed all legal positions from the provisions of the civil service law" while the case was still pending).

failed to respond to the broad way in which veterans' preference served as a glass ceiling for women in the civil service.

Given the dramatic evidence of disparate impact and lack of legislative response, it is not surprising that no plaintiff has been able to meet the discriminatory purpose test since the Supreme Court decided *Feeney*.<sup>211</sup> In the race and gender discrimination areas, the discriminatory purpose test means that pursuit of legal redress is most often a mirage. Plaintiffs can only win cases in which the racial or gender discrimination is explicit; cases based solely on racial or gender disparate impact always fail.

But let us now engage in a hypothetical inquiry. What if a RFRA-type doctrine had applied to this case? What result would we expect for the plaintiff? Under a RFRA-type analysis, the plaintiff would begin the litigation by asserting that a gender-neutral state statute had substantially limited her employment opportunities. She could not seek promotions and eventually was terminated. She then would be able to request that the government find a way to meet its important state interest of enhancing job opportunities for veterans without causing this dramatic harm to her employment opportunities. Rather than ask that veterans' preference be eliminated entirely, she would ask whether the government could meet its important state interests while not dramatically harming the employment prospects of many women. The dissent offered several suggestions that would have produced a less dramatic impact against women.<sup>212</sup> Such options include a point preference system for veterans (that would have allowed Feeney still to compete for jobs) or a veteran's preference that lasted only for a limited duration of a person's history of employment with the state, so that it is unlikely to affect promotion decisions.<sup>213</sup>

Under a RFRA framework, the plaintiff could have gone even further. She could have asked that nonveteran women be exempted from the veterans' preference system and allowed to compete directly against any veteran. The veterans' preference system could be allowed to continue its longstanding practice of preferring male veterans over

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211. See Nabiha Aziz, *Dog Whistles and Discriminatory Intent: Proving Intent Through Campaign Speech in Voting Rights Litigation*, 69 DUKE L.J. 669, 684 (2019) (explaining Feeney's "more subjective inquiry into the specific intent" of a statute imposes a stricter burden on plaintiffs challenging under the Fourteenth Amendment).

212. Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 287–88 (Marshall, J., dissenting).

213. *Id.*

male nonveterans, since most men have had an opportunity (and sometimes an obligation) to engage in military service.

The reader might object to the RFRA-like solution as providing an undue advantage to nonveteran women seeking employment in Massachusetts. But this is exactly the point. The RFRA standard is unprecedented. It allows certain corporations or other entities (who claim to have religious beliefs) to receive exemptions from federal laws that do not apply to other entities. At most, as suggested by the dissent, a victory for Feeney should have meant a softening of the veterans' preference standard for all applicants.<sup>214</sup> Singling out women to avoid this adverse treatment seems unfair. Any remedy should also include nonveteran men who apply for jobs in Massachusetts. In fact, a remedy exclusively for women might create its own constitutional problems as the courts are extremely reluctant to impose a sex-based or race-based remedy.<sup>215</sup> Yet, as we will see below, that is exactly what has happened in the religion context. In recent years, the Supreme Court has bent over backwards to exempt religious entities from the adverse effects of neutral laws without concern for its blatantly preferential treatment. That preferential treatment goes unnoticed because it serves the interests of mainstream Christianity. These exemptions are considered as innocuous as the Christmas tree on public property yet, as we will see in the next Section, they have an adverse impact on many people who do not share their religious beliefs.

### *C. The Christian Religion Cases under RFRA*

This Section will demonstrate how the Court broadly interprets RFRA to insist on exemptions that have few counterparts under civil rights laws. A broad exemption model is unique to RFRA. For example, if a Title VII plaintiff believes a test is unfair because of its disproportionate racial or gender-based disparate impact, the plaintiff has to seek to eliminate the test for all applicants, not just themselves.<sup>216</sup>

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214. *Id.* at 288 (asserting that the current "degree of preference" given to veterans "is not constitutionally permissible").

215. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2234 (2023) (holding that "indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions").

216. While Title VII does permit disparate impact cases involving testing, it also says that it is unlawful for an employer "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(l). With respect to

Similarly, the Court has been insistent that all applicants to universities must meet the same standards, and no special rules can be put in place to attain racial diversity.<sup>217</sup> The only federal statutes that arguably permit a partial exemption model are the Americans with Disabilities Act<sup>218</sup> (for disability accommodations) and Title VII of the Civil Rights Act of 1964<sup>219</sup> (for religious accommodations). But, in the disability context, the courts employ an undue hardship rule to ensure that any accommodations for disabled workers do not negatively impact others.<sup>220</sup> Not surprisingly, the Court has recently opened the door to religious accommodations under Title VII even when those accommodations impact others.<sup>221</sup> But RFRA's exemption model goes even further than the ADA and Title VII by having no undue hardship type defense; it is unprecedented under both constitutional and statutory doctrine in the civil rights area. RFRA's broad religious exemptions have disproportionately benefitted Christian plaintiffs.<sup>222</sup>

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disparate impact cases, Title VII allows the challenged practice to stand if the employer can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). In other words, the challenged practice either stands or falls for all applicants. There is no exemption relief parallel to RFRA.

217. *See Students for Fair Admissions, Inc.*, 143 S. Ct. at 2176 (overturning race-based affirmative action programs at Harvard and University of North Carolina).

218. 42 U.S.C. § 12112(a)–(b) (prohibiting an employer from discriminating against an "individual with a disability" who, with "reasonable accommodation," can perform the essential functions of the job unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business").

219. 42 U.S.C. § 2000e(j) (requiring employers to accommodate the religious practice of their employees unless doing so would impose an "undue hardship on the conduct of the employer's business").

220. *See, e.g.*, US Airways, Inc. v. Barnett, 535 U.S. 391, 394 (2002) (invoking presumption that an accommodation request that conflicts with an employer's seniority rules is unreasonable under the Americans with Disabilities Act).

221. *See Groff v. DeJoy*, 143 S. Ct. 2279, 2297 (2023) ("Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.").

222. I am aware of one case in which a member of minority religion successfully used RFRA to challenge ROTC grooming rules. *See Singh v. McHugh*, 185 F. Supp. 3d 201 (D.D.C. 2016) (granting plaintiff's motion for summary judgment, allowing the plaintiff, a Sikh individual, to keep his turban, hair, and beard). This case has not been appealed so it is impossible to know if appellate courts would agree this conclusion.

### 1. Burwell v. Hobby Lobby Stores, Inc.

*Burwell v. Hobby Lobby Stores, Inc.* is a glaring example of the exemption process at its worst, because of the negative impact on others. On the one hand, the *Hobby Lobby* Court allows an employer to be exempted from coverage of certain contraceptives<sup>223</sup> which may lead more women to be unintentionally pregnant while the *Dobbs* Court<sup>224</sup> systematically discounts the impact that restrictive reproductive health policies have on women's lives.<sup>225</sup> The Court has bent over backward to protect views held by some Christians.<sup>226</sup> No law has ever forced Christians to use contraceptives or have an abortion contrary to their religious beliefs. Yet, the Roberts Court has empowered Christians to make it difficult for women with other

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223. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (holding that mandating that employers provide certain contraceptives in their health care plans violates the Religious Freedom Restoration Act).

224. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

225. The *Dobbs* Court found that "the Fourteenth Amendment does not protect the right to an abortion." *Id.* at 2248. While the Court acknowledges that the dissent raises "important concerns" when it describes the "effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women," it attaches no constitutional significance to those concerns because of the "absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life." *Id.* at 2261. The Court spent one sentence dismissing the argument that abortion bans constitute an unconstitutional sex-based classification. *Id.* at 2245–46. It says they should be "governed by the same standard of review as other health and safety measures" without even considering the dramatic impact that these abortion bans have on women's health. *Id.* at 2246.

226. The Court insists that "[o]ur opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth" and chides the dissent for "impos[ing] on the people a particular theory about when the rights of personhood begin." *Id.* at 2261. Yet, the Court also insists that states must be permitted to protect fetal life without acknowledging that that protection emerges from a particular Christian tradition that lies outside the belief system of many pregnant women. *Id.* The Court doesn't merely say that people are entitled to have their own views about when life begins, they insist that the courts must give recognition to the fact that abortion is a "unique act" because it terminates "life or potential life." *Id.* at 2277. It therefore insists that its decision in *Dobbs* does not draw into question other precedents because "abortion is inherently different from marital intimacy, marriage, or procreation." *Id.* Thus, *Dobbs* only concerns the "constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Id.* at 2277–78. The only way that logic makes any sense is if the Court thinks that a state interest in protecting fetal life (without any defined limitations) is some kind of super right that does not need to be balanced against any competing concerns, such as the healthcare needs of the pregnant woman. It is hard to read those passages without concluding that the majority, rather than the dissent, has taken a position on the value of fetal personhood.

religious beliefs to use certain contraceptives or obtain an abortion. In *Smith*, Justice Scalia described one religion imposing rules on others as a problematic “constitutional anomaly,”<sup>227</sup> but that is what the Roberts Court has crafted.

*Hobby Lobby* is a great example of the tyranny of an exemption model to protect religious freedom. The case arose under RFRA which, as discussed above, requires an exemption from a generally applicable rule unless government can meet the compelling interest standard. The plaintiffs, which were closely held corporations, wanted to be exempted from the ACA’s requirement that they offer forms of contraception to their employees.<sup>228</sup> These contraceptives include the intrauterine device (IUD), which is significantly more effective than other contraceptive methods.<sup>229</sup> Because the federal government had already agreed to provide an exemption for religious nonprofit corporations, whereby the government paid for the cost of those medications or devices, they requested that the government make this exemption available to them.<sup>230</sup> The Court concluded that the “effect of the HHS-created accommodation on the women employed by *Hobby Lobby* and the other companies involved in these cases would be precisely zero;” thus, the exemption needed to be offered to the plaintiffs in this case.<sup>231</sup>

The *Hobby Lobby* Court apparently assumed that there was an easy way to accommodate the plaintiffs’ religious beliefs without creating any burden on women covered by the health care plan, even though the plaintiffs and others had made statements during the litigation that drew that assumption into question.<sup>232</sup> A no-burden-to-women exemption would be one in which a woman would simply use her existing health insurance card when she went to a pharmacy or doctor’s office and obtain the desired contraceptive in a seamless process. She would not even be aware that the federal government,

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227. See *Emp. Div. v. Smith*, 494 U.S. 872, 886 (1990) (“What [the compelling government interest requirement] produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.”).

228. *Hobby Lobby Stores, Inc.*, 573 U.S. at 689–90.

229. *Id.* at 761 (Ginsburg, J., dissenting).

230. *Id.* at 692 (majority opinion).

231. *Id.* at 693.

232. See *id.* at 767 (Ginsburg, J., dissenting) (noting that plaintiff’s counsel did not confirm whether they would accept the Court’s accommodations).

rather than her employer, was covering the cost of the free contraceptive. For that kind of process to work, the employer would have to agree to notify the government of its unwillingness to pay, make sure that the charges for such care went to the government (or were reimbursed, if paid by the employer).

The plaintiffs in *Hobby Lobby* never indicated they would accept such a seamless process. When asked at oral argument whether the proposed exemption was acceptable, counsel for Hobby Lobby responded: “We haven’t been offered that accommodation, so we haven’t had to decide what kind of objection, if any, we would make to that.”<sup>233</sup> Another plaintiff, Conestoga, said it would support a system whereby a woman paid for the contraceptive and received a tax credit when she filed her taxes.<sup>234</sup> But, as the dissent noted, that alternative “would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.”<sup>235</sup> That issue would be especially problematic for women who chose IUDs, an extremely reliable form of contraception that costs more than \$1,000 for insertion.<sup>236</sup> Further, in a related case, religious nonprofit organizations objected to the requirement that they submit a form either to their insurer or the federal government stating that they object to providing contraceptive coverage on religious grounds.<sup>237</sup> In a later case, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,<sup>238</sup> the Court accepted that objection, concluding that the employer’s self-certification requirement could be eliminated without any adverse effect on women’s contraceptive access.<sup>239</sup>

The Court’s lack of concern for the actual impact on women is illustrated by the *Little Sisters of the Poor* litigation. In that case, the Court tolerated exemptions for the employer that would pose significant burdens on women because it refused to ensure that women could continue to use their existing insurance card for free contraceptive coverage. Instead, women would have to “take steps to learn about, and to sign up for, a new health benefit” that was never designed to cover the tens of thousands of women who could be affected by this

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233. *Id.* at 767 (quoting counsel from oral argument).

234. *Id.*

235. *Id.* at 767–68.

236. *Id.* at 761 n.22.

237. Zubik v. Burwell, 578 U.S. 403, 405–06 (2016) (per curiam).

238. 140 S. Ct. 2367 (2020).

239. *Id.* at 2376.

exemption.<sup>240</sup> Alternatively, they would pay for contraception out of their own pocket and possibly seek reimbursement through a government program, often making it difficult for them to afford an IUD.<sup>241</sup> The adverse impact was defined only in dollars and cents, on the assumption there was no negative impact if women had a path to obtaining contraception. Learning about and then signing up for a new health benefit, when one discovered that their employer did not cover their desired contraceptive, could be very challenging. Does a woman, for example, wait weeks or months to obtain an IUD, risking an unwanted pregnancy in the meantime? As for situations where women receive reimbursement after paying for contraception, that option assumes women have savings they could use while awaiting reimbursement. And how lengthy and burdensome would the reimbursement process be? Women are not merely a dollar sign; they live busy lives in a state that might prohibit abortion and now must navigate additional steps to protect their health, merely because of their employer's religious beliefs about contraception (when the employer, of course, is not the person using the contraception).

The majority really had no response to the dissent's objections to the burdens on women. It said that "even assuming that the dissent is correct as an empirical matter, its concerns are more properly directed at the regulatory mechanism that Congress put in place to protect this assumed governmental interest."<sup>242</sup> It acknowledged that the *Hobby Lobby* decision assumed that an exemption could be put in place while providing women "seamless access to contraception,"<sup>243</sup> but backtracked by characterizing that assumption as not essential to its holding.<sup>244</sup> Now, it blamed Congress for not being more specific about the necessity of covering all forms of contraception under the ACA.<sup>245</sup> Congress was to blame for this imposition on women's access to contraception, not the courts that have bent over backwards to accommodate an employer's religious beliefs. The *Hobby Lobby* slippery slope is quite oily, as religious employers can be exempted from coverage of some of the most effective contraceptives; the Court's

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240. *Id.* at 2409 (Ginsburg, J., dissenting).

241. *Id.*

242. *Id.* at 2381 (majority opinion).

243. *Id.*

244. *Id.*

245. *Id.*

subsequent overturning of *Roe v. Wade*<sup>246</sup> worsened the effects of this pernicious decision by making it less likely that a woman could obtain an abortion following an unintended pregnancy.<sup>247</sup>

Let us highlight the gymnastics the Court used to reach this result. The initial cases challenging the contraception mandate merely sought an exemption that would supposedly still provide women with full and seamless access to all forms of contraception.<sup>248</sup> In the early cases on this issue, the courts assumed that the government had a compelling state interest in covering the full list of contraception because of strong language in the ACA on full access to health care treatment for women.<sup>249</sup> But as religious employers began to balk at the seamless solution, the courts confronted the reality that the requested exemptions would have a dramatic effect on many women's access to contraception. So, the courts pivoted by saying that the ACA never really required access to all forms of contraception.<sup>250</sup> Congress never expressed a compelling interest in such coverage. It was alright to limit that coverage in the name of protecting the religious liberty of some employers.

The next logical step would be for employers that do not claim to have an anti-contraception religious belief to merely say that they do not want to pay for contraception under the ACA health care plan. If Congress never required that coverage (as the Court now says), then the entire regulatory regime of requiring contraceptive coverage is invalid.<sup>251</sup> And that possibility is not a remote one. Some states are

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246. 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

247. See *Dobbs*, 142 S. Ct. at 2345 (Breyer, J., dissenting) (noting that the majority's holding will prevent women living below the poverty line who experience unintended pregnancies from obtaining safe and legal abortions).

248. See *supra* notes 231–41 and accompanying text.

249. See 42 U.S.C. § 300gg-13 (listing the minimum coverage requirements of a group health plan and health insurance issuer to include "additional preventative care and screenings").

250. See *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2381 (holding that the plain reading of the ACA gives the Health Resources and Services Administration broad discretion to determine what constitutes preventative care and screenings under the statute).

251. Some commentators are suggesting that the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo* could negatively impact the contraception mandate. 144 S. Ct. 2244 (2024) (overturning *Chevron* deference to agency decision-making); see Sam Whitehead, *If Lawsuit Ends Federal Mandates on Birth Control Coverage, States Will Have the Say*, KFF HEALTH NEWS (July 9, 2024),

already trying to ban certain forms of contraception,<sup>252</sup> even though such bans would be inconsistent with the ACA.<sup>253</sup> The decision in *Little Sisters of the Poor* therefore opened the door for states to mandate Christian domination. States can codify into law their religious perspective that certain contraceptives should not be available, irrespective of the religious beliefs of women and their employers, and irrespective of the damage to women's well-being.

## 2. Braidwood Management Inc. v. Becerra

*Hobby Lobby* has received considerable publicity.<sup>254</sup> By contrast, *Braidwood Management Inc. v. Becerra*,<sup>255</sup> a case filed in the Northern District of Texas, which tries to eliminate ACA coverage of prophylactic drugs,<sup>256</sup> has received less consideration.<sup>257</sup> The judge assigned to the

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<https://kffhealthnews.org/news/article/lawsuit-could-change-state-rules-birth-control-coverage/> [https://perma.cc/QQY4-CSTR] (explaining that eliminating federal coverage requirements for contraception would allow private insurers to pick and choose what services to cover or charge for).

252. See Christina Cauterucci, *Birth Control is Next*, SLATE (Apr. 21, 2023, 11:48 AM), <https://slate.com/news-and-politics/2023/04/birth-control-is-next-republicans-abortion.html> [https://perma.cc/M4VJ-BDTX] ("In other words, counter to a refrain that has taken hold on the left since the overturning of *Roe v. Wade*, conservatives are not coming for birth control next. They're coming for birth control now."); Gabrielle Gurley, *Controlling Birth Control*, THE AM. PROSPECT (Mar. 7, 2024), <https://prospect.org/health/2024-03-07-controlling-birth-control> [https://perma.cc/6ZAD-P76T] (describing efforts in Oklahoma, Tennessee, Louisiana and Congress to restrict access to some contraceptives).

253. See 42 U.S.C. § 300gg-13(a)(4) (noting that health insurance issuers shall provide coverage for and not impose any cost sharing requirements for women's additional preventative care and screenings).

254. See, e.g., Adam Liptak, *Supreme Court Rejects Contraceptives Mandate for Some Corporations*, N.Y. TIMES (June 30, 2014), <https://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html> (noting that the White House press secretary criticized the decision and urged Congress to find ways to make all contraceptives available to women); Planned Parenthood Action Fund, *Burwell v. Hobby Lobby and Birth Control*, <https://www.plannedparenthoodaction.org/issues/birth-control/burwell-v-hobby-lobby> [https://perma.cc/YP2R-VYUM] (last visited June 15, 2023) (describing the decision as "devastating").

255. 627 F. Supp. 3d 624 (N.D. Tex. 2022).

256. *Id.* at 633.

257. But see Doron Dorfman, *Penalizing Prevention: The Paradoxical Legal Treatment of Preventative Medicine*, 109 CORNELL L. REV. 311, 324–25 (2024) (providing extensive discussion of *Braidwood* case); Ruth Marcus, *Opinion: This Federal Judge May be Hazardous to Your Health*, WASH. POST. (March 31, 2023, 5:45 PM), <https://washingtonpost.com/opinions/2023/03/31/texas-obamacare-judge-reed-o-connor> [https://perma.cc/7XMM-RT6R] (discussing *Braidwood* case).

case is Reed O'Connor, who, in 2018, declared the ACA unconstitutional, in a case which was reversed on appeal.<sup>258</sup> In *Braidwood*, he took another swipe at the ACA by declaring the preventive services coverage unconstitutional.<sup>259</sup> While O'Connor offered numerous reasons for his decision, one is relevant to the thesis of this Article—his response to a request to have coverage of prophylaxis drugs (PrEP) to prevent HIV infection exempted from coverage under RFRA because such coverage allegedly facilitates and encourages homosexual behavior in violation of Braidwood's religious convictions.<sup>260</sup> Braidwood Management "is a for-profit corporation owned by Steven Hotze" who believes that "providing . . . PrEP drugs 'facilitates and encourages homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman,'" and that "providing coverage of PrEP drugs in Braidwood's self-insured plan would make him complicit in those behaviors."<sup>261</sup>

Braidwood challenged the mandatory PrEP coverage under RFRA.<sup>262</sup> Citing *Hobby Lobby*, Judge O'Connor ruled in their favor on that claim, finding that RFRA required an exemption unless the government could meet its burden of demonstrating a compelling state interest.<sup>263</sup> And, even if the government met the compelling interest test, it still would not prevail unless no alternative (like an exemption) was available to mitigate the impact of the governmental rule.<sup>264</sup> Again, citing *Hobby Lobby*, O'Connor ruled that the government should be able to "assume the cost of providing PrEP drugs to those who are unable to obtain them due to their employers' religious objections."<sup>265</sup> The judge offered no discussion of the mechanics of such an exemption. Is this a *Little Sisters of the Poor* situation where the plaintiff is not even willing to notify HHS of its religious refusal?<sup>266</sup> Will the employees covered by this health plan have to pay for this medication and seek reimbursement from the federal government? PrEP is an

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258. See *Texas v. United States*, 340 F. Supp. 3d 579, 585–86, 619 (N.D. Tex. 2018), *rev'd*, *California v. Texas*, 141 S. Ct. 2104, 2113, 2120 (2021) (Supreme Court reversing on standing grounds).

259. *Braidwood Mgmt. Inc.*, 627 F. Supp. 3d at 652–55 (N.D. Tex. 2022).

260. *Id.* at 636, 652–53.

261. *Id.* at 652.

262. *Id.*

263. *Id.* at 652–53, 655.

264. *Id.* at 654.

265. *Id.*

266. See *supra* text accompanying notes 221–22.

expensive medication with annual costs around \$21,000 before insurance.<sup>267</sup> Again, like in *Little Sisters of the Poor*, an exemption is offered to a Christian plaintiff that is likely to have a substantial impact on an employee who does not share the plaintiff's religious convictions.<sup>268</sup> The notion that religious exemptions cannot burden others is gone.<sup>269</sup>

In conclusion, we can see the enormous havoc that the RFRA exemption process is already wreaking on important aspects of health care coverage. Depending on the religious sensibilities of their employers, even at for-profit commercial entities, employees may find themselves unable to obtain free access to contraception and PrEP medication. If they can afford to pay for these items out of their own pocket and submit timely claims to the government, they may be reimbursed for these expenses. Because both medications are used on a daily and long-term basis, this burden in terms of time and cost could be quite substantial. But the only burden that concerned the courts were quite attenuated religious concerns. The ACA merely required an employer to provide a health insurance card to an employee with a long list of ACA-required preventive health care benefits.<sup>270</sup> The *Braidwood* district court allowed the employer to pick and choose from that list, passing on a substantial burden to the employee to obtain their federally-mandated ACA benefit.<sup>271</sup> One must wonder what argument comes next. Will an employer argue that they should not have to provide any health insurance to employees who want to use that benefit? Because the reimbursed benefit is only available when the employee has health insurance, one could argue that the employer

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267. See *How Much Does PrEP Cost?*, PREPDAILY (Aug. 17, 2020), <https://prepdaily.org/how-much-does-prep-cost> [https://perma.cc/H8HC-Z6F7] (discussing the annual cost of HIV treatment).

268. See *supra* Section II.C.1.

269. Judge O'Connor rejected a request to stay his order pending appeal. *Braidwood Mgmt. Inc., v. Becerra*, No. 4:20-cv-00283-O, 2023 WL 3032062, at \*1 (N.D. Tex. April 20, 2023). The Fifth Circuit heard oral argument in June 2023 on the government's request to stay the elimination of no-cost coverage for PrEP and contraception on a nationwide basis but reportedly did not focus on the RFRA argument. See Chris Geidner, *Appeals Court Skeptical of Argument to End ACA Coverage Requirements During Appeal*, LAWDORK (June 7, 2023), <https://www.lawdork.com/p/fifth-circuit-aca-preventative-care-stay-args> [https://perma.cc/UV6S-9JGC] (describing the oral arguments heard in the case regarding a stay on the lower court order). The Fifth Circuit ruled that RFRA precluded the EEOC from enforcing guidance against the employer. *Braidwood Mgmt. Inc. v. Equal Emp. Opportunity Comm'n*, 70 F.4th 914 (5th Cir. 2023).

270. *Braidwood Mgmt. Inc.*, 627 F.3d at 631–32.

271. *Id.* at 637.

continues to be entangled in the benefit. The only solution, one might argue, is for employers to provide health insurance only to those employees who agree not to seek to use that insurance to obtain contraception or PrEP medication, even through a reimbursement process. The scope and impact of the exemption process has received insufficient attention while these kinds of remedies are becoming more commonplace. It is important to highlight this example of Christian protectionism and domination even if the district court's opinion is not entirely sustained on appeal.<sup>272</sup> There is no reason to think that versions of this argument for broad Christian exemptions will not be attempted in the future.

### III. CONSTITUTIONAL GYMNASTICS

Not all cases involving Christians who object to neutral state laws can be brought under a state RFRA, because not every state has its own RFRA. Federal RFRA cannot apply to states.<sup>273</sup> These state cases are brought under the Due Process Clause of the Fourteenth Amendment that incorporates the First Amendment's free exercise of religion jurisprudence when a state RFRA is not available.<sup>274</sup> They are controlled by *Smith* and should ordinarily not invoke strict scrutiny.<sup>275</sup> But the Court deploys constitutional gymnastics to employ strict scrutiny in these cases and requires a religious exemption (a remedy never available in the constitutional civil rights arena). First, as discussed in Section III.A, it bends over backwards to find anti-Christian religious animus based on a factual record that would never meet the animus test as reflected in *Davis*, *Feeney*, or *Arlington Heights*, and then imposes a religious exemption. Second, as discussed in Section III.B, the Court is very generous in finding a law not to be religiously neutral, again in ways that are inconsistent with how it treats that issue in the race and sex discrimination arenas, so that strict scrutiny is required and, once again, a religious exemption is required. Rather than directly overrule *Smith* to permit easy invocation of strict

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272. See *Braidwood Mgmt. Inc.*, 70 F.4th at 937–40 (5th Cir. 2023) (ruling that RFRA precluded EEOC bringing an action against the employer, and not resolving how employees would receive their medication under the ACA).

273. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that Congress's imposition of the RFRA on states was unconstitutional).

274. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

275. See *supra* Section II.B.

scrutiny in these cases, the Court finds sneaky constitutional tools to allow it to avoid the *Smith* holding that neutral state laws should ordinarily invoke only rational basis scrutiny.<sup>276</sup>

The Roberts Court uses constitutional gymnastics to find an excuse to deploy strict scrutiny in religious discrimination cases, and then deploys a version of strict scrutiny that looks nothing like the version used in the race discrimination area. This is a double gymnastics feat to favor Christianity and avoid (at this time) overruling *Smith*. Under racial strict scrutiny, the requested relief is the invalidation of the state statute for everyone. Thus, in *Washington v. Davis*, the plaintiffs sought to invalidate the employment test for all applicants.<sup>277</sup> They did not seek to be exempted from rules that would still be applied to others.<sup>278</sup> In the religion area, the requested relief is an exemption merely for the plaintiff. No one had previously noticed the specialized, exemption-based version of strict scrutiny only available in the religion context. This kind of special treatment is the opposite of the Court's direction in the race context, where it will not tolerate any different treatment at all, even for the purpose of affirmative action.<sup>279</sup>

#### A. Religious Animus

This subpart will discuss two cases that involve the issue of religious animus. The decisions in these cases are in sharp contrast to the failure to consider religious animus in *Smith*. In both cases, the Court found evidence of religious animus readily in sharp contrast to how this evidence would have been handled in a race or gender discrimination case. One case—*Masterpiece Cakeshop v. Colorado Civil Rights Commission*—has received a lot of attention,<sup>280</sup> but another case—

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276. See *Emp. Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (describing two varying methods of constitutional interpretation and noting that the correct interpretation allows states to regulate activity so long as the object is not to prohibit the exercise of religion).

277. 426 U.S. 229, 232 (1976).

278. *Id.*

279. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748. (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

280. See, e.g., Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 297 (2018) (arguing that the Court has weaponized the First Amendment to protect corporations and business interests while marginalizing the interests of individuals and groups once deemed in need of the law’s protection); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination*

*Espinoza v. Montana Department of Review*<sup>281</sup>—has been largely ignored on the religious animus issue.<sup>282</sup> Together, these cases tell the story of a Court eager to find anti-Christian animus.

The *Masterpiece Cakeshop* story is probably familiar to most readers. When Charlie Craig and Dave Mullins visited the Masterpiece Cakeshop in Lakewood, Colorado, they expected to order a cake for their Denver wedding reception after the couple were legally married in Massachusetts.<sup>283</sup> Jack Phillips, owner of the bake shop, told the couple he would not create a cake for a same-sex couple.<sup>284</sup> When Craig's mother called the next day, Phillips explained that creating the cake would directly go “against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.”<sup>285</sup>

Phillips' action arguably violated the Colorado Anti-Discrimination Act<sup>286</sup> (CADA), which prohibited discrimination on the basis of sexual orientation at a public accommodation.<sup>287</sup> When Craig and Mullins filed suit against the cake shop, the State Administrative Law Judge (“ALJ”) concluded that Phillips’ conduct violated the CADA because it constituted discrimination on the basis of sexual orientation, not

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*Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201, 218, 224 (2018) (arguing that the Court should not have followed an exemption process in evaluating the plaintiff’s claim of religious discrimination); Pamela S. Karlan, *Just Desserts?: Public Accommodations, Religious Accommodations, Racial Equality, and Gay Rights*, 2018 SUP. CT. REV. 145, 177 (2018) (observing that the same Justices who objected to the Court describing those who objected to marriage equality as bigots have now deployed that logic to describe those as bigoted who seek to enforce nondiscrimination laws).

281. 140 S. Ct. 2246 (2020).

282. The religious animus finding is not discussed in the literature on the *Espinoza* case. See, e.g., *Leading Cases, First Amendment—Free Exercise Clause—Government Aid to Religious Schools—Espinoza v. Montana Department of Revenue*, 134 HARV. L. REV. 470, 479 (2020) (arguing that the decision “can steady the Court’s course moving forward and provide vital clarity in a time of intensifying clashes over the importance of religious freedom”).

283. *Masterpiece Cakeshop v. Colorado C.R. Comm’n*, 138 S. Ct. 1719, 1724 (2018).

284. *Id.*

285. *Id.*

286. COLO REV. STAT. § 24-34-601 (2021), held unconstitutional by 303 Creative LLC v. Elenis, 143 Sup. Ct. 2298, 2321–22 (2023).

287. *Masterpiece Cakeshop*, 138 S. Ct. at 1735.

simply opposition to same-sex marriage.<sup>288</sup> A finding of sexual orientation discrimination was necessary to invoke CADA.<sup>289</sup>

In defense of his conduct, Phillips raised two constitutional questions: a First Amendment right not to be compelled to use “his artistic talents to express a message with which he disagreed,” and a First Amendment right to the free exercise of religion.<sup>290</sup> On the free exercise issue, the ALJ cited *Smith*, concluding that the state law was a “valid and neutral law of general applicability” and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause.<sup>291</sup>

The Colorado Civil Rights Commission affirmed the ALJ’s decision, and the Colorado Court of Appeals affirmed the Commission’s ruling.<sup>292</sup> Again, relying on *Smith*, the court stated that the Free Exercise Clause “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability” on the ground that following the law would interfere with religious practice or belief.<sup>293</sup> The Colorado Supreme Court declined to hear the case and the U.S. Supreme Court granted certiorari on the Free Speech and Free Exercise issues.<sup>294</sup>

Because the facts were undisputed, one would think this would have been an easy case for the Court to resolve. Phillips had refused to bake the cake even without hearing about what design they preferred.<sup>295</sup> They might have chosen one of his traditional designs from a book without any request that it make mention, in any way, that they were a

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288. *Id.* at 1726.

289. See *Colorado Updates Anti-Discrimination Laws*, CIVIL RIGHTS LITIGATION GROUP (Jan. 18, 2023), <https://www.rightslitigation.com/2023/01/18/colorado-updates-anti-discrimination-laws> [https://perma.cc/5UPA-3JBQ] (describing the scope of Colorado’s antidiscrimination statute).

290. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

291. *Id.* (quoting Emp. Div. v. Smith, 494 U.S. at 879).

292. *Id.* at 1726–27.

293. *Id.* at 1727 (quoting *Smith*, 494 U.S. at 879).

294. *Id.* The Supreme Court characterized these issues as claims under the First Amendment, but the First Amendment only applies to Congress. Technically, this claim is heard through its incorporation into the Due Process Clause of the Fourteenth Amendment which applies to states. See *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) (suggesting that the Fourteenth Amendment’s due process clause incorporates some rights such as the First Amendment).

295. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

same-sex couple.<sup>296</sup> As for the religion claim, *Smith* should have easily resolved it. The Colorado law was written as one of general applicability; it was a religiously neutral law protected by *Smith*. But, of course, if the case were that simple, then there was no reason for the Supreme Court to agree to hear it. Because the case did not involve a circuit split or raise new issues, there was no reason to take the case except to reverse some aspect of long-settled precedent. And the Court did grant certiorari to reverse.

Justice Kennedy, who wrote the opinion for the Court, also authored *Romer v. Evans* (striking enforcement of Colorado's constitutional amendment that prohibited all government action that may protect against sexual orientation discrimination),<sup>297</sup> *United States v. Windsor* (striking a federal statute that discriminated against same-sex marriages),<sup>298</sup> and *Obergefell v. Hodges* (finding a constitutional right to same-sex marriage).<sup>299</sup> Yet in this case, Justice Kennedy's opinion emphasized the aspects of those prior opinions that sought to *protect* religious objections to same-sex marriage<sup>300</sup> and went to great lengths to conclude that Phillips' treatment by the Civil Rights Commission had "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."<sup>301</sup>

The state concluded Phillips had violated state law by following six steps. First, an investigator for the state Civil Rights Division conducted

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296. While the Court's holding did not center on the free speech claim, Justice Kennedy's opinion did give weight to that argument, finding that

state law also afforded storekeepers some latitude to decline to create specific messages that storekeeper considered offensive . . . . And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'

*Id.* at 1728–29.

297. 517 U.S. 620, 623–24, 635–36 (1996) (enjoining enforcement of Colorado Amendment 2 which banned sexual orientation anti-discrimination laws).

298. 570 U.S. 744, 752, 775 (2013) (overturning the part of the Defense of Marriage Act that defined "marriage" under federal law as a "legal union between one man and one woman").

299. 576 U.S. 644, 681 (2015) (overturning state laws that prohibited states from issuing marriage licenses to same-sex couples).

300. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 ("[T]he religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.").

301. *Id.* at 1729.

an investigation.<sup>302</sup> Second, based on the findings from that investigation, the seven-member Civil Rights Division found probable cause that Phillips violated state law and referred the case to the state Civil Rights Commission, which, in turn, sent the case to an ALJ for a formal hearing.<sup>303</sup> Third, the ALJ ruled in favor of Craig and Mullins.<sup>304</sup> Fourth, the seven-member Civil Rights Commission affirmed the ALJ's decision.<sup>305</sup> Fifth, the three-member Colorado Court of Appeals affirmed the Commission.<sup>306</sup> Sixth, the seven-member Colorado Supreme Court declined to hear the case, leaving the lower court of appeals decision in place.<sup>307</sup> At no step in this process did any member of any of these bodies dissent from the conclusion that Phillips had violated state law and that the plaintiffs were entitled to relief.

The U.S. Supreme Court concluded that a "neutral and respectful consideration" of Phillips' case "was compromised" by the Civil Rights Commission.<sup>308</sup> The evidence in support of this assertion were statements by two of the seven commissioners at two different hearing dates. The statements by the first commissioner were hardly evidence of bias; they merely restated the statute's requirements.<sup>309</sup> As the Court acknowledged, "they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views."<sup>310</sup> While acknowledging that more than one interpretation of those comments was possible, the Court concluded that it was more appropriate to see them as "inappropriate and dismissive . . . [i]n view of the comments that followed" by another Commissioner more than two months later.<sup>311</sup>

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302. *Id.* at 1725.

303. *Id.* at 1726.

304. *Id.*

305. *Id.* at 1725–26.

306. *Id.* at 1726–27.

307. *Id.* at 1727.

308. *Id.* at 1729.

309. These were the statements: "that Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'" *Id.* (quoting the transcript from the May 30, 2014 Commission hearing). This commissioner also stated: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." *Id.* (quoting the transcript from the May 30, 2014 Commission hearing).

310. *Id.*

311. *Id.*

At a hearing that was held two months later, another Commissioner made extensive comments about the ways religion has been used to justify discrimination and concluded with the statement “And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”<sup>312</sup> The Court concluded that that statement should be understood as disparaging someone’s religion by describing it as “despicable” and by comparing Phillips’ conduct as comparable to religious defenses of slavery or the Holocaust.<sup>313</sup> The Court considered those comments to be “inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.”<sup>314</sup> The Court’s willingness to consider this statement as reflecting religious bias, however, seems to reflect undue sympathy for people who profess Christian religious beliefs. The Commissioner did not say that the person’s religion was despicable; he merely reflected that religion has sometimes been used to harm others. That harm is despicable, not the religion itself. This kind of evidence is a far cry from what the Court requires to demonstrate animus in race or gender cases.<sup>315</sup>

What is most astonishing about this case is the willingness to find a violation of the principle of religious neutrality through an extraordinarily broad reading of the record that has no comparison to previous religious discrimination cases or comparable race and gender discrimination cases. Until *Masterpiece Cakeshop*, there was only one case

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312. *Id.* (quoting the transcript from the July 25, 2014 Commission hearing).

313. *Id.*

314. *Id.*

315. An analogous issue might be the treatment of racially biased statements during jury deliberations. The Supreme Court has only concluded on one occasion that statements made during jury deliberations reflected so much racial animus that the conviction needed to be overturned. See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861–62, 871 (2017) (holding that racially charged statements exhibiting jurors’ racial bias must be considered by courts). The statements in that case, as reported by two other jurors, were unquestionably explicit with statements such as “I think he did it because he’s Mexican and Mexican men take whatever they want.” *Id.* at 862. Admittedly, special considerations might arise in the jury process to protect deliberations, but the evidence required to overturn a jury verdict is exponentially higher than what the Court required in *Masterpiece Cakeshop*. See *id.* at 869–70 (noting that the judicial inquiry must begin with a threshold showing that one or more jurors made statements exhibiting “overt” racial bias, casting serious doubt on fairness). Chief Justice Roberts and Justices Alito and Thomas joined the dissent in *Pena-Rodriguez* but joined the majority in *Masterpiece Cakeshop*.

where the Court invalidated a government action based on the actions of a governmental decision-making body. But, in that case, *Church of Lukumi Babalu Aye v. Hialeah*,<sup>316</sup> the bias of the decisionmakers was obvious.<sup>317</sup> In response to a community's concern that members of the Santeria church would move into their community and open a church, the city enacted a resolution declaring it unlawful to practice the ritual sacrifice of animals (which was basic to the Santeria church's practices).<sup>318</sup> With *Smith* constituting the binding precedent, the Court concluded that the object or purpose of the law was to suppress religion or religious conduct, not to serve a neutral state purpose.<sup>319</sup> Using language that appeared in *Feeney*, the Court concluded “[t]hat the ordinances were enacted ‘because of,’ not merely ‘in spite of,’ their suppression of Santeria religious practice.”<sup>320</sup> In other words, as of 1993, the Supreme Court considered the proof of discriminatory intent standard under the Fourteenth Amendment's equal protection clause to be the same as the First Amendment's religious freedom clause.

Unsurprisingly, *Feeney* (as well as *Davis* and *Arlington Heights*) make no appearance in the majority opinions in *Masterpiece Cakeshop*. While the *Feeney* standard may have been appropriate to weigh evidence of religious animus in a case involving a minority religion, it is entirely absent from a case involving a Christian baker. With several layers of decisionmakers, and questionable comments from only two of those decisionmakers, it is impossible to conclude that Phillips lost “because of” rather than merely “in spite of” hostility towards his religious beliefs. No one could possibly argue that Colorado adopted its nondiscrimination statute to harm Christians. Under *Smith*, Phillips had to follow a religiously neutral state policy.<sup>321</sup> Yet, he was able to escape that state policy by criticizing two arguably innocuous statements made by two of the decisionmakers at one stage of the lengthy process.<sup>322</sup> *Masterpiece Cakeshop* can only be understood as distorting the rules for demonstrating an invidious purpose to protect

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316. 508 U.S. 520 (1993).

317. *Id.* at 547.

318. *Id.* at 526.

319. *Id.* at 534–36 (referring to text of the law, the effect of the law only on the Santeria community).

320. *Id.* at 540 (quoting *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)).

321. See *supra* text accompanying note 94.

322. See *supra* text accompanying notes 311–12.

the actions of a Christian baker. No member of a minority religion has benefitted from this generous rule of law. Even the Santeria plaintiffs in *Church of Lukumi Babalu Aye* had to meet a much higher burden of proof to prevail.

While *Masterpiece Cakeshop* has received considerable attention,<sup>323</sup> there has been scant discussion of how the Court repeated this generosity toward the Christian religion in *Espinoza v. Montana Department of Revenue*.<sup>324</sup> *Espinoza* involved a Montana state constitutional provision that prohibited any state aid to a school controlled by a “church, sect, or denomination.”<sup>325</sup> In accordance with that provision, the state had promulgated a rule prohibiting families who received a new state-supported scholarship from using it to attend a religious school.<sup>326</sup>

Three parents sued the state of Montana for refusing to allow scholarship money to be awarded to children who wished to attend a religious school.<sup>327</sup> They argued that the state “discriminated on the basis of their religious views and the religious nature of the school they had chosen for their children” to attend.<sup>328</sup> The Montana Supreme Court agreed that the state’s interpretation of the scholarship program posed constitutional problems, and ruled that the entire scholarship program needed to be invalidated to avoid conflict with the Montana constitution and the First Amendment.<sup>329</sup>

The U.S. Supreme Court reversed the Montana Supreme Court decision based, in part, on its conclusion that the state constitution’s no-aid provision should be understood as being an anti-Catholic measure that would conflict with the First Amendment.<sup>330</sup> The logical trail for this conclusion is at odds with the Court’s treatment of animus in the race or gender context. It said that the state’s “no-aid provisions

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323. See, e.g., NeJaime & Siegel, *supra* note 280, at 218, 224 (criticizing exemption from nondiscrimination law to accommodate religion); Murray, *supra* note 280, at *passim* (criticizing how the Court deployed animus doctrine in religion case in contrast to how it has treated animus in cases involving the LGBTQ community).

324. 140 S. Ct. 2246, 2256–57, 2262–63 (2020) (overturning a decision of the Montana Supreme Court that eliminated a scholarship program on the ground that it violated a state constitution no-aid provision because the Supreme Court held the no-aid provision should be subject to strict scrutiny and invalidated).

325. *Id.* at 2251.

326. *Id.* at 2252.

327. *Id.*

328. *Id.*

329. *Id.* at 2253.

330. *Id.* at 2259.

belong to a more checkered tradition shared with the Blaine Amendment of the 1870s,” because that Amendment (which never became law) was similar to the Montana constitutional provision in “prohibiting States from aiding ‘sectarian’ schools.”<sup>331</sup> The Supreme Court had previously found that “‘sectarian’ was code for ‘Catholic.’”<sup>332</sup> The fact that Montana had re-adopted its no-aid provision “for reasons unrelated to anti-Catholic bigotry” in the 1970s did not cure the provision of its anti-Catholic history.<sup>333</sup> According to the Supreme Court, Montana’s application of a no-aid provision invoked strict scrutiny and could not be justified.<sup>334</sup> Thus, the Montana Supreme Court was not entitled to enter a remedy that barred aid to religious schools. The program needed to be left intact with aid to both religious and non-religious schools.<sup>335</sup>

In Justice Alito’s concurrence, he justified the majority’s concern for the “original motivation” of laws even when those laws are readopted in later years “under different circumstances.”<sup>336</sup> His justification for that rule was consistent with a race discrimination case, *Ramos v. Louisiana*,<sup>337</sup> that was brought under the Sixth Amendment.<sup>338</sup> The *Ramos* Court had emphasized the role of the Ku Klux Klan when it invalidated the challenged rule.<sup>339</sup> But, as Justice Sotomayor explained in her concurrence, *Ramos* did not bring an equal protection challenge to the Louisiana law, despite its sordid history of racial animus.<sup>340</sup> Justice Alito mischaracterized the *Ramos* decision to cite it as a reason to give weight to a history that cannot be explained in contemporary times. But Justice Alito uses the *Ramos* case (in which he dissented) as an excuse to offer a long history of anti-Catholic bias in the United States.<sup>341</sup> And, in *Espinoza*, Justices Thomas and Gorsuch give a long history of “hostility toward certain disfavored religions” in their

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331. *Id.*

332. *Id.* (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion), remanded to *sub nom. Helms v. Picard*, 229 F.3d 467 (5th Cir. 2000)).

333. *Id.*

334. *Id.* at 2260.

335. *Id.* at 2261 (“A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”).

336. *Id.* at 2268 (Alito, J., concurring).

337. 140 S. Ct. 1390 (2020).

338. *Espinoza*, 140 S. Ct. at 2267–68 (Alito, J., concurring).

339. *Ramos*, 140 S. Ct. at 1394.

340. *Id.* at 1410 (Sotomayor, J., concurring).

341. *Espinoza*, 140 S. Ct. at 2268–74 (Alito, J., concurring).

concurrence, including descriptions of past Supreme Court precedent which it described as “hostile” to certain religions, especially Catholicism.<sup>342</sup>

But these kinds of broad claims of racial or gender bias have never been sufficient to establish the requirement of “purposeful” discrimination under the Fourteenth Amendment’s equal protection clause. In *Feeney*, for example, the Court had to recognize that the absolute veterans’ preference system was created at a time when women were excluded from most positions in the U.S. military.<sup>343</sup> Yet, the connection between Massachusetts’ absolute veterans’ preference and women’s exclusion from U.S. military service was not connected in the way that the *Espinoza* Court was so eager to connect the failed Blaine Amendment to a contemporary rule in the state of Washington. Similarly, in *Davis*, a history of exclusion of African-Americans from the police force was not considered relevant to the current impact of a racially discriminatory qualifying exam.<sup>344</sup> These kinds of connections are only made in cases involving religion.

In showing the Court’s willingness to find anti-religious bias, this Article does not mean to discount the reality of the Ku Klux Klan and its anti-Catholic bias in U.S. life. But African-Americans have faced a history of slavery and lynchings at the hands of the Ku Klux Klan. Yet, that history does not get emphasized by the Courts’ conservatives who are eager to find anti-religious animus from isolated statements made by some decisionmakers.

### B. Religious Neutrality

The Roberts Court has also used the tool of “religious neutrality” to protect Christian domination, again in a way that it has never employed that tool in the race or gender contexts. It also misreads *Smith* to pursue that argument. The case that best reflects this development is *Fulton v. City of Philadelphia*.<sup>345</sup> *Fulton* involved the constitutionality of nondiscrimination requirements found in a contractual provision, which prohibited a foster care licensing entity from considering sexual orientation in their decision-making

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342. *Id.* at 2266–67 (Thomas, J., concurring).

343. Pers. Adm’r of Massachusetts v. Feeney, 442 U.S. 256, 271, 273–74 (1979), remanded to 475 F. Supp. 109 (D. Mass. 1979), *aff’d*, 445 U.S. 901 (1980).

344. *Washington v. Davis*, 426 U.S. 229, 246 (1976).

345. 141 S. Ct. 1868 (2021).

process.<sup>346</sup> The Court found *Smith* to be the appropriate precedent but concluded this requirement could not be considered a religiously neutral rule.<sup>347</sup> Because it was considered religiously based, it was subject to strict scrutiny.<sup>348</sup> The Court ordered the Christian plaintiff to receive an exemption from the city's nondiscrimination ordinance.<sup>349</sup> Strict scrutiny, once again, resulted in an exemption rather than an invalidation of the ordinance itself.

At first glance, the lack of religious neutrality is a surprising conclusion. The provision required the application of a sexual orientation nondiscrimination rule "unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."<sup>350</sup> The *Fulton* Court then blew up that exception clause to control the outcome of the case, relying on dicta from *Smith* that seemingly only controlled unemployment compensation cases.

But it is wrong to understand *Smith* as a case that sought to expand the possibility of exemptions for religious practitioners when there is any suggestion of religious non-neutrality. The *Smith* Court emphasized that it had "never invalidated any governmental action . . . except the denial of unemployment compensation."<sup>351</sup> It required parents of a Native American child to provide social security numbers in order to receive federal benefits, even though providing the numbers violated their religious beliefs.<sup>352</sup> It ruled that the Free Exercise Clause did not preclude the federal government from harvesting timber and engaging in road construction in an area of national forest that was "traditionally . . . used for religious purposes by members of three [Native American] tribes."<sup>353</sup> It concluded that Jews could not make a free exercise claim to be exempted from a military dress regulation that forbid the wearing of yarmulkes.<sup>354</sup> And it concluded that Muslim prisoners had no free exercise right to be

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346. See *id.* at 1878 (quoting standard foster care contract). The city had also maintained that a city ordinance also required nondiscrimination in this type of situation, but the Court found that the ordinance did not cover foster care service entities. *Id.* at 1879–81.

347. *Id.* at 1877–79.

348. *Id.* at 1879.

349. *Id.* at 1882.

350. *Id.* at 1878.

351. Emp. Div. v. Smith, 494 U.S. 872, 883 (1990).

352. Bowen v. Roy, 476 U.S. 693, 700–01 (1986).

353. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988).

354. Goldman v. Weinberger, 475 U.S. 503, 504 (1986).

excused from work requirements during the time of their worship services.<sup>355</sup>

*Smith* stood strongly for the proposition that government should not be expected to survive strict scrutiny (or a compelling interest test) to enforce generally applicable laws that may burden some people's religious exercise. The decision was an act of judicial modesty, not judicial encroachment. Thus, Justice Scalia, writing for the majority said: "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."<sup>356</sup>

Yet, the *Fulton* Court did exactly what Scalia cautioned against. It ignored the prefatory statement: "our decisions in the unemployment cases stand for the proposition," as well as the final cautionary statement quoted above.<sup>357</sup> The *Fulton* Court required an entity to create a religious exemption if any kind of exemption process existed in a statute. Under the *Fulton* Court's reading of *Smith*, the *Smith* case was wrongly decided. Under that reading, the state of Oregon would have been required to use its individualized unemployment compensation process to create an exemption for the plaintiffs.

The *Fulton* Court also overread the relevant contractual provision in reaching its decision. While the contractual clause, in theory, permitted exemptions, "the Commissioner ha[d] never granted one."<sup>358</sup> Thus, like everyone else, Catholic Charities was subject to a no-exemption policy.

Further, the Court's over-the-top praise for Catholic Charities is exactly what Scalia warned against in *Smith*. At the beginning of the opinion, the *Fulton* Court describes the two centuries of work that the Catholic Church has done for "the needy children of Philadelphia."<sup>359</sup> At the end of the opinion, the Court highlights the City's characterization of Catholic Charities as a long-held "point of light in the City's foster-care system."<sup>360</sup> Justice Scalia warned against a system in which "judges weigh the social importance of all laws against the

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355. *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 344–46 (1987), remanded to 829 F.2d 32 (3rd Cir. 1987).

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

357. *Id.* at 884.

358. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1879 (2021).

359. *Id.* at 1874.

360. *Id.* at 1882.

centrality of all religious beliefs.”<sup>361</sup> He cautioned against the overuse of strict scrutiny’s compelling interest test because “any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.”<sup>362</sup>

The actual use of strict scrutiny in the religion context may be even worse than Scalia feared. It has been deployed selectively to favor Christians. *Smith* ratified the prior precedent in which Native Americans, Jews, and Muslims were unable to persuade the court to employ strict scrutiny so that they could attain religious exemptions. But, as misinterpreted by the *Fulton* Court, *Smith* is interpreted to open the door widely to claims of religious non-neutrality when cases are brought by Christians. As discussed in Part I, *Smith* never even considered the possibility that Oregon had treated the members of the Native American Church non-neutrally even though such evidence existed. *Fulton*’s use of the non-neutrality clause from *Smith* is inconsistent with the fundamental thrust of that opinion. Yet, that is now the rule as Christians race to the courts with claims of religious mistreatment.

Again, let us imagine what would happen if this set of rules applied in the context of race or gender discrimination. In *Arlington Heights*, the city had a zoning enforcement process that allowed exemptions to its rules about occupancy.<sup>363</sup> The enforcement of the general rules had a disparate impact against developers who were trying to build racially integrated housing.<sup>364</sup> Under the *Fulton* analysis, they should have been able to insist upon an exemption unless the city could meet the strict scrutiny test.<sup>365</sup> But the *Arlington Heights* Court considered the zoning laws to be racially neutral and did not consider the availability of exemptions as constitutionally relevant.<sup>366</sup> Under a *Fulton* theory, the city of Arlington Heights should have been required to provide a zoning exemption to the developers, especially when one considers how zoning laws have been historically used to maintain racial

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

362. *Id.* at 888.

363. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 257 (1977), remanded to 558 F.2d 1283 (7th Cir. 1977), remanded to 469 F. Supp. 836 (N.D. Ill. 1979), aff’d, 616 F.2d 1006 (7th Cir. 1980).

364. *Id.* at 269.

365. See *supra* text accompanying notes 345–49, 357–58.

366. *Arlington Heights*, 429 U.S. at 269.

inequality and segregation.<sup>367</sup> It is hard to understand why exemptions are required in the religion but not the race context. One should not need to be a religious “point of light” to receive fair treatment from the legislative and judicial process.

#### IV. THE DEATH OF CONGRESS'S SECTION FIVE POWERS

Congress responded to *Smith* with bipartisan legislation that provided an exemption for religious adherents unlike any kind of legal standard that has been developed in the civil rights arena. Even a conservative Supreme Court, which might be inclined to protect Christians from neutral laws, could determine that Congress had gone too far when it crafted RFRA. But, unfortunately, the Court's decision in *City of Boerne*, which overturned parts of RFRA,<sup>368</sup> did little to stop Christian domination while undercutting Congress's power to enact civil rights law.

##### A. City of Boerne v. Flores

###### 1. The facts

*City of Boerne* began as a dispute between the Archbishop and the City of Boerne over his desire to expand St. Peter Church so that more congregants could attend Mass.<sup>369</sup> When the city denied the church a permit to expand, the Archbishop brought a lawsuit challenging the permit denial under RFRA.<sup>370</sup> Because the district court concluded that Congress exceeded its enforcement powers under Section Five of the

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367. See, e.g., Chair Cecilia Rouse, Jared Bernstein, Helen Knudsen & Jeffrey Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market> [https://perma.cc/RQC7-E7EP] (exploring the numerous policies that have systematically made it difficult for Black families to live in certain neighborhoods); Michael H. Wilson, *The Racist History of Zoning Laws*, FOUND. FOR ECON. EDUC. (May 21, 2019), <https://fee.org/articles/the-racist-history-of-zoning-laws> [https://perma.cc/DV2E-XK58] (exploring the history of zoning laws used to achieve racially discriminatory ends).

368. 521 U.S. 507, 536 (1997).

369. *Id.* at 512.

370. *Id.*

Fourteenth Amendment in enacting RFRA, it ruled that RFRA was unconstitutional and entered a partial final judgment for the city.<sup>371</sup>

As in *Smith*, there was some suspicious evidence of anti-religious bias that may have influenced the city's decision. After the Archbishop gave permission to enlarge the parish, the Boerne City Council passed an ordinance authorizing the preparation of a historic preservation plan.<sup>372</sup> St. Peter Church was not designated as a historic landmark; it appeared that only the facade was included.<sup>373</sup> But the Landmark Commission took the position that the entire structure was within the historic district, and denied a request to enlarge the church that did not affect the church's façade.<sup>374</sup> The City Council denied the church's appeal from the decision of the Commission.<sup>375</sup> Then, "the church filed this suit seeking a judicial declaration that the Ordinance was unconstitutional."<sup>376</sup>

Following the Supreme Court's decisions in *Masterpiece Cakeshop* and *Fulton*, one might ask whether the city applied its rules in a neutral fashion. Was the historical landmark ordinance enacted to make it difficult for the church to expand? Was there bias in determining that the entire church, rather than merely the façade, was covered by the ordinance? Thus, notwithstanding *Smith*, was the church entitled to relief as a victim of religious bias? Because of the rush to declare RFRA unconstitutional, those issues never got addressed. And because Texas rushed to pass its own version of RFRA following the Supreme Court decision in this case, there was no need to file an additional lawsuit charging the city with anti-religious bias. The church could simply move forward to obtain an exemption through its state RFRA.

## 2. The litigation

Concluding that RFRA was unconstitutional was an easy judicial exercise. It is a bedrock principle of constitutional law since *Marbury v. Madison*<sup>377</sup> that the courts, rather than Congress, interpret the

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371. See *Flores v. City of Boerne*, 877 F. Supp. 355, 358 (W.D. Tex. 1995) (holding that RFRA is unconstitutional and ordering an expedited interlocutory appeal to the Fifth Circuit), *rev'd*, 73 F.3d 1352 (5th Cir. 1996); *see also Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996) (referring to the district court entering a "partial final judgment"), *rev'd*, 521 U.S. 507 (1997).

372. *City of Boerne*, 521 U.S. at 512.

373. *Flores*, 73 F.3d at 1354.

374. *Id.*

375. *Id.*

376. *Id.*

377. 5 U.S. 137 (1803).

Constitution.<sup>378</sup> Yet, through RFRA, Congress stated that one of its purposes was to “restore the compelling interest test,” while also criticizing the *Smith* case as “virtually eliminat[ing] [that] requirement.”<sup>379</sup> It boldly sought to overturn *Smith* through legislation.

Because RFRA was so blatantly unconstitutional, the Court could have written a short opinion citing *Marbury*, as had the district court.<sup>380</sup> Even the dissenters agreed that Congress was seeking to overturn *Smith* in enacting RFRA. But they concluded that *Smith* was wrongly decided, so that RFRA would merely “put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress.”<sup>381</sup>

The challenge for the *City of Boerne* Court was that it thought it needed to offer a test for distinguishing between cases where Congress properly and improperly sought to use its remedial authority under Section Five of the Fourteenth Amendment, even though no one doubted that RFRA was on the impermissible side of the ledger.

Section Five of the Fourteenth Amendment gives Congress the power to “enforce” the provisions of the Fourteenth Amendment.<sup>382</sup> Historically, the Court has described this power as “remedial.”<sup>383</sup> In *City of Boerne*, the Court emphasized that the power to “enforce” does not include the “power to determine what constitutes a constitutional violation.”<sup>384</sup> That bright line rule made it easy to conclude that Congress was substantively trying to change what constitutes a constitutional violation when it enacted RFRA. It was seeking to tell the courts that *Smith* was wrongly decided.

The problem with this bright line rule is that it could not easily be reconciled with previous case law. In particular, it was difficult to reconcile this rule with prior cases interpreting Congress’s power to enact key elements of voting rights legislation pursuant to their parallel

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378. *Id.* at 177.

379. *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997).

380. See *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995) (relying on *Marbury* to find RFRA unconstitutional in a brief four-page opinion), *rev’d*, 73 F.3d 1352 (5th Cir. 1998).

381. *City of Boerne*, 521 U.S. at 545 (1997) (O’Connor, J., dissenting); see also *City of Boerne*, 521 U.S. at 565 (1997) (Souter, J., dissenting) (expressing “serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence”).

382. U.S. CONST. amend. XIV, § 5.

383. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966).

384. *City of Boerne*, 521 U.S. at 519.

power to enforce the Fifteenth Amendment.<sup>385</sup> The thorniest example was Congress's response to the Supreme Court decision in *Lassiter v. Northampton County Board of Elections*<sup>386</sup> in which the Court upheld the facial validity of a North Carolina statute that required all prospective voters to "be able to read and write any section of the Constitution of North Carolina in the English language."<sup>387</sup> While recognizing that literacy requirements can "be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot," a unanimous Court agreed that the North Carolina rule was a

fair way of determining whether a person is literate, not a calculated scheme to lay springs for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot.<sup>388</sup>

Despite the decision in *Lassiter*, Congress included a provision in the Voting Rights Act of 1965<sup>389</sup> that "suspend[ed] literacy tests and similar devices for a period of five years from the last occurrence of substantial voting discrimination."<sup>390</sup> That rule condemned literacy tests *on their face* without a requirement of demonstrating racial animus.<sup>391</sup> Nonetheless, by an 8-1 vote, the Court upheld that provision of the Voting Rights Act,<sup>392</sup> explaining that

the record shows that in most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising [Black people], have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years.<sup>393</sup>

Thus, North Carolina (the plaintiff in *Lassiter*) could presumably now be denied the ability to institute a literacy test because "most of the States" have used literacy tests in a discriminatory fashion.<sup>394</sup> The practical effect of the Voting Rights Act was to overturn *Lassiter*.

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385. See U.S. CONST. amend. XV, § 2 (granting Congress the "power to enforce" the provisions of the Fifteenth Amendment).

386. 360 U.S. 45 (1959).

387. *Id.* at 53–54.

388. *Id.*

389. 52 U.S.C. § 10101(a)(2)(C).

390. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

391. See *id.* at 338, 341 (banning any "test or device" used "for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color").

392. *Id.* at 337.

393. *Id.* at 333–34.

394. *Id.* at 333.

Similarly, in *Katzenbach v. Morgan*,<sup>395</sup> a unanimous Supreme Court upheld a provision of the Voting Rights Act that affected English literacy requirements imposed by the state of New York that would harm its Spanish-speaking population, particularly those who migrated to New York from the Commonwealth of Puerto Rico.<sup>396</sup>

The *Katzenbach* Court offered a different distinction than the *City of Boerne* Court to determine whether Congress had exceeded its Section Five authority. It said that Congress could enforce the Equal Protection Clause through measures “plainly adapted to that end” so long as it is consistent with, but not prohibited by, the “letter and spirit of the [C]onstitution.”<sup>397</sup> That broad statement by the majority invoked a response by the dissent that such a rule might be too broad.<sup>398</sup> The majority responded with the following statement:

§ 5 does not grant Congress power to exercise discretion in the other direction and to enact ‘statutes so as in effect to dilute equal protection and due process decisions of this Court.’ We emphasize that Congress’[s] power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.<sup>399</sup>

Under the *Katzenbach* rule, then, the issue in *City of Boerne* would have been whether RFRA was enforcing or diluting the protections of the Fourteenth Amendment with respect to religious discrimination.

But *City of Boerne* rejected that one-way ratchet approach. While recognizing that there was language in *Katzenbach* that could be interpreted to mean that Congress has the power “to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment,” that is “not a necessary interpretation” or “even the best one.”<sup>400</sup> The better interpretation, according to the Court, was that the Voting Rights Act provision was justifiable as a “measure to deal with ‘discrimination in governmental services’” or protect against an “invidious discrimination in violation of the Equal Protection Clause.”<sup>401</sup> The enforcement versus dilution distinction was gone, because that distinction interfered with the Court’s power to ensure that the Constitution be “superior[,] paramount law, unchangeable by

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395. 384 U.S. 641 (1966).

396. *Id.* at 658.

397. *Id.* at 650 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

398. *Id.* at 668 (Harlan, J., dissenting).

399. *Id.* at 641 n.10 (majority opinion).

400. *City of Boerne v. Flores*, 521 U.S. 507, 527–28 (1997).

401. *Id.* at 528 (quoting *Katzenbach*, 384 U.S. at 653, 656).

ordinary means.”<sup>402</sup> To hold otherwise would risk “shifting legislative majorities” and changing the Constitution without use of the amendment process.<sup>403</sup>

Rejecting the *Katzenbach* one-way ratchet approach left the Court with a difficult issue. Section Five of the Fourteenth Amendment must be understood to have some meaning. It must be giving power to Congress that would not otherwise exist in the Constitution. It must therefore do more than give Congress the power merely to ban conduct that the Court had already found unconstitutional. The Court got around that problem by saying Congress could enact what it called “preventive rules” as appropriate remedial measures.<sup>404</sup> But “preventive rules” were not “substantive” measures.<sup>405</sup>

What constitutes an appropriate “remedial” measure? *City of Boerne* said that preventive rules are appropriate remedial measures when there is a “congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”<sup>406</sup>

RFRA failed the congruence and proportionality test for many reasons. Its “legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.”<sup>407</sup> Its “sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”<sup>408</sup> Its “stringent test” is too demanding.<sup>409</sup> It exacts “substantial costs.”<sup>410</sup> By contrast, the Court concluded that the various civil rights statutes that have faced Section Five challenges have had none of these problems.<sup>411</sup> They were an appropriate and proportional response to the serious problem of race discrimination.<sup>412</sup>

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402. *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

403. *Id.* at 529.

404. *Id.* at 530.

405. *Id.* at 527, 530.

406. *Id.* at 530.

407. *Id.*

408. *Id.* at 532.

409. *Id.* at 533.

410. *Id.* at 534.

411. *Id.* at 532–33.

412. *Id.*

The *City of Boerne* majority consisted of Justices Kennedy, Rehnquist, Stevens, Thomas, and Ginsburg. Justice Scalia concurred separately, joining most of the majority's opinion. It included two of the Court's most liberal Justices (Stevens and Ginsburg), who likely understood the Court's decision as not threatening civil rights statutes.

### B. Constitutional Impact of City of Boerne

On its face, *City of Boerne* would appear to be a setback for religious entities that sought to expand their facilities in conflict with local zoning laws. But Congress and the states quickly reversed that problem.

By unanimous consent, Congress enacted the Religious Land Use and Institutionalized Persons Act<sup>413</sup> (RLUIPA), which used the Spending Clause (rather than Section Five of the Fourteenth Amendment) to require localities that receive federal funding to provide religious exemptions, as would have occurred under RFRA.<sup>414</sup> The Supreme Court upheld RLUIPA in 2005, when Ohio sought to argue that it violated the Establishment Clause by impermissibly advancing religion by bestowing benefits to religious prisoners that were not available to non-religious prisoners.<sup>415</sup>

States also rushed to enact their own RFRAAs with language that went far beyond land use and institutionalized persons.<sup>416</sup> Texas enacted its own RFRA in 1999, which would appear to have offered relief to the Archbishop in *City of Boerne* who sought to expand the size of his church despite the applicable zoning regulations.<sup>417</sup> Unlike the plaintiffs in *Smith*, who never benefitted from the state's amendment of its drug laws or Congress's passage of RFRA, the Archbishop likely did eventually get permission to expand his church.

The more dramatic impact of *City of Boerne* has been on the ability of Congress to enact civil rights legislation. The liberals who joined the *City of Boerne* majority contested this development, but it has

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413. 42 U.S.C. § 2000cc.

414. *Cutter v. Wilkinson*, 544 U.S. 709, 714–15 (2005).

415. See *id.* at 721, 725 (2005) (unanimously upholding RLUIPA in the prison context since the government had already severely burdened the prisoners' religious rights through incarceration).

416. See *Religious Freedom Restoration Act Information Central*, *supra* note 48 (noting that 28 states have enacted RFRAAs).

417. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–012 (West 1999) (requiring government to demonstrate that statute, which has a substantial burden on a person's free exercise of religion, is "in furtherance of a compelling government interest" and is "the least restrictive means of furthering that interest").

strengthened over time, as the Court has grown increasingly conservative.

In 2000, the Supreme Court ruled in *Kimel v. Florida Board of Regents*,<sup>418</sup> that Congress could not use its Section Five authority to protect state employees under the Age Discrimination in Employment Act.<sup>419</sup> Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented on sovereign immunity grounds, but their dissent did not even discuss Congress's authority under Section Five following the *City of Boerne* decision.<sup>420</sup>

The Court also ruled in 2000 that Congress could not use its Commerce Clause or Section Five authority to protect women under the Violence Against Women Act.<sup>421</sup> Once again, Justices Souter, Stevens, Ginsburg, and Breyer dissented, but their dissents mostly considered the Commerce Clause issue.<sup>422</sup> In a part of his dissent joined only by Justice Stevens, Justice Breyer observed that he "need not consider Congress's authority under § 5 of the Fourteenth Amendment," but that he "doubt[ed] the Court's reasoning rejecting that source of authority."<sup>423</sup>

In 2001, the Court held that Congress could not use its Section Five authority to protect state employees from employment discrimination under the Americans with Disabilities Act.<sup>424</sup> For the first time, the dissenters (Justices Breyer, Stevens, Souter, and Ginsburg) challenged the Court's developing Section Five jurisprudence. They said that "the Court's harsh review of Congress's use of its § 5 power is reminiscent of the similar (now-discredited) limitation that it once imposed upon Congress's Commerce Clause power."<sup>425</sup> They argued that the Court has "improperly invade[d] a power that the Constitution assigns to Congress" by invalidating these legislative protections for individuals with disabilities.<sup>426</sup> Somewhat ironically, the Court criticized prior attempts to restrict Congress's Commerce Clause authority, even

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418. 528 U.S. 62 (2000).

419. *Id.* at 91–92.

420. *See id.* at 98 (Stevens, J., dissenting) (criticizing the majority for unnecessarily resolving "vexing questions of constitutional law respecting Congress'[s] § 5 authority").

421. *United States v. Morrison*, 529 U.S. 598, 605, 627 (2000).

422. *Id.* at 628 (Souter, J., dissenting).

423. *Id.* at 664 (Breyer, J., dissenting).

424. *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001).

425. *Id.* at 387 (Breyer, J., dissenting).

426. *Id.* at 388–89.

though the current Court was also engaging in those restrictions. In other words, the Section Five restrictions were part of, rather than contrary to, restrictions on Congress's authority under the Commerce Clause (also in the civil rights context).<sup>427</sup> In other words, this Court was using any available authority to limit Congress's power to enact civil rights legislation as it went out of its way to protect Christians from discrimination.

In a narrow decision, the Court in 2003 upheld Congress's ability to enact the family leave provisions of the Family and Medical Leave Act (FMLA).<sup>428</sup> But, then, in 2012, it overturned the parts of the FMLA that permitted employees to take leave when they became seriously ill.<sup>429</sup> The 2012 decision was remarkable because it required the Court to maintain its long-held position that pregnancy discrimination is not sex discrimination.<sup>430</sup> Thus, Congress could not justify its desire to provide twelve weeks of leave to all employees facing a serious health condition, including pregnant employees, under Congress's Section Five power to prevent sex discrimination.<sup>431</sup> In dissent, Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan), argued that that provision must be understood as core to Congress's attempt to protect women from gender discrimination.<sup>432</sup> It sought to "make it feasible for women to work while sustaining family life."<sup>433</sup> Once again, the dissent took aim at the ways the Court was using its authority to diminish Congress's ability to enact legislation designed to help a disadvantaged group in society. The Court had now limited Congress's authority to protect older workers, disabled workers, and women.

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427. See, e.g., *Morrison*, 529 U.S. at 627 (majority opinion) (invalidating parts of the Violence Against Women Act as going beyond Congress's Commerce Clause authority).

428. See *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 738–40 (2003) (finding the FMLA "congruent and proportional to its remedial object" and designed to prevent unconstitutional behavior).

429. See *Coleman v. Ct. of Appeals of Maryland*, 566 U.S. 30, 35, 37, 43–44 (2012) (upholding the Fourth Circuit's distinguishment of this self-care provision from the family-care provisions in *Hibbs* because, unlike the family-care provisions, the self-care provision lacks congruence and proportionality to the States' alleged sex discrimination).

430. *Id.* at 38.

431. *Id.* at 39.

432. *Id.* at 47 (Ginsburg, J., dissenting).

433. *Id.* at 65.

The next logical step would be for the Court to restrict Congress's authority to protect racial civil rights.<sup>434</sup> *City of Boerne* had claimed to protect that area of congressional activity. In 2013, in *Shelby County v. Holder*,<sup>435</sup> the Court nevertheless suggested that racial civil rights laws are not free from attack. The Court invalidated the preclearance requirements of the Voting Rights Act of 1965 without directly mentioning Congress's Section Five authority.<sup>436</sup> But, in language that was reminiscent of *City of Boerne*, the Court chastised Congress for using a preclearance formula that was based on forty-year-old facts.<sup>437</sup> It did not need to cite *City of Boerne* to follow its logic. This Court would no longer defer to Congress's desire to protect civil rights in the areas of race, gender, age, or disability. And the Court would never have rendered the decision in *City of Boerne* if Congress had not overreacted to the denial of unemployment compensation for two members of the Native American Church in Oregon. Oregon's unfortunate participation in a history of discrimination against participants in a Native American ceremony should have been invalidated in *Smith*. The Court's error in *Smith* has had unfortunately long tendrils. Who would have thought that an unemployment compensation denial in Oregon could be the foundation for the unraveling of Congress's authority to enact civil rights laws?

#### CONCLUSION

The damage may be irreversible. The transition from *Smith* to RFRA to *City of Boerne* has embedded Christian domination in our constitutional framework, while also damaging Congress's ability to enact civil rights legislation. One cruel irony is that the Black church was a crucial factor in the mobilization for and passage of many of the

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434. Thus, it is unsurprising that Justice Thomas relied heavily on *City of Boerne*, in a dissent joined by Justices Gorsuch, Barrett, and Alito, to argue that the Constitution cannot be interpreted to permit the Court to interpret section two of the Voting Rights Act to invalidate Alabama's apportionment of congressional seats. See *Allen v. Milligan*, 143 S. Ct. 1487, 1520–21, 1544 (2023) (Thomas, J., dissenting). The Supreme Court is one vote away from invalidating judicial oversight of congressional districts on the basis of race.

435. 570 U.S. 529 (2013).

436. *Id.* at 550–55.

437. *Id.* at 554.

civil rights acts.<sup>438</sup> Christianity does not have to stand opposed to civil rights progress and legislation, yet existing doctrine emboldens that position. Reversing *Smith* would merely further empower Christianity and weaken civil rights protection. Reversing *City of Boerne* would do little to protect the civil rights laws the Court has already invalidated. It is unrealistic that Congress would re-enact many of these measures even if it were constitutionally possible.

RFRA's version of strict scrutiny, which religious conservatives want to embed in First Amendment doctrine,<sup>439</sup> would tilt U.S. society back toward the colonial era in which Christian domination was well accepted. It would allow Christians to escape compliance with many civil rights laws and further intrude on the reproductive rights of women and the ability of gay men to protect themselves from HIV infection. Although religious conservatives claim that they want to interpret rather than update the Constitutional text, they conveniently seek to re-write it to serve their values by ignoring both the plain language of the First Amendment and the important contributions of the Civil War Amendments. By naming their strategy as one of maintaining and even strengthening a Christian nation, we may be able to fight its inevitability.

*Smith* was misframed. Prohibitions of sacramental peyote use can only be understood as an expression of animus towards members of the Native American Church. *City of Boerne* may also have been incorrectly decided. The zoning denial may have been an expression of an anti-Catholic bias in the community. Correcting those errors, however, should not have resulted in the desecration of Congress's Section Five power to enforce the Fourteenth Amendment.

Thus, the Court's misinterpretation of nondiscrimination protection reifies the power dynamic that the Reconstruction Amendments were designed to upend. Their decisions support white supremacy by weakening the enforcement of civil rights protections. Christians can obtain truck-size exemptions from religiously neutral laws without any requirement to prove religious animus while civil

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438. See Marilyn Mellowes, *The Black Church*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/godinamerica/black-church> [https://perma.cc/ 2DP4-8CQJ] (last visited May 17, 2023) (discussing the origins and influence of the Black church on the civil rights movement).

439. See *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring) (arguing that *Smith* should be overturned and likely replaced with “[a] law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest”).

rights plaintiffs can only attain relief from neutral laws when they meet an impossibly high threshold of proof. These exemptions can even adversely impact others while the Court minimizes that harm. Civil rights laws should not be the sacrificial lamb of religious freedom.

To conclude, it is helpful to step back and see the vastly different responses of the Roberts Court to claims of religious and racial discrimination. Religious claims of discrimination are given highly favorable treatment even without evidence of anti-religious animus. The religion cases have resulted in protection for Christians from neutral laws even when those protections cause harm to others. By contrast, racial claims of discrimination must be supported by strong evidence of racial animus. A desire to use any kind of racial preference to remedy a history of slavery and segregation is not considered a valid justification for race-based remedial measures because those measures are conceptualized as harming “innocent whites.”<sup>440</sup> A Court that is so committed to formal equality in the race area has no hesitancy to promote Christian favoritism in the religion area by creating exemptions that have no parallel in civil rights doctrine. Christian favoritism needs to be unmasked. Christian favoritism needs to end. The Court should stop using Christian favoritism as one more tool to undermine the protection of civil rights.

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440. See David Simson, *Whiteness as Innocence*, 96 DEN. L. REV. 635, 695 (2019) (tracing “Whiteness as Innocence ideology” to justify hostility to race-conscious remedies).

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