2015

Intentional Discrimination in Establishment Clause Jurisprudence

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INTENTIONAL DISCRIMINATION IN ESTABLISHMENT CLAUSE JURISPRUDENCE

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* Professor of Law, University of Miami School of Law. Many thanks to Michael Cheah, Fred Gedicks, Jessie Hill, Bill Marshall, Lisa Shaw Roy, and participants at the Fifth Annual Law and Religion Roundtable. Thanks are also due to Brooke Flanders for excellent research assistance and the *Alabama Law Review* for excellent editing.

ABSTRACT

In Town of Greece, New York v. Galloway, *the Supreme Court upheld a legislative prayer practice with overwhelmingly Christian prayers in part because the Court concluded that the exclusion of all other religions was unintentional. This requirement—that a religiously disparate impact must be intentional before it amounts to an establishment violation—is new for Establishment Clause doctrine. An intent requirement, however, is not new for equal protection or free exercise claims. This Essay explores the increased symmetry between the Establishment Clause, the Equal Protection Clause, and the Free Exercise Clause. It argues that many of the critiques of the intentional discrimination standard made in the equal protection context apply in the establishment context. It also argues that free exercise and establishment jurisprudence still differ substantially despite their superficial symmetry.*

INTRODUCTION

In *Town of Greece, New York v. Galloway*,[1] the Supreme Court upheld a legislative prayer practice despite the fact that almost all prayers given were Christian. Greece is a small town in upstate New York.[2] Starting in 1999, an invited member of the clergy—the "chaplain for the month"—would give a prayer before the start of the Town's monthly board meetings.[3] Until complaints were lodged, all the chaplains were Christians, as were all the chaplains selected after the town prevailed in the district court.[4]

At first, the Town chose these unpaid chaplains by calling congregations in the town directory and asking for volunteers.[5] Later, it relied on a list of people who had agreed to come.[6] All the listed congregations were Christian. While there was a Buddhist temple in town, it was not included in the town directory, perhaps because of its out-of-

1. 134 S. Ct. 1811 (2014).

2. *Id.* at 1816.

3. *Id.*

4. After complaints, the Town invited a Jewish layperson and the chair of the local Baha'i temple. (It is not clear from the decision where the Baha'i temple was located.) A Wiccan priestess who volunteered after reading about the issue in the local paper was also invited. *Id.* at 1816–17.

5. *Id.* at 1816. Specifically, "[f]or the first four years of the practice, a clerical employee in the office would randomly call religious organizations listed in the Greece 'Community Guide,' a local directory published by the Greece Chamber of Commerce, until she was able to find somebody willing to give the invocation." *Id.* at 1828 (Alito, J., concurring).

6. *Id.* at 1816 (majority opinion).

town mailing address.[7] Also excluded were several Jewish synagogues just outside of the Town.[8]

Town officials did not advise that the chaplains give nonsectarian prayers; instead, they provided no instructions regarding the content.[9] As a result, many of the prayers were explicitly Christian. It was not unusual to have prayers along the lines of: "We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter."[10] Prayers regularly closed with phrases such as "in the name of Jesus Christ."[11]

The Supreme Court upheld the Town's practice despite its pervasive Christianity on the ground that the exclusion of all other religions was not intentional. It just happened that most of the Town's congregations were Christian, and it just happened that the Town decided to invite only clergy with congregations in town.[12] As the majority explained: "Although most of the prayer givers were Christian, this fact reflected only the predominately Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths."[13] The exclusion of the Jewish synagogues just beyond the town limits resulted not from animus but a mistake that was "at worst careless."[14] Indeed, in a concurring opinion, Justice Alito emphasized that he "would view this case very differently if the omission of these synagogues were intentional."[15]

This requirement—that a religiously disparate impact must be intentional before it amounts to an Establishment Clause violation—is new for Establishment Clause doctrine. It is not, however, new for Equal Protection Clause doctrine, which has for decades required both discriminatory impact and discriminatory intent in order to merit any kind of heightened scrutiny. Thus, the decision increases the symmetry between the two clauses. The requirement of intentional discrimination is also arguably not new in Free Exercise Clause doctrine, which requires that a law intentionally target religion before any religiously disparate impact triggers free exercise scrutiny. Thus, the *Town of Greece* decision also

7. *Id.* at 1828 n.2 (Alito, J., concurring).

8. *Id.* at 1828.

9. *Id.* at 1816 (majority opinion).

10. *Id.*

11. *Id.* at 1848 (Kagan, J., dissenting) (internal quotation marks omitted).

12. "That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths." *Id.* at 1824 (majority opinion).

13. *Id.* at 1817.

14. *Id.* at 1831 (Alito, J., concurring).

15. *Id.*

increases the symmetry between the Establishment and Free Exercise Clauses.

This Essay explores the greater symmetry between establishment, equal protection, and free exercise. First, this Essay will explain how the intentional discrimination standard, established in equal protection jurisprudence and imported into free exercise jurisprudence, has, with *Town of Greece v. Galloway*, probably become part of establishment jurisprudence. Next, it will argue that many of the critiques of the intentional discrimination standard made in the Equal Protection Clause context apply in the Establishment Clause context. Finally, it will examine the degree of symmetry between the Free Exercise Clause and the Establishment Clause.

I. INTENT REQUIREMENT

A. Equal Protection

Laws that discriminate by race on their face are automatically suspect and subjected to the highest level of scrutiny.[16] On the other hand, the Supreme Court held in *Washington v. Davis*[17] that it would not closely scrutinize facially neutral laws that had a racially discriminatory impact unless that impact resulted from a racially discriminatory intent. Despite the fact that black applicants to the D.C. police department failed an employment test at four times the rate as white applicants, the Supreme Court refused to examine whether the test actually led to more qualified employees.[18] Instead, it concluded that the test did not trigger any heightened equal protection scrutiny due to "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[19]

In *Personnel Administrator of Massachusetts v. Feeney*,[20] the Supreme Court clarified what it meant by discriminatory purpose. "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences."[21] Although in other areas of law people are presumed to intend the natural and foreseeable consequences of their voluntary

16. Korematsu v. United States, 323 U.S. 214, 216 (1944).

17. 426 U.S. 229 (1976).

18. The test had not been validated. That is, there was no proven correlation between test scores and job performance. *Id.* at 235.

19. *Id.* at 240.

20. 442 U.S. 256 (1979).

21. *Id.* at 279 (internal quotation marks omitted).

actions,[22] that was not to be the case for equal protection. Instead, discriminatory intent is present only if the discriminatory impact was the purpose of the state action. "[Discriminatory intent] implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[23] As a result, even though it was obviously foreseeable that an absolute veterans preference[24] would keep women out of civil services jobs,[25] the preference did not violate equal protection because it was not adopted for that purpose.[26] The preference was enacted "in spite of" its effect on women, not "because of" its effect on them.

B. Free Exercise

Just as neutral laws lacking in discriminatory intent do not trigger closer scrutiny in equal protection, neutral laws lacking discriminatory intent do not trigger closer scrutiny under current free exercise doctrine. After *Employment Division, Department of Human Resources of Oregon v. Smith*, neutral laws of general applicability, regardless of the impact they may have on a religious practice, do not violate the Free Exercise Clause.[27] Thus, even though a federal anti-drug law essentially outlawed a religious sacrament, it did not run afoul of the Free Exercise Clause because it was not "specifically directed at [a] religious practice."[28]

In explaining further what neutrality meant, the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[29] drew explicitly

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22. *See id.* at 278 (acknowledging existence of "the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions"); RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965) ("Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.").

23. *Feeney*, 442 U.S. at 279.

24. *Id.* at 259 (Under the preference, "veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The preference operates overwhelmingly to the advantage of males.").

25. *Id.* at 278 (conceding that "it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men"); *see also id.* at 283 (Marshall, J., dissenting) ("Because less than 2% of the women in Massachusetts are veterans, the absolute-preference formula has rendered desirable state civil service employment an almost exclusively male prerogative.").

26. *Id.* at 279 (majority opinion).

27. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886 n.3 (1990) (holding that, under the Free Exercise Clause, "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest"); *id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability[.]'").

28. *Id.* at 878.

29. 508 U.S. 520 (1993).

from equal protection: "In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."[30] In particular, the analysis borrowed the discriminatory intent requirement: A law lacks neutrality if it intentionally targets a practice because it is religious. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[31] In striking the challenged ordinances, the *Hialeah* Court emphasized that they were motivated by "animosity"[32] and "hostility"[33] to the Santeria religion. In sum, since the Hialeah ordinances were passed "because of" and not "in spite of" their effect on Santeria practices, they were held to violate the Free Exercise Clause.[34]

C. *Establishment*

There is reason to believe that after *Town of Greece v. Galloway*, state actions that favor one particular religion may not rise to an Establishment Clause violation without discriminatory intent. Heretofore, Establishment Clause doctrine arguably did not require discriminatory intent, and government actions that so starkly benefitted one religion over all others risked violating the Establishment Clause.[35] Under the often-reviled-but-not-yet-officially-extinct *Lemon* test,[36] a government action violates the Establishment Clause if it has either the predominant purpose of advancing religion or the predominant effect of advancing religion.[37] It does not require both. Similarly, the endorsement test—which asks whether a reasonable person aware of the history and circumstances of the

30. *Id.* at 540.

31. *Id.* at 533.

32. *Id.* at 542.

33. *Id.* at 541.

34. *Id.* at 540 (finding that "the ordinances were enacted '"because of," not merely "in spite of,"' their suppression of Santeria religious practice").

35. *See* Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 605 (1989) ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed[.]").

36. While *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 859–60 (2005), specifically invoked the *Lemon* test, the plurality in its companion case asserted that "*Lemon* is not useful in dealing with the sort of passive monument that Texas has erected on its capitol grounds." Van Orden v. Perry, 545 U.S. 677, 677–78 (2005).

37. Zelman v. Simmons-Harris, 536 U.S. 639, 668 (2002) ("A central tool in our [Establishment Clause] analysis of cases in this area has been the *Lemon* test. As originally formulated, a statute passed this test only if it had 'a secular legislative purpose,' if its 'principal or primary effect' was one that 'neither advance[d] nor inhibit[ed] religion,' and if it did 'not foster an excessive government entanglement with religion.' In *Agostini v. Felton*, 521 U.S. 203, 218, 232–233 (1997), we folded the entanglement inquiry into the primary effect inquiry." (O'Connor, J., concurring) (alteration in original) (citation omitted)).

government's religious practice or symbol would conclude the government was endorsing one religion[38]—has never insisted on finding discriminatory intent.[39]

In earlier cases, disparate impact alone sufficed to find that a state-sponsored religious practice violated the Establishment Clause.[40] For example, in *Estate of Thornton v. Caldor, Inc.*,[41] the Supreme Court struck down a law protecting employees' right to refuse working on their Sabbath in part because the law protected the religious practices of presumably Christian and Jewish Sabbath observers without providing any protection for the religious practices of others.[42] The Court's analysis focused exclusively on the disparate effect of the law; it did not examine the motivation behind it. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,[43] the Supreme Court found that the placement of a Christian crèche on the grand staircase of a county courthouse violated the Establishment Clause because "the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message."[44] No intent to discriminate against non-Christians was required. "[N]othing more [than endorsement of Christianity] is required to demonstrate a violation of the Establishment Clause."[45] Neither *Estate of Thornton* nor *Allegheny* asked whether the state's action was motivated by the intent to disfavor some religions, a query that turned out to be pivotal in *Town of Greece v. Galloway*. In sum, government alignment with Christianity was enough to violate the Constitution.

The claim is not perfect. Although the Court has struck down displays of crèches and the Ten Commandments, it has also upheld them in different

38. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *McCreary Cnty.*, 545 U.S. at 866. The endorsement test, as well as the *Lemon* test, apply to both laws that are facially neutral and laws that are not.

39. Granted, the endorsement test is open-ended enough that it could be interpreted as requiring evidence of both discriminatory impact and discriminatory intent before it is reasonable to find that the government was endorsing religion. Until *Town of Greece*, however, that has not been the case.

40. Similarly, several cases have found an Establishment Clause violation based solely on an illegitimate purpose. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 57 (1985) (striking statute whose sole goal was to "return voluntary prayer to the public schools" (internal quotation marks omitted)).

41. 472 U.S. 703 (1985).

42. *Id.* at 711 (O'Connor, J., concurring) ("The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees.").

43. 492 U.S. 573 (1989).

44. *Id.* at 600; *see also id.* at 601 ("In sum, . . . government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ.").

45. *Id.* at 601–02.

circumstances.[46] One might wonder how different the *Town of Greece* approach is given that the Court has previously allowed government practices and displays that disproportionately favor Christianity. Perhaps *Town of Greece* does not represent a change, but simply a continuation of the Court's context-specific application of its Establishment Clause jurisprudence.[47] However, in earlier cases the Court downplayed the religious significance by claiming that the religious display was really about acknowledging our nation's history[48] or celebrating a national holiday.[49] Here, the Court does not deny the religious import of the prayers. Thus, the cases are distinguishable, and the *Town of Greece* Court's decision that prayers do not cross the line even if they do promote religion marks a new development.

According to the Court, state-sponsored prayers only cross the line if they are too extreme and slip into denigration of non-Christian religions or proselytization of the Christian one. Their overwhelming Christianity is not itself a reason to invalidate them.[50] Instead, the Supreme Court held that without an illegitimate intent the practice stands: "Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation."[51] As discussed, that illegitimate motive must be a discriminatory intent to devalue or exclude minority religions.[52] Justice Alito makes the point plain when he emphasizes that the omission of all non-Christian chaplains "was at worst

46. Crèches and Ten Commandments displayed on their own have been struck. *See id.* at 601–02 (striking crèche); McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 868 (2005) (striking Ten Commandments). Crèches and Ten Commandments that were part of a larger display that included secular items have been allowed. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding crèche); Van Orden v. Perry, 545 U.S. 677 (2005) (upholding Ten Commandments).

47. A more critical summary might describe *Town of Greece* as a continuation of the Court's inconsistent application of its Establishment Clause jurisprudence.

48. *See Van Orden*, 545 U.S. at 689–90 (arguing that the "Ten Commandments have an undeniable historical meaning" and that display of Ten Commandments amongst other historical monuments was merely acknowledging Decalogue's role "in America's heritage").

49. *See Lynch*, 465 U.S. at 681 (holding that government sponsored crèche depicts the "historical origins" of a National Holiday and was merely part of a larger display intended "to celebrate the Holiday and to depict the origins of that Holiday").

50. Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811, 1821–23 (2014) (holding that *Marsh* did not require nonsectarian prayers and that "[p]rayer that reflect beliefs specific to only some creeds can still serve to solemnize the occasion").

51. *Id.* at 1824. Notably, one or two acts of proselytization or denigration do not violate the Establishment Clause. Only a pattern of such occurrences may be unconstitutional. Presumably a discriminatory intent can be inferred from multiple instances in a way it cannot from a single instance.

52. *Id.* at 1824 ("That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths."); *see also id.* at 1829 (Alito, J., concurring) (noting that the Court of Appeals found that the exclusion of any non-Christians from the list of possible chaplains was not due to "religious animus").

careless, and . . . was not done with a discriminatory intent"; if it were, he would view the case "very differently."[53]

It is possible that the discriminatory intent requirement will remain confined to the legislative prayer context. Legislative prayer is something of an anomaly in Establishment Clause jurisprudence. In *Marsh v. Chambers*, the Supreme Court's first legislative prayer case, the Court failed to apply any of its existing Establishment Clause tests.[54] Instead, it relied on an originalist argument: Since the Founders countenanced legislative prayers, so should we.[55] Given the current Supreme Court, however, it is more likely that *Town of Greece* signals a new approach to Establishment Clause challenges to government religious displays and practices, especially since the opinion nowhere indicates that it is limited to legislative prayers.[56]

In sum, it is not enough that the effect of the Town's prayer practice resulted in exclusively Christian prayer at the seat of government. Without a discriminatory motive, the disparate impact does not equate to an Establishment Clause violation. Thus, discriminatory intent is arguably now a requirement for facially neutral laws with disparate impact in Equal Protection, Free Exercise, and Establishment Clause cases.[57]

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53. The full quotation is as follows:

> The town's clerical employees did a bad job in compiling the list of potential guest chaplains. . . . If the task of putting together the list had been handled in a more sophisticated way, the employee in charge would have realized that the town's Jewish residents attended synagogues on the Rochester side of the border and would have added one or more synagogues to the list. But the mistake was at worst careless, and it was not done with a discriminatory intent. (I would view this case very differently if the omission of these synagogues were intentional.)

Id. at 1830–31 (Alito, J., concurring).

54. The *Marsh v. Chambers* dissent pointed out that any law student applying the existing tests would easily conclude that legislative prayer violated the Establishment Clause. Marsh v. Chambers, 463 U.S. 783, 800–01 (1983) (Brennan, J., dissenting).

55. *Id.* at 790–91("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. . . . [I]t would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.").

56. Although the Court notes that "*Marsh* is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence," it soon argues that *Marsh* teaches "that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Greece*, 134 S. Ct. at 1818–19; *see also, e.g.*, Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting in denial of certiorari) (arguing that "*Town of Greece* abandoned the antiquated 'endorsement test'" and that "*Town of Greece* left no doubt that the Establishment Clause must be interpreted by reference to historical practices and understandings" (internal quotations omitted)).

57. The doctrine for the three clauses is obviously not completely parallel. For example, in equal protection and free exercise, the finding of discriminatory impact plus discriminatory intent triggers heightened scrutiny. Establishment lacks this heightened scrutiny step. Moreover, the facially neutral vs. not facially neutral distinction does not quite map onto establishment challenges to religious displays and prayer practices, which are religious on their face. Nonetheless, the prayer program could

II. INTENT IN EQUAL PROTECTION AND ESTABLISHMENT

There are advantages and disadvantages to the increased symmetry across the various clauses. On the one hand, greater symmetry is more fair. To the extent that the religion clauses serve as an Equal Protection Clause for religious minorities,[58] there is no reason that religious minorities should receive a different level of protection than racial minorities.[59]

On the other hand, importing equal protection's discriminatory intent requirement into establishment makes the requirement's shortcomings more widespread. The main equal protection critiques of the discriminatory intent requirement—that it reflects a cramped notion of discrimination and fails to protect the most vulnerable[60]—apply equally to establishment jurisprudence.

A. Missing Unconscious Bias and Indifference

Requiring discriminatory intent before discriminatory treatment raises a constitutional eyebrow severely limits the Constitution's reach and amounts to a stingy understanding of equal protection.[61] It also reflects a

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be characterized as facially neutral in terms of favoring one religion over another in that it did not specify Christian prayers before town meetings, merely prayers before town meetings.

This characterization does raise the possibility that *Estate of Thornton* and *Allegheny* are distinguishable from *Town of Greece* as not facially neutral. Instead of standing for the proposition that facially neutral practices previously could violate the Establishment Clause without discriminatory intent, the cases might simply stand for the proposition that facially religious practices often violate the Establishment Clause. Nevertheless, Establishment Clause cases involving displays that could conceivably be described as facially neutral, such as holiday displays or history displays that happen to include a crèche or Ten Commandments, never highlighted discriminatory intent the way *Town of Greece* does. *Town of Greece* makes discriminatory intent prominent and dispositive.

58. Both the Equal Protection Clause and the religion clauses are designed to protect minorities against discrimination by more powerful majorities. It is well known that the Equal Protection Clause was written to protect newly freed African-Americans from discriminatory black codes that attempted to keep them in virtual servitude. Today, the Equal Protection Clause also protects against discrimination based on alienage, legitimacy, sex, and religion. But while in theory religious discrimination triggers the Equal Protection Clause, in fact religion cases are usually resolved by the religion clauses. The Free Exercise Clause protects against state actions that intentionally target religious practices. The Establishment Clause, on the other hand, protects against state action that favors one religion over others because, among other ill effects, persecution or discrimination of those who do not belong to the favored religion may, and historically usually did, follow when the state prefers one particular religion.

59. *See* Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 138–40 (1997) (arguing that racial and religious minorities should receive equivalent constitutional protection).

60. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) ("[R]equiring proof that the defendant was aware of his animus against blacks[] severely limits the number of individual cases in which the courts will acknowledge and remedy racial discrimination.").

61. Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080–81 (2011) ("[T]he requirement for proving a discriminatory purpose in

highly privileged view of discrimination and ignores how pervasive discrimination actually is.[62]

1. Unconscious Bias

If nothing else, discrimination means penalizing someone, for no good reason, because of a protected characteristic. For the state to prevent political participation or to deny access to education, employment, or housing solely because of someone's race or religion amounts to a discriminatory act that should be unconstitutional under the Equal Protection Clause or the equal protection component of the Establishment Clause.

Yet precisely that type of discrimination will go undeterred under a regime requiring intent to discriminate. Imagine a government employer who receives two resumes that are essentially identical. He decides to interview (and eventually hire) the white candidate instead of the black candidate for no other reason than race. While this seems to fit the common understanding of discrimination, it will not necessarily be captured by current jurisprudence. Why not? Because much discrimination today is not intentional but the result of unconscious biases or indifference.[63] Odds are, the government employer was not even aware that race influenced his decision.

It has been known for decades that unconscious race and sex discrimination is endemic. Unconscious biases distort people's evaluations in a way that reinforces their pre-existing stereotypes. Study after study has shown that people remember, interpret, and respond differently to identical information depending on the race or sex of the person evaluated.[64] People rate the exact same resume more highly when they think the candidate is male versus female,[65] or white versus black.[66] Even when a white employee

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order to demonstrate a racial or a gender classification . . . tremendously limited the ability of the courts to deal with inequalities.").

62. *See, e.g.*, Lawrence, *supra* note 60, at 321 (noting that "the illness of racism infects almost everyone").

63. *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1170–71 (1995); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1056 (2006).

64. *See infra* notes 65–66.

65. *See, e.g.*, Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PROC. NAT'L ACAD. SCI. U.S. 16474 (2012) (Yale study finding that science professors given exact same resume except for male or female names rated "Jennifer" as 3.3 out of five compared to 4.0 for "John" and offered "Jennifer" a starting salary of $26,508 compared to $30,238 for "John"); *cf.* Claudia Goldin & Cecelia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. R. 715 (2000) (charting how female musician hires increased with the advent of "'blind' auditions with a 'screen' to conceal the candidate's identity from the jury").

and black employee perform exactly the same, employers are more likely to remember the black person's mistakes and the white person's accomplishments.[67] Furthermore, people are unaware of their disparate assessments. As a consequence, people make race- and sex-based decisions without even realizing it. Indeed, if asked, they might sincerely believe that illegitimate factors played no role.[68] But they did, and the upshot is that people are regularly denied equal opportunity due to their race or sex. "[I]f one is concerned about impermissible *partiality*, there is no reason to confine the inquiry to conscious partiality."[69]

The same dynamics play out for discrimination based on religion. In the United States, stereotypes of people who are Jewish, Muslim, or without any faith are widespread.[70] Nonbelievers, for example, are regularly viewed as unpatriotic and immoral.[71] Moreover, many religious minorities, such as Muslims, are also racial minorities.[72] Whether the unconscious bias is against racial minorities, gender minorities, religious minorities, or some combination thereof, the end result is discrimination based on a protected characteristic.

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66. *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. R. 991 (2004) (finding that resumes with white-sounding names received 50% more callbacks for interviews); Katherine L. Milkman et al., *What Happens Before? A Field Experiment Exploring How Pay and Representation Differently Shape Bias on the Pathway into Organizations*, J. APPLIED PSYCHOL. (Apr. 13, 2015), http://dx.doi.org/10.1037/apl0000022 (finding professors are most likely to respond to otherwise identical requests for mentorship when signed with a white male name).

67. Similarly, when their employees are late to work, employers will assume the man was late because he was meeting a client while the woman was late because she was tending to her children. *Cf.* Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 624 (2007).

68. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136–37 (1997) ("In sum, the sociological and psychological literature demonstrates that (1) racial bias remains the norm among white Americans; but that (2) they are strongly inhibited in expressing the racial attitudes they consciously hold, and often are wholly unaware of the extent to which their conscious judgments are unconsciously race based.").

69. David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 960 (1989).

70. *Cf. How Americans Feel About Religious Groups*, PEW RES. CENTER (July 16, 2014), http://www.pewforum.org/2014/07/16/how-americans-feel-about-religious-groups/ (finding Americans chilliest towards Muslims and atheists).

71. *See, e.g.*, Penny Edgell, Joseph Gerteis & Douglas Hartmann, *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 AM. SOC. REV. 211, 228 (2006).

72. *Section 1: A Demographic Portrait of Muslim Americans, Muslim Americans: No Sign of Growth in Alienation or Support for Extremism*, PEW RES. CENTER (Aug. 30, 2011), http://www.people-press.org/2011/08/30/section-1-a-demographic-portrait-of-muslim-americans/ (reporting that only 30% of U.S. Muslims were white, compared to 23% black, 21% Asian, 19% Mixed/Other, and 6% Hispanic).

2. Indifference

Insisting that discrimination must be intentional—that the disparate impact must be the goal of the state action—also overlooks how differential treatment may be the result of indifference. The hallmark of indifference is that a discriminatory impact that would be unacceptable if it affected decisionmakers is willingly tolerated when it disadvantages others.[73] Take a state employer who tries to hire fellow fraternity members whenever possible. When faced with two essentially identical resumes, he opts to interview the man who belonged to his fraternity rather than the woman who is equally qualified. He did not adopt the policy to systematically deny women equal opportunity. Consequently, since he hires fraternity members "in spite of" the disparate impact on women rather than "because of" it, this policy would not trigger any heightened scrutiny under equal protection.[74] Nonetheless, the end result is still a hiring policy that denies women equal opportunity for reasons wholly unrelated to their qualifications.

Town of Greece v. Galloway provides a textbook example of indifference.[75] The Town's prayer policy led to overwhelmingly Christian prayers. Not only was this result eminently foreseeable (what else would be the result when the Town chose to invite only clergy from the houses of worship in town, all of which were Christian, and then failed to provide any guidelines to their Christian chaplains-for-the-month?), but also no attempt was made to remedy this result. Town officials never publicized that the chaplaincy was open to all; they never sought chaplains from nearby non-Christian congregations, and they never even "provided [the] chaplains with guidance about reaching out to members of other faiths, as most state

73. With environmental racism, for example, lawmakers are not necessarily targeting blacks. Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 395 & n.10 (1991) (describing how "race is the predominant factor related to the presence of hazardous wastes in residential communities throughout the United States—a more significant factor than even socioeconomic status"). At the same time, white lawmakers are often indifferent to the effect of pollution on black neighborhoods in a way they would never allow in white communities. *Id.* (describing environmental racism as "the intentional and unintentional disproportionate imposition of environmental hazards on minorities").

74. *Cf.* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (upholding absolute preference for hiring male veterans "in spite of" the fact that 98% of veterans were male due to the military exclusionary policy and "in spite of" the fact that it resulted in a sex-segregated government workforce, with men in the powerful positions and women in the undesirable ones).

75. One might argue that adoption of originalism as a theory of constitutional interpretation—particularly for interpreting the Establishment Clause—also demonstrates indifference towards non-Christian faiths. After all, strict originalism for establishment would obviously lead to favoring Christianity, essentially the only religion at the time of the founding. (One might respond that the original principle was that no particular denomination would be favored, which in the context of the time meant the state could not favor one particular Christian denomination but in our more religiously diverse age would mean the state could not favor one particular religion like Christianity; however, that is not how the Supreme Court has interpreted it.)

legislatures and Congress do."[76] Even if not motivated by the desire to exclude,[77] Town officials certainly did not care about the disparate impact on non-Christians. Furthermore, these Christian decisionmakers undoubtedly would have adopted a different prayer policy had it led to overwhelmingly Muslim prayers. Whether discriminatory impact is due to indifference rather than intent, religious minorities are still excluded. Yet, when it is caused by indifference, the Supreme Court refuses to demand that the state have a compelling reason that justifies this exclusion.

3. *Privilege*

To argue discrimination due to indifference or unconscious bias is not true discrimination that should trigger constitutional scrutiny is to consider the question from the discriminator's point of view. In other words, "If I did not intend any harm, then no harm was done" is very much a perpetrator's view of discrimination. The focus, however, should not be on the ones in power and their behavior but on those without power and their unjust treatment. In other words, the question should not be: has someone done something blameworthy? The question should be: has someone been treated unfairly because of their race, sex, or religion?[78] Instead, as a result of the discriminatory intent requirement, discrimination does not exist (at least constitutionally) unless the discriminators can "see" it, i.e., unless they are aware of it due to their conscious intent to target and mistreat.[79] But equal protection is not supposed to be about the wrongdoer; it is supposed to be about the wrong done.[80] That is, it is supposed to protect against disadvantageous treatment because of race, sex, or religion, which is in fact the result whether the discrimination is due to animus, unconscious bias, or indifference.

That the Supreme Court finds it easier to identify with those in power is apparent in the narratives it writes about each group. One of the most striking aspects of the *Town of Greece* opinion is that the majority's sympathy seems reserved for those who perpetrate the discriminatory

76. Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811, 1852 (2014) (Kagan, J., dissenting).

77. Then again, when the discriminatory impact is this foreseeable, it would also be fair to infer discriminatory intent. *See infra* Part III.A.2 (discussing inferences to be drawn from disparate impact).

78. In other words, would they have been treated better had they been white, male, or Christian?

79. The corollary is that the Court does not see some religious minorities at all. For example, its argument that official government prayers acknowledge "beliefs widely held," *Town of Greece*, 134 S. Ct. at 1818, essentially ignores and renders invisible those who do not share those beliefs. This invisibility and marginalization become literal when the Town's Buddhist temple is mentioned only in a footnote. *Id.* at 1828 n.2 (Alito, J., concurring) ("It appears that there is one non-Christian house of worship, a Buddhist temple, within the town's borders, but it was not listed in the town directory.").

80. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1516 (2d ed. 1988) ("The goal of the equal protection clause is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all.").

impact rather than those who suffer from it. The concurrence can imagine how difficult it is for the Town to be inclusive: Greece is just a little town,[81] with part-time legislators trying their best[82] without the benefit of fancy legal counsel.[83] The Court cites no specific facts; this is all just sympathetic supposition. Nonetheless, the concurrence concludes that the "puzzled"[84] and "terrified"[85] local officials should not be found to have acted unconstitutionally just because the way they chose chaplains does not meet "best practices."[86] You would think from the language that it is the Town who is the injured party, not the religious minorities whom the Town has excluded.

As for religious minorities, without concrete evidence, the majority refuses to imagine that anyone might feel pressured to violate their religious beliefs and join in the (Christian) legislative prayers.[87] According to the Court, "[n]othing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined."[88] Never mind that plaintiffs Galloway and Stephens, a Jewish woman and an atheist woman, testified that they "fe[lt] unwelcome at Board meetings because of[] the Town Board's alignment with Christianity"[89] Galloway added that after remaining seated during prayers,[90] "[m]any members of the audience openly stared at [her], as though [she] were an outsider who didn't belong at the meeting."[91]

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81. *Town of Greece*, 134 S. Ct. at 1831 (Alito, J., concurring) ("The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government.").

82. *Id.* ("In such places, the members of the governing body almost always have day jobs that occupy much of their time.").

83. *Id.* ("In such places, . . . [t]he town almost never has a legal office and instead relies . . . on a local attorney whose practice is likely to center on such things as land-use regulation, contracts, and torts.").

84. *Id.* (describing local officials as "puzzled by our often puzzling Establishment Clause jurisprudence").

85. *Id.* (describing local officials as "terrified of the legal fees that may result from a lawsuit claiming a constitutional violation").

86. *Id.* ("[A] unit of local government should not be held to have violated the First Amendment simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a 'best practices' standard.").

87. *See id.* at 1825 (majority opinion) ("On the record in this case the Court is not persuaded that the town of Greece . . . compelled its citizens to engage in a religious observance.").

88. *Id.* at 1826.

89. Complaint at 2, Galloway v. Town of Greece, N.Y., 732 F. Supp. 2d 195 (W.D.N.Y. 2010) (No. 08-6088).

90. The prayers put her "in the painfully uncomfortable position of either drawing attention to [herself] as a non-Christian by declining to stand and participate in the prayer, or of contravening [her] own religious convictions by participating in a prayer to Jesus." Brief of Plaintiffs-Appellants at 14, Galloway v. Town of Greece, N.Y., 681 F.3d 20 (2d Cir. 2012) (No. 10-3635) (alteration in original).

91. *Id.* (alteration in original).

Apparently, the Court cannot fathom why minorities who feel like unwelcome outsiders might fear discrimination even without proof of prior instances.[92] The Court could imagine the puzzlement and terror of the Town's officials, but they could not picture the discomfort and pressure on the Town's minority citizens.

B. Missing Stigmatic Harm

The requirement that there must be discriminatory intent and discriminatory impact also eviscerates the expressivist strand of equal protection. By that, I mean the idea that discriminatory government messages as well as discriminatory government acts may violate equal protection.[93] Thus, state action would violate the Equal Protection Clause if its social meaning clashes with the government's duty to treat everyone with equal respect. "[T]he government may not express, in words or deeds, that it values some of us more than others."[94] In *Strauder v. West Virginia*,[95] the Court recognized that state-sponsored race discrimination harmed blacks not just because it denied them equal opportunity, but because it conveyed a message of second-class citizenship and helped perpetuate private discrimination.[96] *Brown v. Board of Education*[97] likewise acknowledged the stigmatic injury that accompanies state discrimination.[98] *Brown* repudiated *Plessy v. Ferguson*,[99] a case notorious for its dismissive assertion that segregation did not "stamp[] the colored race with a badge of

92. *Cf.* Alan E. Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in* Town of Greece v. Galloway, LOY. L.A. L. REV. (forthcoming) (manuscript at 22–23), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2495549 ("[Justice Kennedy] is arguing as a matter of fact and social reality that without explicit threats or a history of the sanctioning of dissidents audience members cannot reasonably claim to feel pressured by the prayer practices they challenge. . . . Once again, it is hard to make sense of observations about social reality that bear so little resemblance to the world I experience.").

93. *See* Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 380–81 (2012) ("Under expressivist theory, . . . [t]he focus is on the message conveyed by the state action rather than its intent or its practical effect. . . . Thus, the constitutional validity of a law depends on its social or public meaning." (footnote omitted)).

94. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13 (2000).

95. 100 U.S. 303 (1879).

96. *See id.* at 308 ("The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.").

97. 347 U.S. 483 (1954).

98. *See id.* at 494 ("To separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

99. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

inferiority," and that arguments to the contrary are "not by reason of anything found in [segregation], but solely because the colored race chooses to put that construction upon it."[100]

Washington v. Davis,[101] unfortunately, returned to a more limited view of the Equal Protection Clause.[102] At issue was an employment test for Washington, D.C. police officers that disqualified four times as many black applicants as white ones. While the government argued that the test was meant to improve the police force, it provided no evidence that higher test scores translated into better police officers. Because the discriminatory impact was not intentional, the Court applied no heightened scrutiny and let the unvalidated test stand.[103] Nowhere in the opinion did the Court reckon with the message sent by a government willing to use a discriminatory employment measure with no proven connection to merit.[104] Rather than explicitly deny any message of inferiority or second class status like it did in *Plessy v. Ferguson*, the Court simply failed to address the expressive component at all.[105]

Despite *Washington v. Davis*, the expressive component of equal protection jurisprudence might yet survive. After all, a government proclamation that "whites are the superior race" would presumably violate the Constitution's guarantee of equality.[106] Nonetheless, because the conscious intent of the government does not always map onto the social meaning of its act, the insistence on discriminatory intent makes it that

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100. *Id.* at 551.

101. 426 U.S. 229 (1976).

102. David Strauss describes *Washington v. Davis* as "adopt[ing] the narrowest plausible interpretation of *Brown*" much like *Plessy* "adopted the narrowest possible interpretation of the Reconstruction understanding." Strauss, *supra* note 69, at 955. Along those lines, Reva Siegel has argued that just as *Plessy* interpreted equal protection as limited to political equality and not social equality in order to maintain a racial hierarchy, *Washington v. Davis* interpreted equal protection as limited to discriminatory intent and not discriminatory impact for the same reasons. Siegel, *supra* note 68, at 1129.

103. Query how likely the government would leave in place an unvalidated test that whites failed at four times the rate as blacks.

104. *Cf.* Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 940 (2008) ("In *The Id, the Ego, and Equal Protection*, I challenged the Court's refusal in *Washington v. Davis* to ask whether there was constitutional injury in the cultural meaning of racially discriminatory impact.").

105. Likewise, the Supreme Court never considered in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), what messages might be conveyed by a government policy that essentially excluded women from prestigious state jobs.

106. At the same time, *Palmer v. Thompson*, 403 U.S. 217 (1971), may preclude finding that a discriminatory message alone violates the Equal Protection Clause. In *Palmer*, a city closed its public pools after being ordered to desegregate them. The dissent protested: "The fact is that closing the pools is an expression of official policy that Negroes are unfit to associate with whites. . . . The Equal Protection Clause is a hollow promise if it does not forbid such official denigrations of the race the Fourteenth Amendment was designed to protect." *Id.* at 240–41 (White, J., dissenting). Nonetheless, the Court upheld the pool closing in part because there was no disparate impact, as both whites and blacks lost their public pools. *Id.* at 220–22.

much more difficult to redress an equal protection violation based on the message of the government's action. In particular, requiring intent means that, as in *Plessy*, the government alone controls the constitutionally recognized meaning of a government act. For example, a state flying a confederate flag to demonstrate state pride does not eliminate the flag's racist connotations.[107] However, if the government does not intend to demean, stigmatize, or mark as second class, the flag is essentially deemed to do none of those things because, despite its discriminatory messages, without discriminatory intent it will not trigger equal protection scrutiny.[108] As far as the Constitution is concerned, without that intent, arguments to the contrary are nothing more than misreadings by those who "choose[] to put that construction upon it."[109]

The Establishment Clause seems to be following the same trajectory. As Fourteenth Amendment jurisprudence used to insist that a message of second-class citizenship could violate the Equal Protection Clause, so did First Amendment jurisprudence with Establishment Clause violations. In particular, Justice O'Connor's endorsement test acknowledged that when government favors one religion—which by definition means disfavoring others—it "sends the . . . message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members [of the political community].'"[110] This message of religious second-class citizenship, as with racial second-class citizenship, was unconstitutional.

Town of Greece undercuts the expressivist component of the Establishment Clause in two ways. First, following in equal protection footsteps, the discriminatory intent requirement narrows the messages that will be constitutionally recognized. A decade of exclusively Christian prayer treated non-Christians in Greece "as if they did not exist or were unworthy of notice."[111] Yet, *Town of Greece* holds that the government does not convey any message of endorsement or second-class status unless it intends to send that message. Sponsoring Christian prayers is not recognized as sending a message that Christians are favored unless that was

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107. *See generally* Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 601 (2002).

108. And this is assuming that a discriminatory message will satisfy the discriminatory impact requirement. *See supra* note 106.

109. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

110. McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (alteration in original) (internal quotation marks omitted).

111. Brownstein, *supra* note 92, at 12; *see also* Eric Segall, *Silence Is Golden: Moments of Silence, Legislative Prayers, and the Establishment Clause*, 108 NW. U. L. REV. ONLINE 229, 238 (2014) ("These prayers tell people who are nonbelievers in any God, or who believe in many gods, that those views are not entitled to equal respect by their government.").

the government's deliberate intent. Supporting one religion to the exclusion of all others has gone from unconstitutional endorsement to that which is merely offensive, and objectors have gone from a stigmatized minority to thin-skinned complainers. Indeed, the Court actually suggests that the objectors are in the wrong constitutionally by insinuating that they are akin to free speech hecklers: "Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum[.]"[112] According to the Court, real grown-ups do not whine about "disagreeable" speech, which is protected by the Free Speech Clause.[113] Never mind that this is not a free speech case, the speakers are not purely private but state-sponsored, and the prayers are not taking place in a public speech forum.[114]

In any event, there is a world of difference between offending someone's sensibilities and excluding them from equal citizenship.[115] The *Town of Greece* plaintiffs did not sue because they were "affronted" by hearing the name of Jesus. They were not trying to stop people from praying at home, at church, at parties, on the sidewalks, or in public parks. The plaintiffs sued because the government, at the seat of government, at the moment of citizen self-governance,[116] was sending the message that they were second-class citizens. As Justice Kagan points out in dissent, the prayer practice "does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government."[117]

Second, even messages of second-class citizenship may not be constitutionally recognized unless accompanied by a concrete discriminatory impact. This claim is necessarily speculative, as the Court declined to find any messages of inequality. But even if it had, it is possible

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112. Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811, 1826 (2014).

113. *Cf.* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (internal quotation marks omitted)).

114. On the contrary, forums for speech are meant to encourage public debate; here, "[the] purpose [of the prayers] is largely to accommodate the spiritual needs of lawmakers." *Town of Greece*, 134 S. Ct. at 1826.

115. *See* Corbin, *supra* note 93, at 382 ("First, it is important to clarify what the expressivist claim is not. It is not an argument that 'offending' someone is unconstitutional. Rather, it is an argument that the state cannot, consistent with the Equal Protection Clause or the equal protection component of the Establishment Clause, convey the message that some people are less equal than others or less worthy of regard because of their race, sex, or religious beliefs." (footnote omitted)).

116. *See Town of Greece*, 134 S. Ct. at 1844 (Kagan, J., dissenting) ("And making matters still worse: They have done so in a place where individuals come to interact with, and participate in, the institutions and processes of their government.").

117. *Id.* This alone should be constitutionally suspect, never mind that this message also makes it harder for religious minorities to participate in self-governance.

to read *Town of Greece* as holding that a message alone cannot violate the Establishment Clause.[118] There must also be disparate impact, where disparate impact is narrowly defined. In theory, stigmatizing some but not others amounts to a disparate impact. In reality, the *Town of Greece* Court appears unimpressed by anything other than actual coercion of religious minorities: "Offense, however, does not equate to coercion."[119] Furthermore, coercion must be proved, and it must be proved by evidence of coerced praying or by evidence that town officials have punished objectors for refusing to pray.[120] As mentioned earlier, the Court seems uninterested in the possibility that plaintiffs might have felt pressured to join the prayers.[121] In *Town of Greece*, feeling coerced is not constitutionally problematic; only being coerced is.[122] Yet, as Alan E. Brownstein has noted, "[r]eligious coercion is constitutionally impermissible whether it is likely to be effective or not."[123] In short, by requiring discriminatory intent and defining discriminatory impact narrowly, *Town of Greece* eviscerates constitutional protection against state messages of inequality.

III. INTENT IN FREE EXERCISE AND ESTABLISHMENT

To the extent that free exercise and establishment are in tension with each other, there may be some benefit to having similar requirements to trigger their protections. If the state can limit religious practices by neutral laws under the Free Exercise Clause, perhaps they should be able to sponsor religious practices through neutral laws under the Establishment Clause. As it turns out, the availability of religious liberty exemptions without discriminatory intent means that free exercise doctrine and establishment doctrine are not as symmetrical as they first seem. Moreover,

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118. The same may be true in Equal Protection Clause jurisprudence. *See supra* note 106 (discussing *Palmer v. Thompson*, 403 U.S. 217 (1971)).

119. *Town of Greece*, 134 S. Ct. at 1826.

120. *See supra* note 88 and accompanying text.

121. *See supra* notes 87–89 and accompanying text; *see also Town of Greece*, 134 S. Ct. at 1827 (expressing presumption that "mature adults . . . are 'not readily susceptible to religious indoctrination or peer pressure'").

122. *See Town of Greece*, 134 S. Ct. at 1825 ("On the record in this case the Court is not persuaded that the town of Greece . . . compelled its citizens to engage in a religious observance.").

123. Brownstein, *supra* note 92, at 32. Brownstein continues:

> It violates our commitment to human dignity and personal autonomy to allow the state to pressure religious individuals to violate their beliefs and conscience. The ability or willingness of certain groups to maintain their religious integrity in the face of direct or indirect compulsion should not undermine our conclusion that such coercion is constitutionally impermissible.

Id.

the Religious Freedom Restoration Act, which has no establishment counterpart, significantly increases the availability of religious exemptions.

A. Lack of Symmetry in Doctrine

1. Inconsistency in Requiring Discriminatory Intent

One major doctrinal difference between the two religion clauses is that intentional discrimination is not always required for heightened scrutiny under free exercise. First, *Employment Division v. Smith* made two exceptions to the rule that "neutral laws of general applicability" never violate the Free Exercise Clause.[124] If a law allows individualized exemptions or burdens a hybrid right,[125] the pre-*Smith* test of strict scrutiny for substantial burdens on religion still reigns.[126] While generally understood to be exceptions calculated to avoid overruling *Sherbert v. Verner*[127] (individualized exemptions) and *Wisconsin v. Yoder*[128] (hybrid rights), lower courts have given these exceptions substance.[129]

Second, after *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[130] which upheld the constitutionality of the "ministerial exemption,"[131] the *Smith* test also does not apply to cases involving ministers' discrimination suits against their religious employers and perhaps to any case that implicates "church autonomy."[132]

Third, the actual *Smith* rule is that a law must be both neutral and generally applicable to pass constitutional muster, not just neutral.[133] That

124. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882, 884, 901 (1990).

125. A hybrid right is a free exercise right combined with another constitutional right. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for example, the Amish parents' withdrawal of their children from public school before they turned sixteen implicated both their right to free exercise as well as their right to control the upbringing of their children, which is protected by the substantive component of the Due Process Clause.

126. *Smith*, 494 U.S. at 882, 884.

127. 374 U.S. 398 (1963).

128. 406 U.S. 205 (1972).

129. Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 571 (1999) ("[A]lthough commentators have argued that the *Smith* Court's distinctions of *Yoder* and *Sherbert* are specious and unpersuasive, both the 'hybrid rights' and 'individualized assessment' strands of free exercise have been acted upon positively in the lower courts." (footnote omitted)).

130. 132 S. Ct. 694 (2012).

131. *Id.* at 702.

132. *See, e.g.*, Mark W. Cordes, *The First Amendment and Religion After* Hosanna-Tabor, 41 HASTINGS CONST. L.Q. 299, 303 (2014) ("[T]he Court in *Hosanna-Tabor* essentially recognized that religious institutions have a right of autonomy that frees them from certain types of government interference.").

133. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

is, even if the law is neutral (i.e., it lacks discriminatory intent), if it is not generally applicable, then it is subject to the pre-*Smith* analysis.

What exactly does it mean to lack general applicability? There is no definitive answer from the Supreme Court yet. Perhaps neutrality and general applicability go hand in hand. After all, the Supreme Court has stated that they are interrelated concepts and the absence of one likely indicates the absence of the other.[134] Perhaps the lack of general applicability should be understood as demonstrating an intent to discriminate. In *Hialeah*, for example, the fact that the challenged animal protection ordinances were not generally applicable—they banned animal death by religious sacrifice (as practiced in Santeria) but not animal death for food or sport or euthanasia—helped prove that their goal was to target the Santeria practice.[135]

However, lower courts have read "neutrality" and "general applicability" as two distinct requirements.[136] Take a case where the Newark Police Department banned facial hair,[137] making it impossible for Sunni men to comply with their religious obligation to grow a beard.[138] This regulation was neutral, as it was neutral on its face and no one contended that the police department implemented it in order to penalize Muslim officers. Nonetheless, because the regulation made an exception for medically necessary beards, the Third Circuit, in an opinion written by then-Judge Alito, held that it was not generally applicable and was therefore subject to the pre-*Smith* test.[139] Thus, as currently interpreted, the general applicability requirement means that disparate impact alone may have consequences in a free exercise challenge in a way that is no longer true for establishment challenges.

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134. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

135. *See id.* at 531, 543–46 ("[T]he ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice.").

136. Such a reading is not without foundation. *See id.* at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

137. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

138. *See id.* at 360 (describing plaintiffs, Officers Faruq Abdul-Aziz and Shakoor Mustafa, as "devout Sunni Muslims who assert that they believe that they are under a religious obligation to grow their beards").

139. That the Court also concluded that the lack of general applicability raised an inference of intentional discrimination is a separate point addressed below. *See infra* note 144 and accompanying text.

2. Inconsistency in Inferring Discriminatory Intent

Adding to the asymmetry of the clauses, the Supreme Court seems to demand much more to satisfy intentional discrimination in the establishment (and equal protection) context than in the free exercise one. At first glance, the standards appear the same, especially since the Supreme Court explicitly referenced equal protection when it concluded that the Hialeah ordinances were passed because they targeted Santeria practices and not in spite of their effect on them.[140] On second glance, however, the *Hialeah* Court never clarifies whether that type of targeting was necessary or merely sufficient to satisfy the discriminatory intent requirement.

Moreover, the conclusions drawn about discriminatory intent from discriminatory impact differ in the free exercise and establishment contexts.[141] In *Hialeah*, the Supreme Court suggested that discriminatory intent could be inferred when the burden falls almost exclusively on one particular religion.[142] (Notably, Justice Scalia argued that intent should not be part of the calculus at all: "Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens."[143]) Lower courts have proven especially eager to infer discriminatory intent from discriminatory impact in free exercise cases. In the Newark Police Department case described above, it was enough that the police regulations provided a secular exemption without providing a religious one—an omission that could equally suggest indifference rather than discriminatory intent.[144]

Yet, any willingness to infer discriminatory intent from discriminatory impact seems to have vanished in *Town of Greece v. Galloway*. Despite the arguably *Gomillion*-level disparate impact,[145] the Court still refused to draw any conclusions about intent: Although essentially all the benefit accrued to Christianity, and the Town made no effort to change that, the Court still would not find that the Town intended to promote Christianity to the

140. *See supra* notes 30–34 and accompanying text.

141. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("[A]n 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 race than another.").

142. *See* Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, 508 U.S. 520, 536 (1993) (finding discriminatory intent in part because "the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others").

143. *Id.* at 559.

144. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) ("Therefore, we conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.").

145. In *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), the City of Tuskegee's redistricting eliminated almost all black voters without eliminating a single white one. Here, the Town's prayer policy resulted in almost no non-Christian prayers.

exclusion of all other religions.[146] The Court's impossibly high threshold almost precludes ever relying on discriminatory impact to infer discriminatory intent in Establishment Clause cases. Other than repeatedly allowing prayers that denigrate minority beliefs or another smoking gun, one wonders exactly what would serve to establish discriminatory intent in the establishment context.

B. Lack of Symmetry Due to Religious Freedom Restoration Act

When examining the broader context of religion jurisprudence, which includes statutory as well as constitutional law, the lack of symmetry between protections for religious liberty and protections against government establishment become even more apparent. In particular, the Religious Freedom Restoration Act (RFRA) provides extensive protection against federal laws that interfere with religious practices.[147] RFRA was Congress's attempt to undo by statute the holding of *Smith*. Under RFRA, any federal law—whether neutral or not, or generally applicable or not—that imposes a substantial religious burden is subject to strict scrutiny.[148] Even if the Free Exercise Clause and the Establishment Clause were mirror images of each other, RFRA completely alters the landscape.

Moreover, the Supreme Court has interpreted RFRA expansively. In *Burwell v. Hobby Lobby Stores, Inc.*,[149] which involved a challenge to the Affordable Care Act's requirement that health insurance plans cover contraception,[150] the Supreme Court interpreted RFRA as providing protections that exceed pre-*Smith* case law. To start, exhibiting a great reluctance to engage in any kind of objective analysis, the Court deferred to the plaintiffs' subjective view regarding whether the challenged law imposed a "substantial burden" on them.[151] The *Hobby Lobby* Court seemed to hold that, as long as plaintiffs are sincere, if plaintiffs say that as a matter of religion a regulation imposes a substantial burden, then as a matter of law it imposes a substantial burden: "[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects

146. *See* Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811, 1824 (2014) ("That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths.").

147. 42 U.S.C. §§ 2000bb *to* 2000bb–4 (2012).

148. Recall that this was the test for Free Exercise Clause claims before the Supreme Court instituted the "neutral and generally applicable" test in *Employment Division v. Smith*. *See supra* Part I.B.

149. 134 S. Ct. 2751 (2014).

150. *See id.* at 2779.

151. *See id.*

'an honest conviction'[.]"[152] Thus, the Court accepted the claim that the plaintiffs' religious opposition to abortion was substantially burdened by the contraception mandate because facilitating other people's sinful abortions was itself a sin.[153] It did not matter that, as a matter of science, the challenged drugs were not actually abortifacients.[154] It did not matter that, as a matter of law, the claim was inconsistent with basic tenets of corporate law.[155] Nor did it seem to matter that attenuated "facilitation" claims have no limiting principle.[156] In short, instead of an almost-impossible-to-prove discriminatory intent standard, an almost-impossible-to-fail substantial burden standard prevails.

In addition, the scrutiny applied to Hobby Lobby's RFRA challenge is much more rigorous than was ever applied in free exercise cases. While the pre-*Smith* test (after which RFRA was modeled) might have called for strict scrutiny of laws that imposed substantial religious burdens, it was not "'strict' in theory and fatal in fact" strict scrutiny.[157] Instead, the Court tended to balance the competing interests at stake, and did not insist that the challenged law select the least restrictive means possible.[158] More plaintiffs lost than won their Free Exercise Clause challenges.[159] In contrast, the *Hobby Lobby* Court held that the contraception mandate violated RFRA unless it advanced a truly compelling interest and there was

152. *Id.* (first alteration in original).

153. *See id.* at 2765–66.

154. *See generally Amicus Curiae* Brief of Physicians for Reproductive Health et al. in Support of Defendants-Appellees, Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dept. of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013) (No. 13-1144), 2013 WL 1792349.

155. One of the main reasons people incorporate their businesses is to gain the protection of limited liability, which shields owners from the liabilities of their corporation. For example, the debts of the corporation are not the debts of the owners. *See, e.g.*, David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1309 (2007) ("Long the hallmark of corporate status, limited liability protects a corporation's shareholders from personal responsibility for corporate obligations."). Nonetheless, the *Hobby Lobby* Court was willing to treat owners as separate and distinct from their corporations for purposes of financial obligations, but one and the same for the purposes of religious rights.

156. In facilitation claims, it is not the owners themselves that are forced to take these drugs. Rather, the complaint is that they are enabling others to. While the corporate owners in *Hobby Lobby* were complaining that including certain drugs in the health insurance package given as part of employee compensation amounts to sinful facilitation, other owners might complain that letting their employees use the money given as part of their salary to pay for these drugs also amounts to facilitation.

157. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994). In fact, strict scrutiny in the free exercise context has been characterized as "strict in theory but feeble in fact." *Id.* (internal quotation marks omitted); *see also* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (calling it "strict in theory, but ever-so-gentle in fact").

158. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 857–58 (2006) ("[T]he religious liberty category had the highest survival rate of any area of law in which strict scrutiny applies[.]").

159. *Id.* at 859 (noting that in the decade before *Employment Division v. Smith*, federal courts rejected 87% of Free Exercise Clause challenges).

absolutely no other way to advance that interest.[160] Although free exercise jurisprudence was never this demanding, the Court claimed, rather unpersuasively, that RFRA had meant to break with previous free exercise doctrine rather than reinstate it.[161]

The bottom line is that a state intent to discriminate against religious observers is not always necessary to trigger religious liberty protection under the Free Exercise Clause and is never necessary under the Religious Freedom Restoration Act. In contrast, a state intent to target religious minorities may now be a predicate for Establishment Clause protection. Instead of aligning establishment and free exercise protections, recent Supreme Court decisions have placed them on diverging tracks.[162]

CONCLUSION

Importing the discriminatory intent standard into Establishment Clause jurisprudence has severely curtailed its reach. As with the Equal Protection Clause, the discriminatory intent requirement hobbles the Establishment Clause's ability to protect minorities from discrimination that stems from unconscious biases or indifference rather than animus. At the same time this development brings establishment closer to equal protection, it pulls it further from free exercise, which does not insist on the same level of discriminatory intent. The end result is a legal regime where "All . . . are equal, but some [minorities] are more equal than others."[163] In particular, the greatest solicitude is reserved for those seeking religious exemptions. The irony is that these religious liberty plaintiffs are often not minorities at all.[164] The hundreds of plaintiffs who have now successfully challenged the

160. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014) ("The least-restrictive-means standard is exceptionally demanding, and it is not satisfied here." (citation omitted)).

161. *See id.* at 2761–62 (describing changes to RFRA as "an obvious effort to effect a complete separation from First Amendment case law"); *see also id.* at 2791–92 (Ginsburg, J., dissenting) (describing as "not plausible" the majority's characterization of RFRA as "a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence").

162. If one religion clause were to have a lower activation threshold, it ought to have been the Establishment Clause. Unlike laws that trigger the Free Exercise Clause, laws that trigger the Establishment Clause are unlikely to be addressing compelling interests such as eliminating race or sex discrimination, or promoting health or safety. Solemnizing the start of legislative sessions or celebrating our legal history, while valuable, is not crucial. Moreover, there is always an alternate means of accomplishing the government's secular goal. Reciting the Pledge of Allegiance can solemnize and unite better than Christian prayers, and displaying our Constitution instead of the Ten Commandments is a better tribute to all of our histories.

163. GEORGE ORWELL, ANIMAL FARM 133 (Signet Classic 1996) (1946).

164. Another irony is that affording greater protection for religious liberty means that every law Congress passes is now vulnerable to a RFRA challenge. Why is this ironic? One of the justifications for requiring intentional discrimination to trigger the Equal Protection Clause is that discriminatory impact alone would make a huge number of laws vulnerable to equal protection challenge. Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another

contraception mandate under RFRA have all been Christian—hardly a religious minority in the United States.[165] Meanwhile, the Establishment Clause claims of Jewish and atheist citizens against state sponsorship of Christianity have been thoroughly rebuked.[166] "Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed[.]"[167] Unfortunately, the discriminatory intent requirement brings that claim into question.

would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes . . . .").

165. The plaintiffs in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the case that established the ministerial exemption, were also Christian. *Id.* at 706.

166. In a final twist, the laws they seek exemptions from are often designed to protect historically subordinated minorities from discrimination. In *Hosanna-Tabor*, a church was held to be exempt from the Americans with Disabilities Act. *Id.* at 701, 707. In *Hobby Lobby*, corporations were held exempt from the Affordable Care Act's contraception mandate, a requirement designed to improve the equality of women. *Cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

167. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 605 (1989).