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Religion and Race: On Duality and Entrenchment

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RELIGION AND RACE: ON DUALITY AND ENTRENCHMENT

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Can religion or race ever be the basis for legitimate government policies? For several decades, constitutional law concerning both religion and race has moved toward a model of formal neutrality. At its most expansive, the formal neutrality model bars all religion- or race-based decisions by government.

Recently, though, the Court has rejected an absolutist version of neutrality in the religion context. While maintaining that the First Amendment's religion clauses themselves require only impartiality, the Court has allowed governments space to pursue substantive, constitutionally grounded concerns about religion, even if the resulting policies favor or disfavor individuals based upon their religion. The Court calls this space the "play in the joints" of the religion clauses: It allows governments to pursue separation of church and state or affirmatively protect religious exercise. But in the equal protection context, the Court has not shown such flexibility toward race-based action that is inspired by constitutional concerns, whether the policies are aimed at racial integration or substantive racial equality.

In this Article, I argue that the religion clauses and the Equal Protection Clause serve similar dual goals: protecting minorities from substantive harms and preventing majorities from entrenching their own power via the state. Formal neutrality prevents governments from addressing these constitutionally based concerns. The Court apparently grasps this difficulty in the religion context and has resisted this outcome by providing play in the joints. Yet formal neutrality generates the same problems in the equal protection context. I argue that the Court should extend the notion of play in the joints to race doctrine. I conclude by explaining what this approach would require and how it would address the normative concerns underlying formal neutrality.

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INTRODUCTION

Whether government is required, or even permitted, to take race-conscious action toward particular goals is a raging and long-running debate in the constitutional law of race. Proponents of colorblindness argue that race is never a legitimate criterion in state action. Others insist that government decision makers must sometimes consider race and racial inequality in formulating their policies. Religion doctrine has seen a parallel, deeply divisive debate over the necessity and legitimacy of religion-conscious action by government. Over the course of several decades, the position opposing race- and religion-conscious

action—what I call the ideal of "formal neutrality"[1]—has increasingly dominated both areas of constitutional law. At times, it has seemed that government consideration of race and religion would be deemed illegitimate under all circumstances, rather than seen as potential evidence of government's deeply rooted constitutional concerns.

The formal neutrality model has evolved in two distinct phases. Initially, race and religion doctrine converged on the position that the Fourteenth Amendment's Equal Protection Clause and the First Amendment's religion clauses require only a neutral governmental process, and do not regulate the effects of government action. According to this position, so long as government does not rely on race and religion in its decision making, the Constitution is satisfied. The Constitution does not require government to avoid disproportionately benefiting or burdening specific religious or racial groups.[2]

Later, the idea of formal neutrality expanded. Race and religion doctrine took different paths at that point. After the Supreme Court indicated that government indifference to racial and religious concerns was *sufficient* to satisfy the respective constitutional mandates, the Court gradually began to adopt a stronger version of neutrality: the idea that government neutrality was affirmatively *required*. This would presumptively bar most race- and religion-conscious action.[3] In the religion context, the Court suggested that formal neutrality would dissipate what it understood as an inherent tension between robust readings of the Free Exercise Clause and the Establishment Clause. In

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[1] In a well-known article, Douglas Laycock distinguished between formal, substantive, and "disaggregated" neutrality in the religion context. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990). He used formal neutrality to denote a legal rule barring government reliance on religious classifications. *Id.* at 999. A similar term often used for a bar on government racial classifications is "colorblindness." In this Article, I use formal neutrality to mean the anticlassification model as applied to both religion and race, along with the various ideals associated with the anticlassification model by the legal process theorists and their successors, such as impartiality and universality. *See generally infra* Parts II and III.

[2] As to the religion clauses, see *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990). As to race and the Equal Protection Clause, see *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

[3] As to religion, see *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion); *Widmar v. Vincent*, 454 U.S. 263 (1981). As to race, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Miller v. Johnson*, 515 U.S. 900 (1995); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

the race context, the Court expressly recognized that the tension was between the procedural ideal of formal neutrality and alternative, substantive interpretations of equal protection. In both settings, other government actors resisted. These parties insisted that goals like racial integration or separation of church and state were compelling, grounded in the Constitution itself, and required race- and religion-based action. Conflict between substantive aims and an ideal of formal neutrality—that is, government blindness toward race and religion—grew acute.

Ultimately, the Court resolved this conflict in different ways for religion and race. In four important religion and race cases over the last decade, the Court considered how far a formal neutrality rule limits government in affirmatively pursuing concerns related to religion or race. Two distinct answers emerged.

In the religion cases, *Locke v. Davey*[4] and *Cutter v. Wilkinson*,[5] the Court indicated that the government retains significant leeway to promote religious liberty or separation of church and state, well beyond what the Court's constitutional interpretation would affirmatively require. The Court calls this leeway the "play in the joints" of the religion clauses.[6] The play in the joints represents the space in which government may choose to protect the free exercise of religion without thereby violating the Establishment Clause or may separate the state from religion without thereby violating the Free Exercise Clause.[7] Play in the joints demonstrates the Court's lingering respect for government's voluntary, religion-conscious pursuit of these constitutional concerns—even where the resulting actions arguably discriminate in favor of or against religion.

The Court has not shown similar flexibility for race. In *Parents Involved v. Seattle School District No. 1*[8] and *Ricci v. DeStefano*,[9] the Court indicated that colorblindness norms impose much stricter limits on the government's pursuit of racial integration and racial equality. The Court's reasoning suggested that it does not view these goals as

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4 540 U.S. 712 (2004).

5 544 U.S. 709 (2005).

6 *See Locke*, 540 U.S. at 718–19, 721 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)) (describing the tension between the Free Exercise Clause and the Establishment Clause, but stating that "play in the joints" permits states to choose "not to fund a distinct category of [religious] instruction" without violating the Free Exercise Clause); *see also Cutter*, 544 U.S. at 713 ("'[P]lay in the joints' . . . [permits] government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause." (quoting *Locke*, 540 U.S. at 718)).

7 *See infra* Part III.C (discussing *Locke* and *Cutter*).

8 551 U.S. 701 (2007).

9 129 S. Ct. 2658 (2009).

affirmatively grounded in the Constitution in the same way that it does government's concerns about free exercise or establishment.[10]

In this Article, I probe the convergence and divergence of religion and race jurisprudence over time, as each field has moved further toward formal neutrality. I argue that, even as the Court has shaped religion and race doctrine in similar ways, the Court has missed the true parallels between the two constitutional mandates. While the religion clauses and the Equal Protection Clause protect distinct substantive concerns, they have a deeper congruence and share an important structural dimension. Like the religion clauses, the Equal Protection Clause is best understood to have two aspects, both directed toward majority-minority balances of power: One protects minority rights and the other checks majority power over the state. Equal protection not only guards against invidious discrimination but also checks majorities'[11] ability to use state institutions to entrench their own power. Formal neutrality collapses both halves of this duality, substituting a narrow right to procedural impartiality in place of substantive and structural protections.

To date, no other scholar has offered a sustained, comprehensive examination of how religion and race doctrine have converged and diverged over the last half-century, nor has anyone systematically traced the parallel paths of formal neutrality ideas in each of the two areas.[12] Equal protection and religion clause scholars have largely

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[10] *See infra* Part III.C (discussing *Parents Involved* and *Ricci*).

[11] For ease of exposition, I refer to "majorities" throughout. A more precise term would be "majority coalitions" since a majority often is more aptly described as a coalition of minority interests that have come together around particular shared interests.

[12] There is a limited body of work comparing religion and race doctrine, none of which takes this overall approach. *See* Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, 2000 SUP. CT. REV. 325 (drawing on religion clause jurisprudence to argue against the categorical rejection of race-conscious policies such as affirmative action); Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994) (contrasting religion clause doctrine with equal protection doctrine); Sheri Lynn Johnson, *A Response to Professor Choper: Laying Down Another Ladder*, 79 CORNELL L. REV. 522 (1994) (critiquing the argument that facially neutral laws burdening religious minorities are more injurious than facially neutral laws that burden racial minorities); Pamela S. Karlan, *Taking Politics Religiously: Can Free Exercise and Establishment Clause Cases Illuminate the Law of Democracy?*, 83 IND. L.J. 1 (2008) (drawing an analogy between religion clause cases and cases involving the law of democracy, including equal protection law regarding race-conscious districting); Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275 (2006) (examining the relationship between formal and substantive versions of equal protection and free exercise, in light of historical decisions in both areas under state constitutions); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119 (1997) (arguing that race and religion should be treated similarly in constitutional doctrine because of their similar role in individual cultural identity).

emphasized formal neutrality's threat to the protection of substantive minority rights under either religion or race doctrine, rather than identifying the parallel risk formal neutrality poses to the structural safeguards within both religion and race doctrine.[13] This Article addresses those gaps in the literature and breaks fresh theoretical ground by arguing for a new understanding of the dualistic nature of both the religion clauses and the Equal Protection Clause.

The Article is structured around three main arguments. First, in Part I, I argue that despite their textual differences, the religion clauses and the Equal Protection Clause are functionally parallel. Both must respond to two related problems: the need to provide substantive protections for minorities and the structural need to protect the state from overwhelming majority power.[14] Neither doctrinal area

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[13] Equal protection theorists have frequently critiqued the Court's shift toward formal neutrality by arguing that doctrine should be more sensitive to real-world outcomes, group status, and social meaning. *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1008–15 (1986) (arguing for an antisubordination approach to equal protection jurisprudence, which would require attention to group-level inequality); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147–77 (1976) (setting forth a theory of equal protection that provides special safeguards for groups in perpetual subordination and with limited political power, focusing on laws or practices that aggravate those groups' subordinate status); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 62–68 (1991) (arguing that the rule requiring strict scrutiny of all race-conscious laws should be abandoned and that religion clause doctrine as it then existed might offer an example of a more nuanced, historically grounded approach); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 38–68 (1977) (proposing "equal citizenship" as an interpretive principle for equal protection law); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 890–96 (2004) (arguing that courts should identify racially stigmatic harms that impede full citizenship for African Americans); Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1034–51 (2007) (critiquing colorblindness doctrine, its reliance on a view of race-as-ethnicity, and its elision of racial subordination).

Religion clause scholars have offered similar critiques, arguing that free exercise doctrine's inattention to actual burdens on religious exercise fails to protect religious liberty, and that ignoring substantial state support of religion promotes religious factionalism. *See, e.g.*, NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 244–47 (2005) (citing the danger of religious division); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 177, 186–87 (2002) (arguing that current doctrine insufficiently protects religious liberty, especially for religious minorities); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 14–15 (same); Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1418–20 (2003) (discussing concerns arising from public funding of religion).

[14] Guy-Uriel Charles's argument that election law claims are dualistic, thereby implicating both rights-based and structural concerns, provided the initial inspiration for my approach. Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1120–30 (2005). Pamela Karlan has suggested a structural view of both areas but unfortunately did not elaborate on it: "[T]he religion clauses reflect a view that sectarian groups

can be reduced to a single mandate. While the text of the religion clauses provides a clearer basis for this dualism than does the Equal Protection Clause,[15] the simultaneous need to protect minorities and check majorities is equally present in the context of race. Thus, the Equal Protection Clause does not just protect vulnerable groups against subordination; it also protects the state—and particularly public institutions and resources—from majority capture.

I differ from others in placing public institutions and public resources at the heart of the equal protection story. The modern state's expansive institutions play a foundational role both in shaping democratic governance and in reproducing social hierarchy. Without a structural view, it is difficult to appreciate the broad role of the state in entrenching the power of majority groups. In this respect, I build on the theory of entrenchment in the work of John Hart Ely[16] and more recent law of politics scholars,[17] and concur with their understanding that political institutions should be safeguarded from majority capture.[18] However, I broaden these ideas of capture and entrenchment to focus on the state in all of its allocative aspects, rather than simply focusing on how it directly distributes political power. I emphasize that this type of broad entrenchment need not occur through

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should be prevented from using state resources to benefit themselves and thereby enhance their competitive position." Karlan, *supra* note 12, at 5; *see also* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2349 (1997) ("[T]he Religion Clauses are both a means of status disestablishment and a means for providing rules of political fairness for the ensuing status competition."). Carl Esbeck has argued for a structural view of the Establishment Clause, but describes the clause as a boundary preventing government from intruding into certain types of religious matters: those which he calls inherently religious. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 104–09 (1998).

[15] *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."), *with* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[16] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 5–9 (1980) (arguing for an approach to judicial review that focuses on preserving and reinforcing representative government).

[17] *See generally, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) (treating gerrymandering as a harm to the competitiveness of political process); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644–48 (1998) (setting forth theory of "lockups," laws that entrench existing office holders in power, and arguing that courts should focus on sustaining democratic political competition); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) (arguing for judicial oversight of democratic politics, including guarding against self-entrenching laws); *see also* Charles, *supra* note 14, at 1114–20 (examining Issacharoff and Pildes's structural approach to the law of politics).

[18] *See infra* Part I.C (discussing Ely and other theorists' views of political entrenchment).

intentional discrimination. Part I elaborates this argument and shows that the Warren Court and early Burger Court's religion and race jurisprudence served both substantive and structural goals.

Second, in Parts II and III, I trace the parallel path taken by formal neutrality toward reducing religion and race doctrine to procedural mandates. I argue that in the fields of religion and race, formal neutrality arose in response to calls for judicial restraint, impartiality, and doctrinal coherence, but the model failed to deliver on its promises. Instead of limiting judicial power, formal neutrality expanded it. Instead of reconciling purported internal tensions in the substantive aims of religion and race doctrine, formal neutrality collapsed them into a single, simplistic rule of procedural impartiality for all branches of government. In doing so, formal neutrality imposed ideals that were meant to govern judicial decision making on democratically elected actors and their delegates. Enforcement of such procedural ideals is not impartial toward state ends; instead it tends to systematically preserve existing balances of political power.

Third, in Part IV, I argue that the Court should retool its approach in both areas and recognize that democratic actors deserve space in which to pursue their constitutional concerns about religion and race. This holds true whether those concerns include the substantive goals of promoting religious liberty or racial equality,[19] or the structural ones of preventing direct state support of religion or seeking actual racial integration of public institutions. Making the shift would not require the Court to set aside all concerns underlying its formal neutrality approach but rather to recognize that other government actors may legitimately interpret these constitutional mandates in a dualistic, countermajoritarian manner. The Court could then focus its scrutiny on the sincerity and reasonableness with which those governments have pursued their constitutional goals. Thus, I offer a pragmatic compromise between substantive goals and formal neutrality: The Court should offer the same play in the joints for race as it does for religion, allowing other government actors room to enforce the substantive and structural countermajoritarian concerns underlying these constitutional provisions.

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[19] Throughout the Article, I treat racial equality as a substantive concept, rather than a procedural one. The Article does not focus on defending this view, but instead relies on others' work in this regard. *See supra* note 13 (listing commentators who argue for a substantive conception of equal protection).

I
DUALITY, STRUCTURE, AND ENTRENCHMENT

A. The Inherent Duality of Countermajoritarian Provisions

There is a long tradition of disaggregating the countermajoritarian goals of the Constitution into two purposes: protecting minorities and safeguarding representative institutions. American constitutional scholars have always viewed the document as a means of dealing with the democratic problem of "the superior force of an interested and over-bearing majority" by protecting minorities and controlling majority power.[20] The idea of simultaneously accomplishing these dual aims through rights protections and structural design is equally old and can be traced to the constitutional framers.[21] James Madison viewed the extended republic as a structural means of diminishing the likelihood that any one faction could dominate enough to oppress others and hoped for a "national negative"—a national legislative veto on local laws harmful to minorities.[22] He thought rights protections important though less efficacious.[23]

The religion clauses and the Equal Protection Clause are paradigmatic countermajoritarian provisions. The religion clauses contain explicit dual commands: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[24] The two commands are often interpreted as distinct provisions—one rights-bearing and one structural. Free exercise doctrine assumes the role of protecting the individual's right to practice

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[20] THE FEDERALIST NO. 10, at 51 (James Madison) (Bantam Classic ed., 1982); *see also* ELY, *supra* note 16, at 80 (stating that the Constitution's original "pervasive strategy" was to "structur[e] the government, and to a limited extent society generally, so that a variety of voices would be guaranteed their say . . . [and] no majority coalition could dominate"); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 6–9, 18–24, 118 (3d ed. 2000) (discussing the Constitution's structural strategies for preventing governmental abuses and their relationship to majoritarianism).

[21] *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991) (describing Bill of Rights provisions as structural as well as rights-protecting but also as "more majoritarian than counter"); *cf.* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 35–36 (1956) (discussing democratic theory's treatment of constraints on majorities).

[22] James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 842–44 (2004) (describing Madison's understanding of a "national negative"); *see also* THE FEDERALIST NO. 10, *supra* note 20, at 50–52; THE FEDERALIST NO. 51, at 316–17 (James Madison) (Bantam Classic ed., 1982) (discussing strategies to protect minorities).

[23] *See* Liebman & Garrett, *supra* note 22, at 843 (stating that Madison viewed the judicial enforcement of rights clauses as "'precarious security' for 'the rights of the minority'" (quoting THE FEDERALIST NO. 51, at 323–24 (James Madison) (Clinton Rossiter ed., 1961))).

[24] U.S. CONST. amend. I.

religion freely, while the Establishment Clause regulates the relationship between state and religion to avoid anything approaching religious establishment. The latter function is explicitly structural.[25] At a minimum, the Establishment Clause prevents any majority religion from using the state to transform its doctrine into official dogma.[26] A separationist strategy is also thought to prevent divisive struggles for control over state machinery.[27]

The Equal Protection Clause has no such explicit dual language. It has traditionally been viewed solely as an individual rights provision.[28] But insofar as the Fourteenth Amendment's framers sought to provide equal citizenship to African Americans, the necessary structural function of safeguarding public institutions has long been understood—if not always implemented. Reconstruction congresses sought to prevent Whites from using their power over public institutions to perpetually subordinate Blacks.[29] One of the few equal protection rights upheld by the Supreme Court before the civil rights era was the right of African Americans to serve on juries.[30] The Court expressed an understanding that a White monopoly over juries

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[25] *See* ELY, *supra* note 16, at 94 (describing the religion clauses as performing a "structural or separation of powers function").

[26] *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 103–06 (1968) (holding that the Establishment Clause's requirement of government neutrality implies that "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion" (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963))); Engel v. Vitale, 370 U.S. 421, 425, 430–31 (1962) (stating that the Establishment Clause does not simply bar coercive actions by government, but is aimed at forestalling "a union of government and religion").

[27] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 622–23 (1971) (describing the danger that state aid for religion will provoke political conflict along religious lines); *cf.* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 417–18 (2009) (discussing the divisiveness concern, but arguing that it should simply be one relevant element among others in Establishment Clause analysis).

[28] *Cf.* Robert C. Farrell, *Affirmative Action and the Individual Right to Equal Protection*, 71 U. PITT. L. REV. 241, 245–63 (2009) (arguing that the Court consistently "has treated the Equal Protection Clause as a limitation on government classification and nothing more").

[29] For example, the Civil Rights Act of 1866 was passed to overturn the Black Codes, laws passed by newly reconstructed Southern governments that severely limited the civil rights of Blacks. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (guaranteeing Blacks the same rights that Whites enjoyed to own property, enter into contracts, and be a party or witness to a lawsuit); *see also* Monroe v. Pape, 365 U.S. 167, 172–83 (1961) (discussing the purposes of the Civil Rights Act of 1871); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 199–203, 243–45, 454–59 (1988) (discussing the Black Codes, the Civil Rights Act of 1866, and the Enforcement Acts of 1870–1871).

[30] *See* Neal v. Delaware, 103 U.S. 370, 394–97 (1880) (confirming a criminal defendant's constitutional right to grand and petit jurors selected without race discrimination); Strauder v. West Virginia, 100 U.S. 303, 305–10 (1879) (ruling that a state law barring non-Whites from serving as jurors violated the Equal Protection Clause).

entrenched White supremacy and prevented equal citizenship.[31] Some Reconstruction congressmen also viewed laws protecting African Americans' rights to vote and hold office as key structural reforms needed to break White strangleholds over state power.[32]

The idea that the religion clauses and the Equal Protection Clause served dual functions, including a structural one, was not seriously tested until the twentieth century. But once the Court began to develop religion and race doctrine, it treated the clauses in precisely this way, using them both to protect vulnerable minorities through a robust doctrine of substantive rights and to regulate majority power over state institutions and resources.

B. The Court's Initial Dualistic Approach to Religion and Race

The Court first began shaping modern constitutional doctrine concerning religion and race in the mid-twentieth century. At the time, there was little religion clause jurisprudence because the two religion clauses only became enforceable against state and local governments during the 1940s.[33] Equal Protection Clause jurisprudence was limited as well because the Court had done relatively little in this area since reneging on the Clause's promise of racial equality in *Plessy v. Ferguson*.[34]

As the Court developed these two new fields, it read the religion clauses and the Equal Protection Clause in a similar dualistic way: One aspect was closer to a guarantee of individual rights, though it rested as much on disparities in outcomes as on findings of invidious intent, and the other aspect was a structural regulation of the state and its relationship to particular types of majorities. In many respects, religion clause doctrine led the way. A theory that the Constitution

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[31] *See Strauder*, 100 U.S. at 308 (describing the exclusion of African Americans from jury service as "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 . . . equal justice").

[32] *See, e.g.*, Civil Rights Act of 1871, ch. 22, §§ 1–2, 17 Stat. 13, 13–14 (codified as amended at 42 U.S.C. §§ 1983, 1985 (2006)) (punishing, among other things, conspiracies to inferfere with federal jurors and federal voting rights); FONER, *supra* note 29, at 221, 276–79, 454–55 (discussing campaigns for African American suffrage); *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 519–20 (1996) (treating White voters' interest in disfranchising Blacks as a type of majority self-entrenchment).

[33] The Court incorporated the Free Exercise Clause into the Due Process Clause of the Fourteenth Amendment in 1940, and the Establishment Clause in 1947. Everson v. Bd. of Educ., 330 U.S. 1, 8, 15 & n.22 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[34] 163 U.S. 537 (1896); *see* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1948) (noting equal protection's "eighty years of relative desuetude").

might protect minorities against disparate burdens caused by generally applicable laws was first solidified in free exercise cases. The Establishment Clause cases provided an early example of structural regulation of state institutions aimed at checking majority power.[35] In both fields, the Court was focused on distributive outcomes, concerned with institutions, and explicitly aware of the political balance of power.

The structural component of religion and race doctrine regulated state institutions and the permissible use of state resources in ways that were not necessarily tied to vindication of individual rights. Establishment Clause doctrine limited the role of religion in public institutions and the flow of state aid to religious groups.[36] Equal protection doctrine regulated the role of race in public institutions and the distribution of state resources among racial groups.[37]

However, the Court's actual institutional goals in each area were distinct. In religion cases, the Court pursued separation—it believed that the best way to check religious majorities was to build a buffer between the state and religious institutions, activities, or doctrines. In the area of race, the Court sought integration. The integration mandate required effectively opening state institutions and resources to racial minorities, giving them an equal participatory role in institutions and a distributive share of state resources.

1. Protecting Minorities from Disparate Burdens

Until the mid-twentieth century, the Court had scant free exercise jurisprudence.[38] In the few cases that it had reviewed, the Court had rejected arguments that the Free Exercise Clause entitled individuals to exemptions from general laws that conflicted with their religious beliefs. Instead, it ruled that religious freedom was trumped by the legislature's power to regulate "actions which were in violation of social duties or subversive of good order."[39] Yet when the Court incorporated the Free Exercise Clause's protections into the Due Process Clause in 1940, the Court's rhetoric suggested the need for a more robust free exercise doctrine: Justice Owen Roberts wrote that the First Amendment allowed "many types of life, character, opinion

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[35] *See infra* Part I.B.2.

[36] *See infra* notes 54–68 and accompanying text.

[37] *See infra* notes 69–88 and accompanying text.

[38] Early free exercise cases included *The Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Reynolds v. United States*, 98 U.S. 145 (1878).

[39] *Reynolds*, 98 U.S. at 164; *see also* Braunfeld v. Brown, 366 U.S. 599, 603–05 (1961) (plurality opinion) (citing *Reynolds* for this principle); Prince v. Massachusetts, 321 U.S. 158, 165–69 (1944) (ruling that a state's interest in protecting children's well-being could trump a religious expression claim).

and belief [to] develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."[40] America's diversity was thus a reason for strong constitutional protections.[41]

In the 1960s, the Warren Court began to protect individuals' religious freedoms in an unprecedented way by taking seriously the differential effects of broadly applicable laws on religious minorities. During the 1960s and 1970s, free exercise doctrine mandated that religious adherents who were significantly burdened by general laws were entitled to exemptions, unless the government could show a compelling interest in withholding the exemptions.[42] In this new period, the Court emphasized the need to protect minorities from burdens based on their religion, even when those burdens resulted from neutral laws, devoid of discriminatory intent.[43] The implicit assumption was that mainstream religions did not need to seek judicially mandated exemptions, either because general laws would not be written to burden them or because they could seek exemptions through the political process.[44]

During this time, constitutional race doctrine was proceeding along a different, but parallel, path. In the cases preceding *Brown v. Board of Education*,[45] the Court had been increasingly willing to look below the surface of laws that allegedly treated the races equally and to identify their true impacts on racial minorities.[46] In *Brown* and

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

[41] The Court's reasoning may have been inspired by a general shift in political sentiment in the United States in reaction to World War II and the struggle against fascism in other nations. *See, e.g.*, Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 389–90 (2008) (discussing Franklin D. Roosevelt's role in "prioritiz[ing] a national commitment to expressive freedom and religious worship above all other constitutional duties").

[42] The first case in this line was *Sherbert v. Verner*, 374 U.S. 398, 399–401, 406–10 (1963), in which the Court held that a Seventh Day Adventist could not be excluded from receiving state unemployment benefits based on her refusal to accept jobs that required work on Saturday, her Sabbath. *See also* Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (requiring the state to exempt Amish parents from compulsory high school attendance laws).

[43] This was in part to protect pluralism itself. As the Court wrote in reference to the Amish: "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Yoder*, 406 U.S. at 224.

[44] *See, e.g.*, Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 291 ("[Judicial e]xceptions . . . give to minorities what majorities have by virtue of suffrage and representative government.").

[45] 347 U.S. 483 (1954).

[46] *See, e.g.*, McLaurin v. Okla. State Regents, 339 U.S. 637, 640–42 (1950) (examining the actual effects of "nominal" physical separation of an African American graduate student from his peers); Sweatt v. Painter, 339 U.S. 629, 632–35 (1950) (describing the material and intangible inequalities resulting from excluding Blacks from the University of

subsequent cases, the Court often looked to both the social meaning of the challenged practice—in particular, the stigma Jim Crow laws placed on African Americans alone—as well as the more concrete differential burdens that were placed on Blacks or other minorities, rather than solely to the law's facial meaning.[47] In these cases, the Court relied on its knowledge of social reality to reject claims that particular laws operated equally upon all, focusing on the actual meaning and impact of express racial classifications.[48] While emphasizing the disparate effects of supposedly "equal" laws that classified people by race, the Court also used the rhetoric of "personal rights" to reject claims that a law was valid because it theoretically affected White persons in the same way that it did African Americans.[49] Thus,

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Texas Law School and requiring them to attend a segregated institution); Oyama v. California, 332 U.S. 633, 642–45 (1948) (invalidating, on equal protection grounds, the application of a state law that barred aliens ineligible for citizenship from owning land, and that had been applied to bar transfer of land by a Japanese immigrant to his U.S. citizen son); Smith v. Texas, 311 U.S. 128, 131–32 (1940) (holding that a system of selecting grand jurors from among White commissioners' personal acquaintances, which produced the near-exclusion of African Americans, resulted in the denial of equal protection).

47 The Court famously denied the stigma of segregation in *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), writing that if "the enforced separation of the two races stamps the colored race with a badge of inferiority," it is "solely because the colored race chooses to put that construction upon it." In 1954, the *Brown* Court finally noted the truth: "[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group." 347 U.S. at 494 (quoting the findings of the lower court in the Kansas case).

48 In *Anderson v. Martin*, 375 U.S. 399 (1964), the Court struck down a Louisiana law requiring candidates' race to be listed on ballots, terming it "a racial classification that induces racial prejudice at the polls," given the "'private attitudes and pressures' towards Negroes at the time of its enactment." *Id.* at 402, 403 (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)). The Court viewed "the alleged equality as superficial." *Id.* at 404. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Court declared that the anti-miscegenation law, though it punished Whites and non-Whites participating in interracial marriages equally, was a "measure[ ] designed to maintain White Supremacy." *Id.* at 10–11.

The Court employed burden-shifting approaches in some areas of equal protection law, ruling that severe patterns of exclusion created a prima facie constitutional violation. Further, the Court downplayed intent, resolving to strike down "discrimination, whether accomplished ingeniously or ingenuously." Smith v. Texas, 311 U.S. 128, 132 (1940). For example, given the absolute exclusion of jurors of Mexican descent for over twenty-five years, the Court held that "[t]he result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." Hernandez v. Texas, 347 U.S. 475, 482 (1954).

49 *See* Sweatt, 339 U.S. at 634–35; Shelley v. Kraemer, 334 U.S. 1, 21–22 (1948). The Court also used the idea of "personal rights" to reject arguments against providing equal facilities for African Americans where there was allegedly limited demand by African Americans. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 350–51 (1938) (holding that the right to equal protection is "personal" and requiring the state to furnish substantially equal facilities for legal education to African American individuals, no matter how limited the demand); McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 160–62 (1914) (holding that a railroad could not decline to offer sleeping cars to African American travelers where such cars were offered to Whites, even if demand was limited, because "[i]t is the individual who is entitled to the equal protection of the laws").

equal protection law, like free exercise law, took seriously laws' differential effects on minorities, though it prescribed a different remedy: invalidation of the law, rather than an exemption.[50]

In addition to analyzing outcomes, the Court overcame its previous reluctance to look for illicit legislative purposes in both substantive areas.[51] The Court expressly approved scrutiny of legislative purpose in Establishment Clause cases but emphasized objective evidence.[52] In the equal protection context, the Court remained ambivalent about whether purpose could be examined but indicated that laws reflecting racial prejudice would be struck down.[53]

2. *Checking Majorities' Power via Structural Safeguards*

As the Court began to scrutinize differential burdens on minorities, it also articulated a structural view of how the Establishment Clause regulated religious majorities' control of public institutions and resources. In 1947, the Court in *Everson v. Board of Education*[54] incorporated the Establishment Clause into the Due Process Clause of the Fourteenth Amendment. In doing so, it created a seemingly formidable barrier against state support for any religion: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . ."[55] From the beginning, the Court expressed Establishment Clause doctrine as a set

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[50] Some suggested that because the exemption remedy for free exercise claims is narrower in scope than invalidation based on racial disparate impact, the free exercise claim should enjoy a more robust application as a result. *E.g.*, Choper, *supra* note 12, at 509–10.

[51] *Cf.* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1208–11, 1217–21 (1969) (discussing the Court's increasing willingness to consider legislative motivation, while arguing that the purported distinction between inquiries into legislative "purpose" and "motive" is nearly impossible to define clearly).

[52] An illicit purpose might be "evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect." McGowan v. Maryland, 366 U.S. 420, 453 (1961).

[53] *See, e.g.*, Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 231 (1964) (ruling that the closure of public schools violated equal protection when they were closed "for one reason, and one reason only: to ensure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school"); *see also* Tussman & tenBroek, *supra* note 34, at 356–59 ("Laws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals."). If the discriminatory purpose resulted in outright denial of a particular right, that was certainly actionable. In *Louisiana v. United States*, 380 U.S. 145 (1965), the Court invalidated a requirement that prospective voters interpret the state constitution to the registrar's satisfaction, both because of the "uncontrolled power" it vested in registrars and because it was "part of a successful plan to deprive Louisiana Negroes of their right to vote." *Id.* at 151–53.

[54] 330 U.S. 1 (1947).

[55] *Id.* at 15–16.

of rules controlling government behavior toward religious groups and institutions, rather than as a set of individual rights.

The cases that followed over the next three decades, mostly involving support for private religious schools and religiosity in the public schools, tested both the Court's specific commitment to the bar on financial support for religious activities and the general bar on "laws which aid one religion, [or] aid all religions."[56] Even at the height of the separation metaphor's strength, the Court never strictly required the state to avoid aid to religious institutions. Instead, the Court undertook what appeared to be a good faith effort to separate the normal incidents of the protective and regulatory state, such as providing police and fire protection to churches, from direct supports that would reinforce the strength of one or more religions.[57]

The Court's eventual doctrinal standard for Establishment Clause cases emphasized the institutional goal of separation. To be valid, laws required "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[58] In *Lemon v. Kurtzman*,[59] the Court elaborated that standard into a three-pronged test aimed at "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[60] The *Lemon* test asked whether the government action (1) had a secular legislative purpose; (2) in its primary effect, neither advanced nor inhibited religion; and (3) avoided excessive entanglement with religion.[61] Entanglement could manifest either through excessive state involvement with religious organizations or in political divisiveness engendered by state programs aiding religion.[62] The *Lemon* test thus simultaneously focused on government process and the tangible outcomes of government action.

The *Lemon* test appeared to be a powerful device for enforcing the separation of church and state, since laws could theoretically be struck down for violating any of the three prongs. However, the Court struggled to draw the line defining impermissible state aid to religion

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56 *Id.*

57 *See, e.g.*, GREENAWALT, *supra* note 27, at 405 (describing the Court's early establishment cases dealing with religious schools as "a reasonable effort to work out an approach that would allow some aid, but only aid that would not significantly advance the religious efforts of religious schools").

58 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963).

59 403 U.S. 602 (1971).

60 *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

61 *Id.* at 612–13.

62 *Id.* at 616, 622–23.

even after settling on the *Lemon* test.[63] Justices and scholars resoundingly critiqued the Court's application of the *Lemon* test for the fine distinctions that it drew in service of this attempt.[64]

Still, during this period the Court navigated one set of cases fairly cleanly—those involving religious activities in the public schools. Starting with *Engel v. Vitale*,[65] the Court barred officially sanctioned prayer, Bible reading, and religiously motivated curricular decisions from the public schools.[66] These cases—drawing a clear line against the state's official expression of religious belief[67]—set the stage for the Court's later increasing emphasis on "expressive harms" that might result from state endorsements of religion.[68]

Meanwhile, the Court took on in earnest the structural project of racially integrating state institutions in the late 1960s and early 1970s.[69] In this endeavor, it was aided by emerging political support for civil rights,[70] and its doctrine sometimes appeared inspired by

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[63] *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 678 (1971) (plurality opinion) ("[C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.").

[64] *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 265 (1977) (Stevens, J., dissenting) (critiquing distinctions in Establishment Clause cases between direct and indirect subsidies, and between types of instructional materials, such as maps versus textbooks); William P. Marshall, *We Know It when We See It: The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495–98 (1986) (describing "legendary . . . inconsistencies" in Establishment Clause jurisprudence and noting that the jurisprudence was "universally criticized"); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 18 (1978) (writing that the Court's Establishment Clause cases concerning aid to parochial schools had shown "no sign of consistency").

[65] 370 U.S. 421 (1962).

[66] Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) (invalidating a law requiring the posting of the Ten Commandments in classrooms); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (invalidating a law prohibiting the teaching of evolution in public schools); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963) (invalidating laws requiring Bible readings and recitation of prayer in public schools); *Engel*, 370 U.S. at 424 (striking down mandatory reading of official prayer in public schools).

[67] The line between church and state was not always so clear in other public settings. For example, in *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), the Court upheld legislative prayer against an Establishment Clause challenge.

[68] *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 684–99 (2002) (examining the Court's increasing emphasis, in establishment doctrine, on the feelings of minorities and the eventual adoption of an "endorsement" standard for government expression related to religion); *see also* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, Bizarre Districts, and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993) (defining an expressive harm as "one that results from the ideas or attitudes expressed through a governmental action").

[69] *See* Goodwin Liu, Brown*,* Bollinger*, and Beyond*, 47 HOWARD L.J. 705, 715–16 (2004) (noting that school desegregation did not start in earnest until the late 1960s).

[70] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 268 (2d ed. 1986) ("The presidential campaign of 1960

other branches' statutory and regulatory innovations.[71] During this time, the Court demanded actual integration of public schools, employment, and even representative government. It required actions beyond simple redress of any particular individual's right to be free from intentional racial discrimination.[72] The Court envisioned "completely unified, unitary, nondiscriminatory" public institutions, institutions that could not be identified as Black or White.[73] As with Establishment Clause doctrine, the Court appeared more concerned with the interaction of government institutions and racial groups than with specific individuals' personal rights.

In the school desegregation cases, the Court moved far beyond declaring de jure segregation unconstitutional. It held that race-neutral rules for school enrollment were not enough; actual integration was required. School systems had "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[74] To that end, the Court authorized a broad set of race-conscious remedial measures, including racial balance goals for schools, race-

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marked the assumption of political responsibility for the principle of racial integration."); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2094–96 (2002) (describing new political support for civil rights in the 1960s and its effect on school desegregation rulings).

[71] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) (adopting the EEOC's disparate impact standard for Title VII of the Civil Rights Act); Gaston Cnty. v. United States, 395 U.S. 285, 296–97 (1969) (agreeing with the federal government's argument that literacy tests had the effect of disenfranchising African Americans in violation of section 4 of the Voting Rights Act of 1965); *see also* Liu, *supra* note 69, at 715–16 & n.53 (noting that several federal circuits assimilated guidelines on school desegregration promulgated by the U.S. Department of Health, Education, and Welfare into constitutional law).

[72] *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1079–102 (1978) (examining how the Court's remedial doctrine addressed conditions of racial inequality in these three sectors that went well beyond the narrowly defined constitional violations); *see also* Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, LAW & CONTEMP. PROBS., Autumn 1978, at 57, 80–82 (discussing the difficulties in treating desegregation cases as remedial given the complexity of causal chains involved, the mismatch between original victims and current beneficiaries, and the uncertainty of benefits to purported beneficiaries).

[73] United States v. Montgomery Cnty. Bd. of Educ., 395 U.S. 225, 235 (1969). Each formerly segregated school district was to "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." Green v. Cnty. Sch. Bd., 391 U.S. 430, 442 (1968).

[74] *Green*, 391 U.S. at 437–38. In 1971, the Court again defined the constitutional mandate in terms of institutional outcomes: "Segregation was the evil struck down by *Brown I*. . . . The task is to correct . . . the condition that offends the Constitution." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971).

conscious design of attendance zones, and busing.[75] And the Court made clear that barriers to desegregation were unlawful, regardless of the intent of those erecting the barriers.[76] Here, too, it rejected claims that "color blind" measures would in fact operate equally.[77]

While much desegregation doctrine would later be reinterpreted merely as "remedial,"[78] the cases did far more than compensate particular individuals for direct harms suffered under school segregation. Many affected children under integration decrees had never gone to a de jure segregated school, so the beneficiaries were not direct victims.[79] Moreover, the scope of injunctive remedies was not necessarily tied to the incremental harms inflicted by defendant school officials' segregative acts, as opposed to segregation resulting from other forces.[80]

During the same period, the Court suggested that public employment would have to be effectively integrated as well. The school desegregation cases led the way: The Court indicated that faculty integration was critical to desegregation of the school system,[81] and later upheld orders setting numerical goals for the racial balance of teaching staffs.[82] Outside the school setting, the Court held in 1971 that methods of hiring and promoting employees could run afoul of Title VII of the Civil Rights Act if they effectively perpetuated past discrimination.[83] Title VII had not yet been extended to public

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[75] *Swann*, 402 U.S. at 24–25, 27–30.

[76] "[A]n inquiry into the 'dominant' motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools, and we have said that '[t]he measure of any desegregation plan is its effectiveness.'" Wright v. Council of Emporia, 407 U.S. 451, 462 (1972) (quoting Davis v. Sch. Comm'rs of Mobile Cnty., 402 U.S. 33, 37 (1971)).

[77] *See* N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45–46 (1971) (striking down a North Carolina law because it "exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the promise of *Brown*").

[78] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736–37 (2007) (plurality opinion) (stating that post-*Brown* school integration cases, such as McDaniel v. Barresi, 402 U.S. 39 (1971), were irrelevant in assessing the legality of a school district's voluntary integration plan because such cases rested on a "remedial justification").

[79] *See* Yudof, *supra* note 72, at 81 (describing desegregation's status "as a remedy for discrimination against past generations of black students").

[80] *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 875–76 (1999) (noting that courts were encouraged "to presume that all existing segregation was a lingering effect of past de jure decisions by school boards").

[81] *See* Bradley v. Sch. Bd., 382 U.S. 103, 105 (1965) (per curiam) (holding that lower courts could not refuse to consider faculty integration in evaluating the adequacy of an overall school desegregation plan).

[82] United States v. Montgomery Cnty. Bd. of Educ., 395 U.S. 225, 236–37 (1969).

[83] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

employers, but lawyers and lower courts assumed that the same rule applied to public employers via the Equal Protection Clause.[84]

Finally, the Court extended the integration mandate to representative government itself by interpreting the Equal Protection Clause to provide not simply non-discriminatory access to the ballot, but also a right to effective political participation.[85] In the case of *White v. Regester*,[86] the Court held that minority group members could show an equal protection violation by demonstrating "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[87] Along with evidence that the group "has not had legislative seats in proportion to its voting potential," other relevant evidence included mechanisms that excluded the group from effective participation, the responsiveness of elected officials to the groups' needs, and a history of discrimination against the group in politics and in other realms as well.[88] By commanding judicial attention to the actual political status of racial minorities, the doctrine amounted to an integration mandate for the elected branches of government.

C. Addressing Entrenchment Through Structural Checks

Starting in the mid-twentieth century, the Court used constitutional doctrine as a means to police substantive burdens on minorities, as well as to promote particular institutional outcomes for the state.

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[84] *See* Eskridge, *supra* note 70, at 2106–07 (noting that the government attorneys in Washington v. Davis, 426 U.S. 229 (1976), uniformly conceded that the disparate impact standard of Title VII applied in the equal protection context as well); *see also Davis*, 426 U.S. at 244–45 & n.12 (citing earlier courts of appeals decisions applying *Griggs* to equal protection claims). Title VII was extended to government employers in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2, 11, 86 Stat. 103, 111–12.

[85] Given their emphasis on actual participation in the relevant political process—rather than formal government neutrality—the *White Primary Cases* arguably constituted earlier steps toward a structural mandate of integration of representative government. *See* Terry v. Adams, 345 U.S. 461, 479–80 (1953) (invalidating the exclusion of African Americans from a political organization's primary elections); Smith v. Allwright, 321 U.S. 649, 663–64 (1944) (holding that the Democratic party acted as an "agency of the state" in excluding African Amerians from primary elections and thus violated the Fifteenth Amendment); Nixon v. Condon, 286 U.S. 73, 89 (1932) (holding that an act of the Democratic party committee in excluding non-Whites from voting in a primary election violated equal protection because it was done under state-delegated power); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (invalidating a state law that barred African Americans from voting in Democratic primaries).

[86] 412 U.S. 755 (1973).

[87] *Id.* at 766.

[88] *Id.* at 766–69.

Many religion and race scholars have argued that the Court's attention to substantive, group-level outcomes and the reality of social and political power was well justified and should have been extended. Equal protection scholars have noted that sensitivity to racial meaning and hierarchy is necessary if deep-rooted racial inequality is to be addressed.[89] Religion scholars similarly have argued that an effects-based approach to religious liberty is necessary to protect religious dissenters from the cultural insensitivity of mainstream religions.[90]

Few, however, have specifically focused on the work that the Court did in that era to safeguard public institutions in the broadest sense.[91] This is an oversight. Protecting public institutions from excessive control by particular religious or racial majorities serves the substantive goals of religious liberty and racial equality. More importantly, structural safeguards are necessary to prevent particular majorities from using the state to consolidate their power and status. Excessive majority dominance over the state distorts the frameworks that are meant to produce a democratic society. It turns collective institutions away from public ends and toward narrower interests.

Scholars have mapped out the problem of entrenchment as it affects the democratic political process. These theories build on John Hart Ely's work and the Supreme Court's famous footnote four in *United States v. Carolene Products Co*.[92] Ely's theory of judicial review, as outlined in *Democracy and Distrust*, presumes most laws to be constitutionally valid.[93] But Ely suggested that closer scrutiny is justified in areas where democratic processes might be self-

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[89] *See, e.g.*, Colker, *supra* note 13, at 1007–15 (arguing for special scrutiny of laws that perpetuate hierarchy); Fiss, *supra* note 13, at 157–60 (describing the Equal Protection Clause as a guard against state actions that reinforce group subordination); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324–27, 355–81 (1987) (proposing that judges look to cultural meaning in race discrimination cases as a means of addressing unconscious racism); Lenhardt, *supra* note 13, at 809–11, 887–96 (arguing for a focus on racially stigmatic harms); *see also* Balkin, *supra* note 14, at 2352–54, 2358–59 (suggesting a constitutional model that focuses on eliminating unjust status hierarchy).

[90] *See, e.g.*, Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 921–22, 964–67 (2004) (arguing for a minority-protection approach to the religion clauses, including constitutionally mandated exceptions); Laycock, *supra* note 13, at 4, 12–17, 42, 54–68 (arguing that the Free Exercise Clause should be interpreted to require substantive neutrality toward religion, not just non-discrimination or formal neutrality); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1118, 1129–52 (1990) (critiquing the Court's analysis in the *Smith* decision and particularly the assumption that generally applicable laws are neutral in their treatment of minority religions).

[91] *Cf.* Issacharoff & Pildes, *supra* note 17, at 652–68 (focusing on the Court's earlier work to open up political institutions in the *White Primary Cases*).

[92] 304 U.S. 144, 152 n.4 (1938).

[93] ELY, *supra* note 16.

undermining, or lead to non-democratic results.[94] He derived the core of this "representation-reinforcing" approach from *Carolene Products*'s footnote four.[95] Under his framework, courts would seek to correct failures in political processes, instances where "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[96] In addition, the courts would seek to protect "discrete and insular minorities" by scrutinizing instances where it appeared that "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility."[97] Ely's two prongs of searching review thus encompass "an antientrenchment and an antidiscrimination rationale for judicial intervention."[98]

The critical feature of Ely's concept of entrenchment is that it is self-reinforcing. Once institutions are structured to promote dominant parties' continuing control over them, the "channels of political change" are blocked.[99] It is very difficult for new majorities to form and unseat dominant parties, because the rules are now stacked in favor of the old majority. The democratic process for change is thus distorted.[100]

Law-of-democracy scholars have built on Ely's concept to argue that courts should focus on structure in regulating politics. In a well-known article, Samuel Issacharoff and Richard Pildes argued that courts should use constitutional doctrine to prevent "lockups"—instances in which "existing holders of political power seek to perpetuate their political control . . . by capturing the basic structures and ground rules of politics itself."[101] Disrupting such "lockups" should promote fairer political competition and more responsive representation by elected officials.[102] Issacharoff and

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[94] *Id.* at 101–03.

[95] *See Carolene Prods.*, 304 U.S. at 152 n.4 (suggesting that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" might receive more searching review); ELY, *supra* note 16, at 75–77 (discussing *Carolene Products*'s footnote four).

[96] ELY, *supra* note 16, at 103.

[97] *Id.* at 100, 103; *see also Carolene Prods.*, 304 U.S. at 153 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

[98] Kathleen M. Sullivan & Pamela S. Karlan, *Symposium in Honor of John Hart Ely—Foreword: The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 697 (2004).

[99] ELY, *supra* note 16, at 103.

[100] *Id.*; *see also* Klarman, *supra* note 32 (calling for an antientrenchment theory of judicial review to counterbalance the potential for political representatives or temporary majorities to entrench their own power).

[101] Issacharoff & Pildes, *supra* note 17, at 650.

[102] *Id.*

Pildes therefore suggested that courts should protect political institutions to prevent elected officials and dominant political parties from restructuring them to their advantage.[103] Thus, these theorists have all focused on political incumbents' ability to distort the framework for political choice and competition, through changes in laws governing aspects of the political process.[104]

But a broader form of entrenchment is possible, one that stretches beyond the arena of political competition. Religious or racial majorities may use the state and its resources to bolster their power in other social domains. Such power is likely to feed back into and reinforce those groups' political dominance and sway over state institutions—enabling a self-perpetuating cycle of entrenchment.[105]

Broader forms of entrenchment present a significant risk because of the modern state's breadth and power. The state structures not only political choice and implementation, but also the general processes of social reproduction. These processes determine how resources will be divided among individuals and groups, on what terms, and with what meaning. By using its powers to regulate, tax, spend, educate, police, zone, and re-district, government at all levels overwhelmingly shapes political, economic, and social life. It provides the ground rules for, and actively intervenes in, the spheres of market, community, and family. As a result, the state is critical in reproducing social structure and hierarchy. As Owen Fiss has noted, "[i]n modern society, where the state is all-pervasive," the constitutional values that "inform and limit . . . governmental structure" effectively "determine the quality of our social existence."[106] If these values and governmental structures are not democratic, then the state will itself reproduce and rigidify

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[103] *Id.* at 648–52, 716–17; *see also* Issacharoff, *supra* note 17, at 600–01, 611–17 (examining the risks of anticompetitive behavior by political actors); Pildes, *supra* note 17, at 43–45 (arguing that democracy necessarily involves structural risks to the framework for electoral accountability, as long as current office holders exercise power over the rules of political competition, and that courts can and should address these risks).

[104] *See, e.g.*, ELY, *supra* note 16, at 105–34 (setting forth a rationale for how judicial review can protect the democratic process in areas including rights of expression, the right to vote, and requirements for transparent lawmaking); Issacharoff & Pildes, *supra* note 17, at 652–90 (analyzing distortions in political competition, using examples such as the *White Primary Cases*, write-in ballots, and electoral barriers faced by third parties).

[105] "The dominant communities are those that have the most resources and rewards, those that manage to influence the rules that define the game to their advantage, and those that through time manage to reproduce or improve their top-dog position through competitive struggle." Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 725.

[106] Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1 (1979).

existing distributions of power by preventing fair, open, and equal access to the institutions and resources that distribute power.[107]

What characterizes social structures that are democratic in the broadest sense? A democratic form of social life need not offer equality of outcomes, but it should offer equal opportunity and do so across distinct spheres of social life. Outcomes in one sphere should not rigidly determine those in another. As with political democracy, mechanisms to assure basic equality, openness, and choice are required. In politics, election cycles are a basic mechanism to invite change, to allow new ideas to take over, and to subject old ideas to continual challenge. By making power fluid and subject to repeated renegotiation, processes of political competition and choice allow continual redefinition of political values and visions. Also, they provide for potential redistributions of power by shuffling the identities of majority coalitions. For these processes to work, equal access to political institutions must be guaranteed.[108] A vision of democratic pluralism in broader social processes similarly must emphasize equal access to the social institutions and resources that structure power; rules providing for change should ensure accountability, fair competition, and choice.[109] Otherwise, individuals will experience social life not as offering a fluid set of chances for achievement, autonomy, and fulfillment, but as a set of structures that simply reinforce existing power relations.

Schools provide an obvious example of a public institution that reproduces power in this broader sense. As an attempt to give life to the claim that in America anyone can rise to the highest reaches of power, free public education is widely understood to be a foundation for socioeconomic mobility.[110] But often schools are engines for

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[107] *See* Balkin, *supra* note 14, at 2313–15 (arguing that the Constitution should be interpreted to include a commitment to "democratic forms of social structure and social organization, . . . social as well as political equality").

[108] This describes a version of democratic pluralism, but with the critical recognition that politics is not a self-regulating system in which all interests can automatically be heard. Rather, it is one that requires frequent structural checks for distortions, rigidities, and inequalities in the institutions of political exchange and competition. Thus I mean to differentiate this vision of pluralism from the more complacent mid-twentieth-century prototype. *See* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1708–28 (2005) (reviewing the literature on pluralism).

[109] *See also* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 336–61, 365–69 (1986) (discussing the ways in which the Constitution supports cultural pluralism and identifying American "ideology" as resting on the values of individualism, egalitarianism, and tolerance).

[110] *See, e.g.*, President Barack Obama, Remarks at Kenmore Middle School in Arlington, Virginia (Mar. 14, 2011), *available at* http://www.gpo.gov:80/fdsys/pkg/DCPD-201100172/pdf/DCPD-201100172.pdf ("We are a place that believes every child, no matter where they come from, can grow up to be anything they want, where Katherine, or

reproducing social inequality, rather than providing equal opportunity. Distributions of political and economic power flow into the school system; disparate educational outcomes then serve to maintain inequality in other realms.[111] Entrenchment occurs as advantages produced via the school system flow back into politics, the market, and other material realms, in a repeated cycle that cumulates over time and rigidifies the status quo.

It is especially problematic that the modern state, with its far-reaching institutions, be the vehicle for dominant groups' entrenchment. We have expanded the role of public institutions precisely because we do not trust the market or other mechanisms to perform adequately on their own.[112] Public institutions are meant to function consistently with collective democratic norms and often are designed to further egalitarian goals or to protect personal liberties. Those very institutions should not be vehicles for cementing particular groups' political power by extending it into other areas of social life. Further, public institutions' output often is deemed more legitimate than that resulting from other mechanisms. Entrenchment via the state thus carries the misleading imprimatur of being democratically and morally sanctioned, even as it is enabled by our modern willingness to provide the state with enlarged power.

Self-entrenchment by religious or racial majorities is also particularly threatening to democracy. Pluralist theory suggests that entrenched majority power is most worrisome when it corresponds to pre-existing, highly fraught, and hierarchically defined boundaries between social groups.[113] Group divisions of this sort exacerbate

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Roberto or a skinny kid with a funny name named Barack Obama can grow up to be President of the United States.").

111 *See, e.g.*, Dennis J. Condron & Vincent J. Roscigno, *Disparities Within: Unequal Spending and Achievement in an Urban School District*, 76 SOC. EDUC. 18 (2003) (examining the relationship between large intradistrict variations in per-pupil spending and local patterns of race and class stratification); Dennis J. Condron, *Social Class, School and Nonschool Environments, and Black/White Inequalities in Children's Learning*, 74 AM. SOC. REV. 683 (2009) (finding that school-based factors play a large role in the Black-White achievement gap and highlighting the effects of racial segregation); Vincent J. Roscigno, *Race and the Reproduction of Educational Disadvantage*, 76 SOC. FORCES 1033 (1998) (reporting substantial school-based institutional effects on racial disparities in achievement tests); Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317 (2002) (reporting racial disparities in school discipline, especially for subjective offenses like "disrespect").

112 *Cf.* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 423 (1987) (stating that a new theory of constitutionalism and state power arose during the New Deal in part because reformers "viewed the common law as a mechanism for insulating the existing distribution of wealth and entitlements from collective control").

113 *See, e.g.*, Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 735–38 (1983) (arguing that societies with multiple, cross-cutting cleavages between groups

rigidities in the distribution of power and help such rigidities become both self-policing and self-perpetuating. These rifts make competition appear zero-sum and have the potential to exclude permanently some groups or even tear societies apart.[114] Long-term subordination also directly undermines the foundational premise of democratic society—political and social equality. In the United States, race and religion have been recurrent and often long-lasting bases for such hierarchical, exclusionary divisions.

Yet despite the frequent association of religious and racial divisions with bias, it is important to note that majority entrenchment need not result from animus toward other groups. It need not even be intentional. Majorities are likely to entrench themselves simply by virtue of enlisting public institutions and resources toward aims that interest them. It may be a near-mechanical result of majoritarian control of the state—but it is not inevitable. Various actors can recognize and respond to the risk of entrenchment by adopting prophylactic strategies. Courts, federal officials, administrative agencies, and other bodies that are insulated from local political dynamics all have the capacity to do so. Even majorities may act to check their own power, to the extent that they subscribe to long-term normative visions of a state that is representative, open, and egalitarian.

Entrenchment, then, is a fundamental distortion of democratic frameworks for reproducing political, social, and economic life. It is an analytically distinct phenomenon from minority subordination, though the two frequently coexist. Treating entrenchment as a separate phenomenon is useful in that it focuses attention on majorities and locates the problem immediately in the disproportionate power and resources that they may hold. It also emphasizes the role of the state in enabling such disparities of power to become self-reinforcing. A dualistic understanding of the Constitution's countermajoritarian provisions captures this important distinction between the need to provide substantive protections to minorities and to create structural checks on majority power over state institutions by preventing entrenchment.

In the two sections that follow, I discuss how religious entrenchment and racial entrenchment play out. Religious entrenchment is most clearly a risk when the state plays any kind of role in generating new religious believers or maintaining existing ones. Such state

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are more politically stable than societies with reinforcing cleavages between groups that produce "universal losers").

[114] *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1294–96 (2005) (describing the fragility of democratic pluralism and the role of identity-based conflict in exacerbating fragility).

involvement will nearly always shore up majority religions, reinforcing the cycle of state support for majority religions and maintaining their majority status. In contrast, the state's role in allocating political, social, and economic power and opportunity among groups triggers racial entrenchment, a predominantly distributive problem. When the state allows majority group members to dominate its institutions and benefit disproportionately from its resources, the result is a self-perpetuating cycle of racial dominance of the state, leading to racial dominance in other spheres. As I discuss in more detail below, because religious and racial entrenchment follow somewhat different patterns, the Court's strategies for addressing entrenchment in each area have necessarily differed.

1. Religious Entrenchment

The modern state offers highly useful means of entrenching religious majorities. Schools always have been the locus of struggle for church-state controversies for important strategic reasons.[115] Short of establishing an official church, the surest way to entrench any religious group is to use the power of the state to inculcate its ideals among the young, thus consolidating or even increasing its constituency. This holds true whether such inculcation occurs within the public schools or by directing state resources to the support of private religious education.[116] Both public education and public aid for educational or other social welfare purposes offer valuable means for religious majorities to entrench their socially dominant positions. The state also can entrench particular religious groups' power by channeling individuals toward those groups' beliefs in other ways—whether through symbolic or tangible support.

When the state and its resources are used to sustain majority religions' constituencies, that support inevitably feeds back into politics. Those religions thereby maintain equal or gain greater political clout both in a direct sense (through membership growth) and an indirect sense. Once it is permissible for religious groups to lobby for inclusion in governmental curricula, aid programs, and other forms of state

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[115] *See* Everson v. Bd. of Educ., 330 U.S. 1, 63 (1947) (Rutledge, J., dissenting) ("Two great drives are constantly in motion to abridge . . . the complete division of religion and civil authority . . . . One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools."); GREENAWALT, *supra* note 27, at 385 ("[T]he . . . subject of aid to religious schools has given rise to far more Supreme Court cases than any other establishment issue.").

[116] *Cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 726–27 (2002) (Breyer, J., dissenting) (describing "the teaching of religious truths to young children" as "a core function of the church" and the divisiveness of public funding for this function).

action, then majorities' religious beliefs have an immediate and legitimate route to influencing governmental decisions. Over time, this cycle is likely to become self-reinforcing. To be clear, this risk is distinct from direct political entrenchment. The problem is not the greater ability of people from dominant religions to occupy positions of political power (the risk one might typically associate with "capture"), but rather the use of state institutions to shore up those religions' social and institutional power, supporting their ability to win adherents and influence broad swathes of policy.

The Protestant domination of public education that persisted in many places well into the twentieth century offers a concrete example of religious entrenchment. As John Jeffries and James Ryan have described, "generalized Protestantism [was] the common religion of the common school," manifested most clearly in the regular reading of the King James Bible.[117] Protestants understood "nonsectarian" public education to permit such practices, and thought them critical to inculcating distinctively American moral values.[118] As Catholics gained numbers and political power, a drive to exclude Bible reading from the public schools gathered force, particularly in the urban North. To Protestants, this phenomenon was an "assault on their religious and cultural hegemony."[119] As political conflict increased, the connection between public education, religious education, and religious groups' relative power became evident, even though Protestants had long succeeded in normalizing nonsectarian education as a "neutral" option.

Some might argue that nonpreferential state aid to religious entities, in contrast to religious expression in the public schools, does not pose majority-entrenchment problems. Theoretically, general access to public funds for all religious groups at worst recreates existing patterns of religious membership.[120] In practice, this is unlikely to be true, because mainstream religions derive disproportionate benefit from general programs of aid.[121] In many places, minority religions are too small to support their own schools or other formal institutions

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[117] John C. Jeffries, Jr., & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297–300 (2001).

[118] *Id.* at 297–303.

[119] *Id.* at 299–304.

[120] *See, e.g.*, Berg, *supra* note 90, at 992–1000 (arguing that including religious entities in funding programs such as school vouchers may aid religious minorities); Esbeck, *supra* note 14, at 92 (arguing that neutral programs of aid produce "cultural pluralism" by maximizing individuals' choices).

[121] *See* Steven K. Green, *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, 38 WILLAMETTE L. REV. 549, 559 (2002) (noting that voucher programs will disproportionately benefit religions with well-established schools and support structures).

that would qualify for state aid.[122] A significant number of religions may not wish state aid for reasons of their own, introducing further distortions.[123] And even if the state did simply assist in maintaining existing patterns, this would still conserve the position of dominant religions.

Separation of the state from religion is a structural means of addressing entrenchment, one that focuses on the institutional relationships between the state and religion. Because the core of religion is a belief system and because it manifests in distinctive practices and institutions, the separation strategy attempts to avoid aid only for these distinctive aspects of religion—recognizing that actual separation between the state and all aspects of religion is impossible.[124] In effect, it tries to keep the state out of the business of reproducing religious adherents.

The Court took this structural approach in its earlier Establishment Clause doctrine by examining the tangible flows of aid and the form and substance of state relationships with religious activities or institutions. With respect to public aid for religion, the Court enforced a rule: "There may be no aid supporting a sectarian [institution]'s religious exercise or the discharge of its religious mission . . . ."[125] To apply this rule, the Court undertook a multi-faceted analysis:

> ask[ing] whether the government is acting neutrally in distributing its money, and about the form of the aid itself, its path from government to religious institution, its divertibility to religious nurture, its potential for reducing traditional expenditures of religious institu-

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122 *See* Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 920–22 (1999) (suggesting that facially neutral criteria for vouchers are likely to result in significant inequalities in different religions' ability to access religious schools); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 728 (2002) (Breyer, J., dissenting) (noting that religions with small populations will be unable to support independent schools).

123 *See* Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 809 (1993) ("Because [access to the public sphere] cannot be understood as an objective benefit for the religious community, some religions will accept the benefit, [and] others will decline."); *see also Zelman*, 536 U.S. at 728 (Breyer, J., dissenting) (noting that some religions will not wish to receive state aid).

124 *Cf.* Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970) ("No perfect or absolute separation is really possible . . . ."); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 555 (1991) (describing the separation metaphor as suggesting "a psychologically and socially impossible discontinuity between the sacred and the secular").

125 Mitchell v. Helms, 530 U.S. 793, 868 (2000) (Souter, J., dissenting) (describing the Court's earlier approach to the Establishment Clause).

tions, and its relative importance to the recipient, among other things.[126]

The Court also consistently barred government from using its own institutions for indoctrination.[127] While many lamented the doctrinal complexities and inconsistencies the Court's rule generated in application,[128] the abstract idea of avoiding state aid for religious endeavors, coupled with the Court's attention to concrete institutional relationships and outcomes, was a very plausible means of avoiding structural risks to the state.

2. *Racial Entrenchment*

As U.S. history amply illustrates, White majorities have been able to use control over the state's institutions and resources not only to disenfranchise other groups directly—preventing them from participating in politics at all—but also to shore up their own political dominance in more indirect ways. The penal system, school system, public health and welfare systems, land use and zoning systems, selection of employees in all these institutions, and other mechanisms have reinforced the power of White majorities through blatant exclusion; theoretically neutral rules with discriminatory meaning, application, or effects; and the failure to address extant inequalities.[129] To the extent these modes of distributing political and economic power assure White majorities' disproportionate control over shaping or implementing the going-forward rules, they allow self-perpetuating disparities.

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[126] *Id.* at 868–69.

[127] *See supra* notes 66–67 and accompanying text (discussing cases on religion in public schools).

[128] *E.g.*, Kurland, *supra* note 64 at 18–19 (criticizing results of the Court's establishment cases as inconsistent and perhaps "nonsensical").

[129] *See, e.g.*, 2 W. MICHAEL BYRD & LINDA A. CLAYTON, AN AMERICAN HEALTH DILEMMA: RACE, MEDICINE, AND HEALTH CARE IN THE UNITED STATES 1900–2000 (2002) (discussing the persistent racial discrimination in the American health care system); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (discussing the relationship of race to the criminal justice system and to mass incarceration); FONER, *supra* note 29, at 198–210, 420–25, 438–44, 590–98 (discussing the role of both race-based and neutral laws, as well as violence, in maintaining Black political and economic subordination in the South); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 26–59 (1993) (discussing the role of government and private actors in constructing highly segregated urban ghettoes); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 130–81, 200–50 (2008) (discussing the role of both race-based and neutral laws in maintaining segregation and Black subordination in the North); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 6–8, 82–93, 97–109, 113–18 (3d rev. ed. 1974) (tracing the disenfranchisement of African Americans and the expansion of Jim Crow laws in the South).

Integration of public institutions and resource flows represents one structural response to this entrenchment problem. It ensures minority voice in decision making and immediately directs resources more evenly, to the extent that integration requires distribution of public jobs and public funds across all racial groups according to criteria that do not simply track pre-existing power balances.

Integration also includes a more subtle check. Equal protection's presumption in favor of generally applicable laws rests on a logical premise: To the extent that rules must apply to the majority as well as the minority, the majority is likely to enact fairer rules.[130] Integration helps assure a similar safeguard—the more that racial minorities and Whites attend, for example, the same public schools, the less likely the White majority is to starve those schools of resources, wittingly or unwittingly. Integration of public institutions promises a shared fate for racial groups by limiting any group's ability to hoard public resources for itself.

Integration has a different logic than religious separation. The essential aim is to assure the equal status of members of different racial groups in their interactions with the state, rather than to diminish the state's support for distinctive practices or institutions.[131] While both strategies play out at the level of resource flows, race cannot be cordoned off as easily from the state as can religion. Whenever a person interacts with the state in a way that involves access to public institutions or resources, there is a potential distributional effect on racial inequality. As a result, race is implicated in these contexts, and the structural strategy of integration rather than separation follows.[132]

The Court's early doctrine treated integration as a means of halting entrenchment by directly shifting racialized patterns of control

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[130] *See, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106, 112 (1949) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."); PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 158 (1970) (citing *Railway Express Agency* in support of the proposition that the purpose of the Equal Protection Clause is to prevent majorities from imposing on minorities through laws that create different standards for each group).

[131] *Cf.* Johnson, *supra* note 12, at 526 ("[I]n assessing racially disparate effects we are most concerned with distributive justice, while with respect to effects on religious practice we are most concerned with coercing beliefs.").

[132] Integration can be viewed in this way as a distributional strategy, but to the extent that it is seen as assimilationist in its aims or deflects attention from substantive equality, it is deeply controversial. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (describing the tension between African American families' interest in quality education and civil rights lawyers' focus on integration); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (tracing "integrationist" ideology and its opposition to race consciousness).

over state institutions and resources. When the Court considered the adequacy of institutions simply adopting race-neutral rules of access, it pointed out that this would "freeze the status quo."[133] Given the extent of underlying inequalities resulting from past discrimination, providing for facially neutral access to schools or jobs would not break up Whites' monopolies.[134] Providing formal access to the ballot would not change the racial make-up of government.[135] Therefore, the Court evaluated institutional outcomes, not simply procedures.

D. What Distinguishes this Structural Approach from Other Theories?

Constitutional law in the area of religion and race should be understood as dualistic, protecting minorities from substantive harms and checking majorities via structural constraints. Many scholars have already laid out compelling reasons to interpret the religion clauses and the Equal Protection Clause in a substantive, minority-protecting way.[136] I rely on their arguments as to the substantive aspects of the constitutional mandates and have focused here on the relatively undertheorized structural side of the religion and equal protection clauses. My structural argument has several distinctive aspects. First, it identifies and responds to a functional problem that arises for both religion and race: majority capture of public institutions and resources. Second, it broadens the typical conception of entrenchment to cover a wider range of institutions and self-reinforcing majority actions. Finally, it suggests that the Constitution's countermajoritarian goals are best attained through a dualistic strategy, one that addresses both subordination and entrenchment.

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133 *See* McDaniel v. Barresi, 402 U.S. 39, 41 (1971) (discussing schools); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (discussing employment practices); *see also* White v. Regester, 412 U.S. 755 (1973) (adopting this logic implicitly in the voting context).

134 *See Griggs*, 401 U.S. at 430–31 (stating that in enacting Title VII, Congress required "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"); *supra* notes 69–77 and accompanying text (describing the Court's structural project of racial integration of state institutions during the 1960s and 1970s).

135 *See supra* notes 86–88 and accompanying text (discussing *Regester*).

136 *See supra* note 13 (citing works that argue for shifting religion and race doctrine toward addressing actual harms to minorities). I do not attempt to rebut fully the objection that the Equal Protection Clause does not grant substantive rights at all. *Cf.* Laycock, *supra* note 13, at 18 (making this claim). Others have ably argued that the equality envisioned by the Equal Protection Clause is not an empty or merely procedural ideal. *See, e.g.*, Karst, *supra* note 13, at 4–11.

Among religion scholars, Noah Feldman comes closest to arguing for this type of structural view.[137] According to Feldman, the best approach to the Establishment Clause is to allow greater space for government religious expression, while simultaneously "insisting that government go to great lengths to dissociate itself from any affiliation with or support for religious institutions."[138] His theory of institutional separation rests on worries regarding divisive competition for government resources and the risk of government religious indoctrination.[139] Feldman accurately diagnoses the risks, but his theoretical explanation is incomplete. These risks arise from the underlying potential for the state to entrench religious majorities' power.

On the equal protection side, prominent law-of-politics scholars have argued that the Equal Protection Clause and other constitutional provisions should be used to prevent majorities from rewriting the rules of political competition to favor themselves.[140] Their diagnosis need not be limited to politics. Because the state now shapes, regulates, and reproduces so many forms of social power and constraint, a majority can use the state apparatus to entrench itself through vehicles outside the political arena.

If constitutional law hopes to safeguard the substantive values of religious liberty and racial equality at a more profound level, it must address the state's role in social reproduction. Doing so promotes

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[137] FELDMAN, *supra* note 13. Christopher Eisgruber and Lawrence Sager, in arguing for an "equal liberty" approach to the religion clauses, propose that government aid to religious activities is valid so long as it rests on individual choice, there are no religious preferences, and there is an alternative secular provider. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 200–03 (2007). Douglas Laycock similarly argues that "substantive neutrality" (defined as minimal influence on individual religious incentives) is achieved for Establishment Clause purposes when government allows individuals to choose between equivalent subsidies for secular and religious education. Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 70–71 (2007). Neither approach fully resolves the risks of entrenchment: Secular and minority religious institutions may not be able to compete with majority religions in service provision, and current flows of state aid to majority religions will tend to maintain their dominant positions into the future. It may also lead to majority-religion institutions becoming the predominant public service providers if enough people exit secular public sector institutions, thereby diminishing religious minorities' opportunity for equal participation in such collective institutions.

In general, without monitoring actual institutional outcomes, it is impossible to gauge entrenchment, regardless of courts' and theorists' predictions that it will not emerge. Moreover, the specific goal of increasing effective choice for the religious poor would be better achieved through straightforward redistribution.

[138] FELDMAN, *supra* note 13, at 237.

[139] *Id.* at 238–39, 244–47. Feldman also argues that institutional separation would be "faithful to our constitutional traditions" but disclaims this as an important reason to adopt it. *Id.* at 237–38.

[140] *See supra* notes 16–17, 92–104 and accompanying text (examining structural approaches to the law of politics).

democracy in the broadest sense. A structural approach in the religion context helps protect autonomous religious choice. A structural approach to race addresses the reality that, if left unchecked, the state will continuously reproduce and intensify existing patterns of racial inequality.

The Court's initial interpretation of the religion clauses and the Equal Protection Clause suggested that it took a dualistic approach in both doctrinal areas, incorporating the twin goals of minority protection and structural safeguards. But that approach did not last. As the next two Parts describe, an alternative vision—formal neutrality—emerged in critical reaction to the work of the Warren and early-Burger Courts. The following Parts describe formal neutrality's origins and how, over time, this procedural ideal ate away at the substantive and structural goals of religion and race doctrine.

II
Formal Neutrality and the Collapse of Duality

The Court's increasingly robust interpretations of race and religion doctrine came under sustained critique from the late 1950s onward. The Court was criticized for pursuing substantive interpretations of constitutional mandates and for interfering too broadly with democratic laws.[141] Critics also argued that the Court had created doctrine rife with internal tensions.[142]

Formal neutrality originally was framed as a means of addressing concerns with both the judicial role and doctrinal consistency. Initially, proponents of judicial neutrality suggested that federal courts should avoid playing a significant role in value conflicts because they are not democratically accountable. Instead of seeking particular outcomes, courts should stay within their special competences: applying general, logically consistent rules, preferably ones of process rather than outcome.[143] The ideal of principled reasoning was proposed as a self-imposed check on judicial power. Next, the enthusiasm for consistent constitutional principles expanded and a broader idea of state neutrality emerged that posited similar constraints for all government

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[141] *See infra* Part II.A; *see also* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. Chi. L. Rev. 935, 989 (1989) (identifying a "recurrent theme" among Warren Court critics that "doctrine becomes unprincipled when courts try to do too much, when they are moved by their sense of moral right and wrong to try to correct social problems that should be left to the other branches").

[142] *See infra* notes 221–30 and accompanying text; *see also* Addison Mueller & Murray L. Schwartz, *The Principle of Neutral Principles*, 7 UCLA L. Rev. 571, 571–76 (1960) (describing these critiques).

[143] *See infra* Part II.A.

actors, not simply courts: a mandate to apply general, procedurally consistent rules to all.[144] Proponents of formal neutrality suggested that this move would dissipate the doctrinal tension between substantive ideals related to religion and race and competing ideals of procedural impartiality.

That is the core dynamic underlying formal neutrality: Seen through its lens, state pursuit of substantive outcomes is inevitably in tension with procedural guarantees of impartial treatment. To the Warren Court's critics, doctrine that required substantive outcomes appeared to undermine the impartiality of the courts. Courts that sought to enforce racial integration or separation of church and state got bogged down in very difficult, value-laden questions. Doctrine that required or even permitted other actors to pursue substantive outcomes automatically appeared to be in tension with the general ideal of impartial treatment, as well as with the goal of avoiding the need for courts to interpret constitutional principles in substantive or socially informed ways. Enforcing exemptions under the Free Exercise Clause favored religion; barring state aid to religious entities disfavored religion. Both appeared to be in tension with a norm of impartiality. In the race context, the demand for substantive racial equality seemed at war with a procedural goal of racial impartiality. Formal neutrality offered to resolve the tension.

But as religion clause scholars have long pointed out, formal neutrality exacts a very high price for impartiality.[145] It simply erases the possibility of substantive constitutional goals, reducing the clauses to a formal command of neutrality. Taken to the extreme, it bars any actor from pursuing any sort of religious or racial goal at all, no matter how strong the democratic mandate or constitutional argument underlying such goals.[146]

Parts II and III examine how the ideal of formal neutrality worked its way through race and religion doctrine from the 1970s onward, progressively reducing each field to a single, procedural

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144 *See infra* Part III (documenting the expansion of the concept of formal neutrality).

145 *See, e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 688–89 (1979) (writing that the formal neutrality rule unnecessarily produces "results hostile to religion" while simultaneously undermining Establishment Clause goals); Leo Pfeffer, *Religion-Blind Government*, 15 STAN. L. REV. 389, 401–06 (1963) (reviewing PHILIP B. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE (1962)) (describing the effects of formal neutrality in potentially invalidating a wide range of laws and practices affecting religion).

146 It is easier to see what is lost in the religion clause context because scholars are used to describing the independent values protected by the religion clauses with terms like religious liberty. Still, there are values beyond impartiality at work in the equal protection context, and those too are lost to formal neutrality. *See supra* note 136 and accompanying text.

norm. In this Part, I show how formal neutrality began as a philosophy of judicial restraint and limited courts' views of their own powers. In Part III, I show how formal neutrality transformed into a broader ideal of absolute impartiality for all state actors.[147]

A. Limiting Courts' Pursuit of Substantive Goals

Many of the Warren Court's academic critics shared common roots in the legal process school of thought, a broad approach to legal theory that was dominant by the mid-twentieth century.[148] Much of legal process theory was directed at justifying and limiting the courts' role, attempting to restore a legitimate role for the judiciary in the context of the legal realists' demonstration that adjudication necessarily requires substantive value choices.[149] It was also set against the backdrop of widespread repudiation of *Lochner* Era jurisprudence, in which the Court seemingly overturned democratically enacted statutes in favor of its own values.[150]

The legal process theorists tried to preserve an apolitical role for judges by positing a fundamental distinction between substance and process. They acknowledged that substantive decisions require value choices but argued that judges can be constrained in such choices if

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[147] I tell this story largely as one of the interplay of ideas and doctrine. To be sure, I still recognize that the evolution of ideas and doctrine is embedded in, and often driven by, political shifts within the country, the elected branches, and the courts. I do not claim that the logic of formal neutrality alone drove doctrinal change but I do want to draw attention to the ways in which formal neutrality's reductionist logic suggested and justified parallel moves in both religion and race jurisprudence.

[148] *See* Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 561, 566–67, 571–72 (1988) (describing the dominance of the legal process approach beginning in the 1950s); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2031 (1993) (discussing Henry M. Hart, Jr. and Albert M. Sacks' classic text, *The Legal Process*, and characterizing it as "a splendid synthesis of public law themes that had become prominent before World War II").

The legal process school is distinct from "political process theory," a term used for constitutional theories like John Hart Ely's that focus on the judicial role in maintaining a democratic political process. However, each of these approaches is sometimes referred to as "process theory."

[149] *See* Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 517–18 (1997) (describing the legal process scholars' aim of distinguishing courts from political actors); Peller, *supra* note 148, at 567–68 (emphasizing the legal process scholars' goal of avoiding "the most corrosive aspect of the realist message": that law is indistinguishable from politics).

[150] *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 216–36 (2002) (linking prominent academics' worries over the countermajoritarian role of the Court in the 1960s to the influence of their mentors from the Progressive Era, such as Learned Hand and Felix Frankfurter; the lingering effects of legal realism's critiques; and the legal process scholars' attempt to "define a role for the judiciary that set it apart from politics").

they rely on a process of "neutral, value-free reasoning."[151] Legal process theorists also linked judicial restraint to logically coherent doctrine, arguing that the judiciary could act legitimately only by engaging in "reasoned elaboration" of "neutral principles."[152]

Herbert Wechsler's theory of neutral principles provided a common foundation for legal process scholars.[153] Wechsler articulated an ideal of "neutral principles of constitutional law," which required courts to provide "analysis and reasons quite transcending the immediate result that is achieved."[154] In his view, this requirement embodied "the main qualities of law, its generality and its neutrality[.]"[155] The primary characteristic of a neutral principle was that the court would be willing to apply the same principle in similar future cases, regardless of the parties' identities or the resulting outcome.[156] Proponents believed that principled reasoning would assure impartial justice at the individual level:

> The restraints of reason tend to ensure . . . the independence of the judge. . . . [That] is an absolute requirement if individual justice is to be done, if a society is to ensure that individuals will be . . . dealt with evenhandedly, under rules that would apply also to others similarly situated, no matter who they might be.[157]

For Wechsler and those who adopted his ideas, the neutral principles ideal seemed to imply that the principle should be universal in scope and not require contingent political judgments.[158] While a neutral

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151 Peller, *supra* note 148, at 590.

152 Friedman, *supra* note 149, at 517–19.

153 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *see also* Friedman, *supra* note 150, at 241–42 (noting the prominence of the "neutral principles" idea).

154 Wechsler, *supra* note 153, at 1, 15.

155 *Id.* at 16. Some theorists sought an even more expansive definition of judicial neutrality. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (arguing that judges should not define any constitutional principles beyond those "clearly specif[ied]" in "constitutional materials" because "there is no principled way to prefer any claimed human value to any other").

156 *See* Wechsler, *supra* note 153, at 17, 19.

157 ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 82, 84 (1970); *see also* G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 290–91 (1973) ("By insisting that opinions be justified through a process of articulated reasoning and that the process itself be internally consistent, the movement was attempting to impose an academic check on the judiciary.").

158 *See* Friedman, *supra* note 149, at 511–12 (describing Wechsler's theory that judicial principles must be applicable beyond the facts of the instant case to be neutral); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1489–90 (2004) (positing that Wechsler was searching for principles that decided cases without reference to social groups); *see also* Mueller & Schwartz, *supra* note 142, at 577–78 (questioning how to define adequate levels

principle arguably may still allow attention to dynamics of social and political power,[159] Wechsler himself seemed to believe that any neutral principle must foreclose such inquiries.

For example, Wechsler considered *Brown v. Board of Education*[160] inadequately reasoned because it rested too heavily on specific judgments about harms resulting from educational segregation. He suggested that the Court might have relied instead on the broader "view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed."[161] Rather than being a historically contingent judgment that Jim Crow segregation imposed unequal conditions on African Americans, *Brown* should have embodied a more universal rule framed in terms of an unidentified political minority. But Wechsler concluded that even that rule would have been insufficiently "neutral," because it implicitly required the Court to assess officials' motives in enacting segregation or the social meaning of segregation.[162] He was unable to identify any neutral principle that would have justified *Brown*.[163]

Some advocates of "neutral principles" have argued that any constitutional choice, if not framed in universal, group-neutral terms, simply trades off the wellbeing of one group against another.[164] Robert Bork, arguing for an extension of the "neutral principles" mandate, wrote that

> [e]very clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifica-

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of generality and neutrality); *cf.* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 987–88, 993 (1978) (arguing that Wechsler "does not think acceptable principles must be very broad").

159 *E.g.*, Friedman, *supra* note 149, at 513 (describing antisubordination as a neutral principle).

160 347 U.S. 483 (1954).

161 Wechsler, *supra* note 153, at 33.

162 *Id.* at 33–34.

163 *Id.* at 34. Wechsler believed that the real issue in *Brown* was the legitimacy of the state-imposed limit on associational freedom. He posited that there was no clear way to prefer the minorities' claim to associational freedom over the White majority's preference to avoid association with African Americans. *Id.* Contemporaneous academics responded by offering neutral principles explaining *Brown*. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960) (arguing that segregation violated equal protection because it constituted "a massive intentional disadvantaging" of African Americans); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24–30 (1959) (emphasizing the principle that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944))).

164 This echoes one of legal realism's ideas: "The legal system cannot simply protect rights, but must always choose between two perfectly logical but mutually exclusive rights." Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW 23, 33 (David Kairys ed., 3d ed. 1998).

> tions of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims . . . .[165]

Legal process theorists also identified institutional concerns with courts seeking particular institutional-level outcomes. For example, Alexander Bickel warned against judicial enforcement of an affirmative mandate for school integration. Such a mandate would force courts into making educational policy for localities, a role for which they lacked both legitimacy and competence.[166]

The command of judicial neutrality derived from legal process theory directed judges to frame their reasoning in universal, apolitical terms. It posited that courts are better institutionally equipped to enforce procedural guarantees, as opposed to substantive mandates for particular outcomes. Legal process scholars warned courts against making substantive value choices outside these limits.

B. The Doctrinal Shifts: Elevating Process over Outcomes

Over time, the Supreme Court echoed the concerns of the legal process scholars and shifted its race and religion doctrine accordingly. The Court expressed worry that its substantive doctrine had led the judicial branch into illegitimate decision making and stretched courts beyond their administrative capacities. Racial and religious diversity became threatening. The Court saw itself potentially overwhelmed by disparate groups' claims for substantively equal treatment, and dragged into political battles that it could not resolve.[167]

Citing these worries, the Court began to interpret the equal protection and religion clauses to regulate government process rather than outcomes. The Court shifted its race doctrine first by limiting its integration jurisprudence and disallowing an "effects test" for equal protection during the 1970s. The Court instead adopted an equal protection norm that valorized equal treatment at the individual level, thereby emphasizing process and individual rights. Subsequently, the Court reshaped religion clause doctrine to be more majoritarian: It no longer mandated exemptions from general laws and it more freely

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165 Bork, *supra* note 155, at 9.

166 BICKEL, *supra* note 157, at 135–38; *see also* Alexander M. Bickel, *Skelly Wright's Sweeping Decision*, NEW REPUBLIC, July 8, 1967, at 11 (arguing that courts are ill-equipped to mandate remedies for de facto segregation). Bickel also suggested that integration was in tension with the right "of the family to nurture the child and 'direct his destiny.'" BICKEL, *supra* note 157, at 139 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

167 *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748, 763–68, 774–76 (2011) (describing how "pluralism anxiety" has caused the Court to retract its doctrine supporting minority groups).

permitted public aid to religious institutions. According to the Court, formal neutrality satisfied the constitutional mandates concerning both religion and race.

1. Race: Avoiding the "Calculus of Effects"

In the 1970s, the Court began to renege on its previous willingness to account for the social reality of supposedly racially neutral laws. In *Palmer v. Thompson*, the Court held that a Mississippi town's closure of its public swimming pools to avoid integration did not violate the Equal Protection Clause, resting its opinion on "the facially equal effect upon all citizens of the decision to discontinue the pools."[168] Justice White dissented, describing the actual inequality in the symbolic meaning and tangible effects of the pools' closure.[169] He argued for a politically sensitive reading of the law (and implicitly, the Court's constitutional role): "[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination . . . ."[170]

In the school integration cases, even as the Court approved sweeping race-based remedies, it planted seeds suggesting that the Constitution did not require integration of public schools on a prospective basis, but only insofar as integration was aimed at curing past constitutional violations. In 1971, the Court emphasized that the integration mandate was intended "to eliminate from the public schools all vestiges of *state-imposed* segregation."[171] It rejected the idea that "any particular degree of racial balance or mixing" was constitutionally required.[172] And the Court emphasized the remedial context,

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[168] 403 U.S. 217, 229 (1971) (Blackmun, J., concurring) (describing the majority opinion); *see id.* at 225 (majority opinion) ("[T]he record . . . shows no state action affecting blacks differently from whites."). In *City of Memphis v. Greene*, the Court similarly upheld an action that was facially neutral but inflicted disparate harms on African Americans, including stigmatic and tangible ones; in *Greene*, it was the closing of a street connecting a White neighborhood to a Black neighborhood. 451 U.S. 100, 123–24, 128–29 (1981); *see id.* at 138–47, 152–53 (Marshall, J., dissenting) (describing the harms).

[169] Justice White wrote:

> Whites feel nothing but disappointment and perhaps anger at the loss of the facilities. Negroes feel that and more. They are stigmatized by official implementation of a policy that the Fourteenth Amendment condemns as illegal. And the closed pools stand as mute reminders to the community of the official view of Negro inferiority.

Palmer, 403 U.S. at 268 (White, J., dissenting).

[170] *Id.* at 266 (quoting Hunter v. Erickson, 393 U.S. 385, 391 (1969)).

[171] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (emphasis added).

[172] *Id.* at 24; *see also id.* at 25 ("Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations.").

stating that "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."[173] It also hinted that such race-conscious remedies would be short-lived.[174]

Throughout the 1970s, these seeds took root, and the Court steadily withdrew its support for a structural requirement of integration. The Court created the doctrinal underpinning for this withdrawal by refusing to evaluate equal protection claims on the basis of outcomes. Neither racially disparate burdens nor actual racial segregation sufficed to make out an equal protection violation. Rather, a violation required an express racial classification or discriminatory intent. With this doctrine in place, the Court could argue that its integration jurisprudence had been aimed solely at curing past intentional discrimination, not seeking integration for its own sake.

The Court first rejected a disparate impact standard in the social welfare context, stating that constitutional review of racial disparities in public benefits would create overwhelming burdens for legislatures (and by implication, for courts).[175] The Court subsequently addressed a decisive question concerning segregation: What was required to show unconstitutional segregation of schools in places where segregation had not been expressly imposed by law? Many had argued that the condition of segregation itself violated equal protection, regardless of whether it was de jure or de facto.[176] The Court instead ruled that school officials' intent to segregate students was critical. Segregation resulting from other causes did not violate the Equal Protection

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173 *Id.* at 28; *see also id.* at 16 ("[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation.").

174 *See id.* at 28, 32 (referring to "the interim period when remedial adjustments are being made to eliminate the dual school systems" and envisioning a point when "the affirmative duty to desegregate has been accomplished").

175 In *Jefferson v. Hackney*, 406 U.S. 535 (1972) the Court rejected a claim that Texas's decision to sharply cut welfare payment levels, while maintaining nearly full payment for the elderly and disabled, discriminated against the African Americans and Hispanic Americans who composed a large majority of welfare recipients in the state. *Id.* at 548–49; *id.* at 574–76 (Marshall, J., dissenting). The Court stated: "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny . . . ." *Id.* at 548.

176 *E.g.*, Robert L. Carter, *De Facto School Segregation: An Examination of the Legal and Constiutional Questions Presented*, 16 W. RES. L. REV. 502, 515–19 (1965); Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 584, 617 (1964); J. Skelly Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U. L. REV. 285, 301–02 (1965).

Clause.[177] In dissent, Justice Powell identified the shift in the Court's approach, noting that the Court's previous doctrine had required integration regardless of school officials' intent.[178]

The Court then began to limit sharply the scope of the integration mandate for public education. It emphasized restrictions on courts' powers to remedy even de jure segregation.[179] The Court pointed to core restraints on the judicial role and process, including the inherent limits on courts' equitable powers,[180] the proper mode of appellate review,[181] and the appropriate deference toward local government powers.[182] Most importantly, the Court warned that courts were not institutionally equipped to manage far-reaching integration orders. For example, in rejecting a metropolitan desegregation remedy in *Milliken v. Bradley*, the Court wrote that the trial court risked becoming "the 'school superintendent' for the entire area[,] . . . a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives."[183]

Finally, the Court struck a fatal blow to the notion that the Constitution might embody an affirmative integration mandate for any government institution—and gave the most revealing explanation of its reasoning to date. In *Washington v. Davis*,[184] the Court rejected an equal protection challenge to a municipal police department's

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177 *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) ("We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate." (footnote omitted)). However, tension remained. The same year, the Court struck down a state program to the extent that it supplied textbooks to racially segregated private schools, without requiring a finding of discriminatory intent on the part of government officials. Norwood v. Harrison, 413 U.S. 455, 465–67 (1973).

178 *Keyes*, 413 U.S. at 219–23 (Powell, J., concurring in part and dissenting in part).

179 In *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court held that the lower court had improperly expanded the potential integration remedy for Detroit's segregated schools to encompass suburban school districts. Integration extending to other school districts could not be ordered unless a constitutional violation had segregated the other districts' schools as well, or caused "interdistrict segregation." *Id.* at 744–45. The Court criticized the lower court judges for attempting a metropolitan-wide remedy based only on "their conclusion that total desegregation of Detroit [alone] would not produce the racial balance which they perceived as desirable." *Id.* at 739–40. In 1976, the Court again emphasized that there was no "substantive constitutional right [to a] particular degree of racial balance or mixing" in public schools. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976).

180 Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419–20 (1977); *Spangler*, 427 U.S. at 433–37; Hills v. Gautreaux, 425 U.S. 284, 292–96 (1976); *Milliken*, 418 U.S. at 738, 744–45; Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16, 31–32 (1971).

181 *Brinkman*, 433 U.S. at 417–18.

182 *Id.* at 419–20; *Milliken*, 418 U.S. at 741–42.

183 *Milliken*, 418 U.S. at 743–44.

184 426 U.S. 229 (1976).

hiring exam. The Court held that a policy's disparate impact on racial minorities was only relevant insofar as it suggested discriminatory intent. Standing alone, disproportionate impact was not actionable.[185]

The Court explained that a contrary rule "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[186] Given the potential consequences and difficulty of administration, the Court thought it more appropriate for legislatures to regulate disparate impacts on racial minorities via statute than for courts to do so using constitutional doctrine.[187] "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility," the Court subsequently explained.[188] "[T]he Fourteenth Amendment guarantees equal laws, not equal results."[189] Instead, courts were to police legislative and administrative processes for unacceptable motives.[190]

Thus, the Court justified its retreat from an affirmative integration mandate using themes of judicial neutrality. It emphasized the need to confine courts to their core areas of legitimacy and competence, areas in which courts would not have to evaluate substantive trade-offs between various groups' well-being.[191]

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185 *Id.* at 238–42.

186 *Id.* at 248; *cf.* Strauss, *supra* note 141, at 955 (calling the Court's decision "a withdrawal from the front lines of social change").

187 *See Davis*, 426 U.S. at 248 ("[E]xtension of the [disparate impact] rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.").

188 Pers. Adm'r v. Feeney, 442 U.S. 256, 272–73 (1979).

189 *Id.*

190 *Id.* at 272.

191 Voting was the only field in which a structural mandate of integration arguably remained as a matter of constitutional law. *Compare* Mobile v. Bolden, 446 U.S. 55, 66–70 (1980) (plurality opinion) (holding that racially discriminatory purpose must be shown in vote dilution claims under the Equal Protection Clause), *with id.* at 94–95, 101–03 (White, J., dissenting) (arguing that the plurality misapplied the discriminatory purpose requirement and should have looked to contextual factors discussed in *White v. Regester* and subsequent cases), *and* Rogers v. Lodge, 458 U.S. 613, 617–27 (1982) (returning to the approach of analyzing the contextual factors outlined in *White v. Regester* as a means of discerning discriminatory purpose). The issue has remained relatively dormant, probably because Congress supplanted the constitutional standard by enacting an effects test under the Voting Rights Act. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2(a), 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(a) (2006)) (barring voting practices that "*result*[ ] in a denial or abridgement of the right . . . to vote" (emphasis added)); *see also* Bertrall L. Ross II, *The Representative Government Principle*, 81 FORDHAM L. REV. (forthcoming 2012) (arguing that the Court has enforced a constitutional right to effective representation in the political process for minorities).

2. Religion: The "Unaffordable Luxury" of Regulating Outcomes

In the 1980s, the Court began to limit its willingness to scrutinize disparate burdens on religious minorities in a similar fashion. Rhetorically, its decisions suggested that requests for exemptions no longer could be deemed attempts by the devout to be treated equally or left alone, but rather were far-reaching requests for special treatment that threatened to undermine important public institutions.[192] The Court carved out broad exceptions to its free exercise doctrine, removing the military and prisons from the purview of the strict scrutiny test for religious exemptions.[193] In a case in which a Native American tribe challenged the federal government's planned development of national forest land that was sacred to their religion, the Court again declined to apply a compelling interest test, reasoning that the claim went only to the government's "internal affairs."[194] According to the Court, allowing such challenges could trigger far-reaching claims that would undermine the nation's ownership of its public lands.[195]

As a result, diversity no longer was framed as a reason for robust constitutional protections, but instead as a problem for the judiciary's institutional interests. There were simply too many minority groups to satisfy all their demands. Doing so would drag the government, and hence the courts, into a never-ending cycle of trying to satisfy special interests. As Justice O'Connor wrote: "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours."[196]

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[192] Thus, in *United States v. Lee*, 455 U.S. 252, 258–60 (1982), the Court held that the government need not exempt an Amish employer from paying social security taxes for his workers, reasoning that "mandatory participation is indispensable to the fiscal vitality of the social security system." In another challenge to the Social Security system, the Court erected a new limit: Claimants could not request that the government "conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." Bowen v. Roy, 476 U.S. 693, 699 (1986).

[193] *See* Goldman v. Weinberger, 475 U.S. 503 (1986), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508(a)(2), 101 Stat. 1019, 1086 (1987) (denying a Jewish Air Force officer an exemption from uniform dress codes to wear his yarmulke); *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (denying Black Muslim inmates schedule adjustments to allow them to attend Friday prayers).

[194] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 448–52 (1988).

[195] *Id.* at 453 ("[S]uch beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property.").

[196] *Id.* at 452. In *Goldman*, the government suggested the possibility of requests by military officers to wear "turbans, saffron robes, and dreadlocks." 475 U.S. at 512 (Stevens, J., concurring). *But see id.* at 519 (Brennan, J., dissenting) (calling this "a classic parade of

Finally, the Court discarded the free exercise exemption. In *Employment Division v. Smith*, the Court held that government no longer would be required to show a compelling interest in order to deny religious exemptions from generally applicable laws.[197] "Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, . . . we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[198] Requests for exemptions could undermine "civic obligations of almost every conceivable kind" and thus threaten institutions ranging from the military to the system of compulsory taxation and the modern regulatory state.[199]

Going forward, the Court emphasized that facially neutral government action was unlikely to give rise to a viable free exercise claim. The Court explained that as with equal protection doctrine, free exercise doctrine focused on overt classifications and covert but intentional harms.[200] The Court explicitly cited its rejection of a disparate impact standard for equal protection as support for the decision.[201] As in the equal protection context, the Court said that it was for legislatures to regulate disparate impacts on minorities via statutory law.[202]

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horribles" and stating that "turbans, saffron robes, and dreadlocks are not before us in this case").

197 494 U.S. 872, 878–89 (1990). The decision did not expressly overturn prior precedents, but it so seriously limited them as to make it appear that the free exercise exemption was dead. *See id.* at 881–82 (limiting Wisconsin v. Yoder, 406 U.S. 205 (1972) and similar decisions to claims invoking additional constitutional rights beyond the right to free exercise); *Smith*, 494 U.S. at 883–84 (limiting Sherbert v. Verner, 374 U.S. 398 (1963) and similar decisions to contexts involving pre-existing systems of individualized exemption).

198 *Smith*, 494 U.S. at 888 (internal citation omitted).

199 *Id.* at 888–89.

200 *Id.* at 877–78 ("[I]f prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (noting that the Free Exercise Clause bars both overt and "masked" religious discrimination).

201 *Smith*, 494 U.S. at 886 n.3.

202 The Court said:

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

Id. at 890.

Such decisions required substantive value choices that courts were not equipped to make.[203]

In its review of Establishment Clause challenges, the Court also increasingly emphasized the facial neutrality of government action and turned away from a separationist strategy. It reshaped the *Lemon* test, turning the effects prong away from attention to tangible institutional outcomes.[204] Instead, the Court generally found that financial support for religion did not violate *Lemon*'s bar on aid advancing religion, so long as the support flowed through facially neutral mechanisms and private choices.[205] In these new cases, the concrete impact of government actions was often found to be irrelevant—the majority almost seemed to sneer at statistics and numbers regarding the proportion or scope of aid flowing to religious recipients.[206] The entanglement prong of the *Lemon* test once served to measure the degree of government intrusion on a religious entity's operations and the poten-

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[203] *See, e.g.*, *id.* at 890–91 n.5 ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

[204] The Court no longer sought to identify acceptable forms of support that were simply incidents of a larger welfare state, or aid that could plausibly be restricted to the secular activities of religious institutions, as it did in earlier Establishment Clause cases. *See* Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 242 (1968) (citing the *Everson* Court's comparison of certain forms of aid to "public provision of police and fire protection, sewage facilities, and streets and sidewalks"); Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167, 172–74 (2000) (discussing prior doctrine barring "unrestricted cash grants" and aid that could be diverted to religious purposes); *see also* Mitchell v. Helms, 530 U.S. 793, 820–25 (2000) (plurality opinion) (critiquing the prior rule that aid not "be divertible to religious use").

[205] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 225 (1997) ("[W]e have departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid."); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 652–55 (2002) ("[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of . . . private choice, the program is not readily subject to challenge under the Establishment Clause.").

[206] *See, e.g.*, *Zelman*, 536 U.S. at 658–59 (dismissing evidence that most vouchers were used at religious schools and stating "we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools"); *Agostini*, 521 U.S. at 229 (rejecting the idea that "the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid"); Mueller v. Allen, 463 U.S. 388, 400 (1983) (refusing to consider whether "in application the statute primarily benefits religious institutions"). *But see* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986) (ruling that the Establishment Clause did not bar a state vocational assistance program from funding theological studies and emphasizing that the proportion of aid flowing to religious education under the program would not be significant).

tial divisiveness of the government action, but with these new cases it largely fell by the wayside.[207]

As it de-emphasized actual institutional outcomes in Establishment Clause cases, the Court emphasized the problems that tracking such outcomes created for principled judicial administration. Evaluating the total amount of aid flowing to religious institutions, or the proportion of religious recipients in any given program, introduced unacceptable arbitrariness. Attention to actual outcomes might render identically structured programs constitutional in some instances and unconstitutional in others, depending on context.[208] "[S]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated."[209] Similarly, the potential for political divisiveness created by any given aid program was deemed too subjective to be a proper judicial inquiry.[210]

The Court also elaborated new Establishment Clause doctrine to regulate intangible government support for religion—mostly in cases involving government speech or symbolic expression about religion. Here the Court was stricter, relying on a theory that government "endorsement" of religion could cause non-adherents expressive harms.[211] In these cases, the effects prong of the *Lemon* test became almost entirely a test of the *meaning* of the government action, asking

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[207] In *Agostini*, the Court reinterpreted entanglement as an aspect of the "effects" inquiry, not a separate question, and noted that only "excessive" entanglement would lead to invalidation. 521 U.S. at 232–34. Neither administrative cooperation nor potential "divisiveness" would give rise to excessive entanglement. *Id.*

[208] *See Zelman*, 536 U.S. at 657–58 (arguing that the use of such criteria might cause the constitutionality of school voucher programs to vary by state, depending on the proportion of religious schools in the particular state).

[209] *Id.* at 658 (quoting *Mueller*, 463 U.S. at 401).

[210] *See, e.g.*, *Zelman*, 536 U.S. at 662 n.7 (suggesting that the Court lacked "authority to deprive Cleveland residents of a program that they have chosen but that [the Court] subjectively find[s] 'divisive'"); Mitchell v. Helms, 530 U.S. 793, 825–26 (2000) (plurality opinion) (suggesting that "divisiveness" was a factor that helped produce "perverse chaos" in establishment clause doctrine, weighing down "legislators, litigants, and lower courts"); Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) ("Guessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise.").

[211] *See Lynch*, 465 U.S. at 687–88 (O'Connor, J., concurring) ("[Government] [e]ndorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community."); *see also* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 850, 860 (2005) (describing, in cases involving courthouse display of the Ten Commandments, the government purpose inquiry as a means to prevent non-adherents from being made to feel like outsiders); Santa Fe Indep. Sch. Dist. v. Doe *ex rel.* Her Minor Children, 530 U.S. 290, 309–10 (2000) ("School sponsorship of a religious message is impermissible because it sends the ancillary message . . . [of outsider status to] nonadherents . . . .") (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) (citing Justice

if a reasonable observer would find that the government had "endorsed" religion in general or a particular religion.[212] While the endorsement inquiry was intended to protect the dignitary interests of religious minorities and non-adherents,[213] in operation it required something like formal neutrality. If various religious and secular symbols were jumbled together—thus suggesting open, equal access—or a plausible secular purpose could be inferred, the Court was less likely to find endorsement, even if the religious symbols belonged to the majority.[214]

Over time, the Court thus stopped scrutinizing differential burdens on racial and religious minorities, and became less willing to enforce racial integration of state institutions and church-state separation. The Court justified its doctrinal shift in all of these areas using ideas associated with judicial neutrality. The Court explained that the judiciary was not well equipped to handle the administrative burdens associated with such far-reaching constitutional doctrines, nor to make the necessary value choices. According to the Court, power to make such trade-offs was best left with democratically accountable actors. By choosing to focus its constitutional doctrine on express classifications and illicit governmental purposes, rather than on group or institutional outcomes, the Court directed doctrine to an area where courts were thought to have special competence—policing acceptable government procedure.

III
The Broader Collapse of Duality

A. Limiting Other Actors' Pursuit of Substantive Goals

A broader state neutrality position also evolved out of legal process theory. Leading academics attempted to identify unifying "neutral principles" for religion and race doctrine. Proponents of this perspective eventually claimed that the only coherent way to interpret the religion clauses and the Equal Protection Clause was through an

O'Connor's concurrence in *Lynch* for the proposition that the government may not make religion relevant to individuals' status within the political community).

212 *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (describing how the effect of a statement depends on its "objective" meaning to a community).

213 *See* Feldman, *supra* note 68, at 702–03 (arguing that, in developing the endorsement inquiry, the Court's earlier concern with government symbolic discrimination in the area of race led to concern with exclusionary religious messages).

214 *See Cnty. of Allegheny*, 492 U.S. at 596, 598, 618–20 (finding no endorsement in a city holiday display featuring Christian and Jewish symbols as well as secular elements); *Lynch*, 465 U.S. at 680–81 (describing the "legitimate secular purposes" of a holiday crèche displayed by a city); *id.* at 691–92 (O'Connor, J., concurring) (observing that the crèche is a traditional holiday symbol often displayed with purely secular symbols).

ideal of formal state neutrality. They saw irresoluble contradictions in permitting government to pursue substantive constitutional concerns in ways that inevitably affected individuals differently according to religion or race. To resolve these contradictions, they advocated the collapse of the religion clauses and the Equal Protection Clause into a single mandate of government "blindness" toward religion and race. In effect, these theorists argued that the only available neutral principle was neutrality itself.[215]

This perspective unselfconsciously extended ideals of the judicial role and process into a model for the entire government.[216] The view of formal state neutrality that proponents adopted—like judicial neutrality itself—emphasized process, focused on individuals, and required universalism in implementation.[217] In some instances it even led to mandated governmental procedures that closely resembled judicial ones. The profound irony of this development was that legal process scholars originally framed their procedural ideals as a means to constrain judges to defer to the decisions of democratically elected actors. Instead, neutrality itself became the overarching constitutional goal. Formal neutrality took precedence over democratically elaborated substantive norms, even when those norms were rooted in compelling interpretations of the Constitution itself.

The argument that the religion clauses suffered from the lack of a "neutral principle" emerged early in judicial decisions, though not yet framed in those terms. Justice Frankfurter—a mentor to many of the legal process theorists—presaged the formal state neutrality position in his *West Virginia Board of Education v. Barnette* dissent.[218] Disagreeing with the Court's ruling that Jehovah's Witness schoolchildren could not be compelled to salute the flag, Frankfurter argued that for courts to protect religious freedom too vigorously would itself tend to violate the Establishment Clause. Frankfurter offered an alternative view of the religion clauses' meaning: a unified, simple rule that "no religion shall either receive the state's support or incur its hostility."[219] He argued that for courts to enter the field substantively would raise insoluble tensions, wherein an attempt to rein in state support for

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215 *Cf.* Greenawalt, *supra* note 158, at 992 (stating that Wechsler, *supra* note 153, did not "mean that [courts'] choices must necessarily treat all relevant groups similarly").

216 *See* Fiss, *supra* note 13, at 118–29 (discussing attributes that made the antidiscrimination interpretation of the Equal Protection Clause appealing).

217 *Id.* at 121–28.

218 319 U.S. 624 (1943).

219 *Id.* at 654 (Frankfurter, J., dissenting).

religion would be read as hostility to religion and attempts to protect religious adherents would raise Establishment Clause concerns.[220]

Philip Kurland, a former clerk for Justice Frankfurter, University of Chicago law professor, and vocal critic of the Warren Court's lack of "neutral principles,"[221] followed up in 1961 with what became the definitive articulation of the absolute state neutrality position.[222] Kurland said that identifying a neutral principle for the religion clauses was hard because the two clauses were in tension.[223] He saw only one way to read the commands consistently: by using a single anti-classification principle. "[T]hey must be read to mean that religion may not be used as a basis for classification for purposes of government action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations."[224] He called this a "'neutral' principle of equality,"[225] one focused on "equality of treatment."[226]

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[220] *See id.* at 654–56 (describing the problems with state involvement in religion and the delicate balance between establishment and hostility).

[221] *See* Kurland, *supra* note 64, at 3–4 (critiquing the Court's religion clause jurisprudence as unconnected to the Constitution and founded on the Court's personal preferences); Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV. L. REV. 143, 145 (1964) (accusing the Court of an "absence of workmanlike product" in its decisions, as well as "disingenuousness and misrepresentation"); Philip B. Kurland, *The Supreme Court and Its Judicial Critics*, 6 UTAH L. REV. 457, 463, 466 (1959) (describing the Court as exhibiting "institutional schizophrenia" and critiquing its "judicial activism"); *see also* Arthur John Keeffe, *Practicing Lawyers' Guide to the Current Law Magazines*, 51 A.B.A. J. 385, 385 (1965) ("If he had thrown a bomb at the Court, Professor Kurland could not have caused more comment than did his [*Harvard Law Review*] 'Foreword'.").

[222] *See generally* Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5–6 (1961) (subsequently published in book form as PHILIP KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT (1963)) (arguing for an anti-classification interpretation of religion clauses). A contemporaneous book review termed it a proposal for "religion-blind government." Pfeffer, *supra* note 145, at 389, 492.

[223] "For if the command is that inhibitions not be placed by the state on religious activity, it is equally forbidden [for] the state to confer favors upon religious activity." Kurland, *supra* note 222, at 5.

[224] *Id.*

[225] *Id.*

[226] Kurland, *supra* note 64, at 24. Kurland suggested that while he viewed his proposal as a "basis for the principled application that the Constitution would seem to demand," he intended his critique of the Court's jurisprudence as a call for judicial modesty. He elided the practical differences between the two. *See id.* at 24–27.

Kurland's proposal was widely rejected at the time he made it, *id.* at 24, but it gradually gained at least partial adherents, as more commentators argued that religious exemptions were unconstitutional and/or that religion could not be disfavored even for separationist reasons. *See, e.g.*, Frederick M. Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555 (1998) (arguing that there is no longer a plausible justification for exemptions under the

In the area of race, another former Frankfurter clerk, prominent Warren Court critic, and Yale law professor, Alexander Bickel, became a leading proponent of the colorblindness interpretation of equal protection.[227] Bickel initially expressed ambivalence toward race-conscious government action aimed at redressing systematic inequality. He later concluded that equal protection should bar any racial classification by government, resting on what he saw as the inherent injustice of categorizing individuals by their race under any circumstances.[228] "[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society," he wrote.[229] Arguing against any distinction between "invidious" and "benign" uses of race, he continued: "Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others."[230]

Free Exercise Clause); Stephen G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 172–85 (1990) (arguing against the "accommodation principle" permitting special treatment of religion); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 365–72 (1999) (arguing that the government cannot constitutionally exclude religious institutions from general programs of aid, solely on the basis of their religious nature); *see also* Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373 (praising Kurland's overall standard).

227 On Bickel's background and his relationship to legal process ideas, see Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 525–28 (1976).

228 *Compare* BICKEL, *supra* note 70, at 71–72 (indicating support for benign racial classifications), *with* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 132–33 (1975) [hereinafter BICKEL, MORALITY] (condemning affirmative action), *and* BICKEL, *supra* note 157, at 118 (supporting an interpretation of *Brown* as barring all government racial classifications).

229 BICKEL, MORALITY, *supra* note 228, at 133. Other academics of his time also argued against race-conscious programs aimed at integration or improving substantive equality. However, Bickel's later argument embodies a "neutral principles" approach that refuses to distinguish one race-based decision from another. *See also* Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970) (arguing against consideration of race in law school admissions); John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363 (1966) (arguing against race-consciousness in employment, housing, and schools).

230 BICKEL, MORALITY, *supra* note 228, at 133; *see* Haney López, *supra* note 13, at 1015–17 (analyzing how Bickel's rhetoric created an "equivalence between the fate of minorities victimized by racial oppression and the experience of Whites not directly benefited by affirmative action"). Bickel made his opinions widely known as a commentator in *The New Republic*, and Bickel and Kurland co-authored an amicus brief opposing affirmative action programs in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), a case the Supreme Court dismissed as moot. Haney López, *supra* note 13, at 1015; *see also* Brief of the Anti-Defamation League of B'nai B'rith as Amicus Curiae Supporting Petitioner at 16, *Odegaard*, 416 U.S. 312 (No. 73-235) ("[I]t must be the exclusion on racial grounds which

Like Kurland in the context of the religion clauses, Bickel saw an irresoluble contradiction in reading the Equal Protection Clause to permit the state to simultaneously pursue some racial goals and not others. Inevitably, favoring some individuals on account of their race meant disfavoring others. Unwilling to address dynamics of political and social power, Bickel lacked any means of distinguishing between different uses of racial classifications.

B. The Doctrinal Shifts—Addressing the Tension Between Impartiality and Substance

As the Court strengthened its commitment to a formal neutrality reading of the religion clauses and the Equal Protection Clause, the tension between this ideal and governmental pursuit of substantive or structural goals grew. That tension was always prominent in religion clause doctrine. The dual structure of the religion clauses made it convenient to reduce them to the symmetric idea that government should neither favor nor disfavor religion. The problem with this symmetric interpretation was that it cast doubt on affirmative attempts both to safeguard free exercise and to avoid religious establishment; the former could be interpreted as religious favoritism and the latter as religious discrimination. As a result, while continually acknowledging the rhetorical power of the neutrality reading and the tension that it produced within religion clause doctrine, the Court tended to seek alternative approaches that would retain the substantive aims of the religion clauses. What the Court did not appear to recognize was that the tension was not inherent to the religion clauses. The tension instead arose primarily from viewing the clauses through the lens of formal neutrality, with the accompanying assumption that any pursuit of substantive goals illicitly favors some individuals and disfavors others.

In the equal protection context, the tension with formal neutrality emerged differently: as an explicit conflict between the anti-classification interpretation of equal protection and more substantive readings. Over time, claims mounted that government action aimed at substantive racial equality or integration clashed with a colorblindness ideal. When these claims came as early challenges to court-enforced or voluntary desegregation measures, the Court easily rejected them. But as affirmative action programs became prevalent—throwing the

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offends the Constitution, and not the particular skin color of the person excluded."). After Bickel's death, Kurland submitted a similar brief in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See* Brief of Anti-Defamation League of B'nai B'rith et al. as Amici Curiae Supporting Respondents, *Bakke*, 438 U.S. 265 (No. 76-811).

redistributive premises of racial equality policies into high relief—the tension grew severe. In response, the Court increasingly adopted the formal neutrality interpretation of equal protection.

By the early 2000s, religion and race doctrine had come to different resting points. In the religion context, the Court restricted government's voluntary pursuit of anti-establishment measures. But the Court also upheld measures intended to secure religious liberty, adopting an approach which it referred to as "benevolent neutrality" or "play in the joints." The Court was less accommodating of government's pursuit of substantive racial equality and integration. In general, the Court limited race-conscious programs to remedial goals, refusing to approve race-conscious pursuit of independent, forward-looking concerns about racial equality or integration. In the only context in which the Court upheld an affirmative action program on non-remedial grounds, university admissions, it premised the program's validity on its orientation toward the universalistic, group-neutral goal of diversity.

1. Religion and "Benevolent Neutrality"

The Court has consistently worried that any substantive approach to religious liberty or pursuit of church-state separation will tilt too far away from impartiality. In *Everson*, the Court wrote that "we must be careful, in protecting . . . against state-established churches, to be sure that we do not inadvertently prohibit [the state] from extending its general State law benefits to all its citizens without regard to their religious belief."[231] The Court worried that if the Establishment Clause were enforced too vigorously, "the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly."[232] Yet the Court did not cede entirely. Striking down daily Bible readings in public classrooms, it wrote: "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs."[233]

Similarly, in the free exercise context, some justices worried that mandating exemptions violated a strict anti-classification view of the Establishment Clause. Justice Stewart wrote in *Sherbert v. Verner* that the Court's Establishment Clause jurisprudence indicated "that government must blind itself to the differing religious beliefs and traditions of the people"—a rule with which he disagreed, but which he

[231] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).
[232] Zorach v. Clauson, 343 U.S. 306, 312 (1952).
[233] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963).

thought conflicted with religiously based exemptions.[234] The dissenting justices in *Sherbert* objected to the Court's new doctrine of mandatory exemptions and cited Kurland for the idea that "singling out of religious conduct for special treatment" might be unconstitutional.[235]

The Court confronted the tension more directly in cases where litigants affirmatively challenged favorable treatment of religion, arguing that it violated the Establishment Clause. Early on, the Court rejected a strict anti-classification view. In *Walz v. Tax Commission*,[236] a challenge to a property tax exemption for nonprofits that specifically included churches and other sites of religious worship, the Court wrote that it had "struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[237] The solution was not formal neutrality, but "benevolent neutrality."[238] In the space between "either governmentally established religion or governmental interference with religion . . . there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[239] The Court therefore upheld the property tax exemption.[240] Subsequently, the Court upheld a statutory exemption for religious organizations from the antidiscrimination provisions of Title VII using similar reasoning.[241]

The breadth of the play in the joints of the religion clauses initially seemed fairly broad, at least in permitting exemptions from general laws.[242] Even when the Court reversed course in *Employment Division v. Smith*, which did away with most constitutionally man-

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234 374 U.S. 398, 416 (1963) (Stewart, J., concurring in result).

235 *Id.* at 422 (Harlan, J., dissenting) (citing Kurland, *supra* note 222).

236 397 U.S. 664 (1970).

237 *Id.* at 668–69.

238 *Id.* at 669.

239 *Id.*

240 *Id.* at 672–80.

241 *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334–49 (1987) (reasoning that there is ample room under the Establishment Clause for "benevolent neutrality," which permits religious exercise without sponsorship and without interference).

242 In one instance, the Court struck down a state sales tax exemption for religious publications, without a majority opinion. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989). All of the Justices that voted for invalidation thought the state's failure to extend the exemption to similar non-religious publications was problematic. *Id.* at 14 (plurality opinion); *id.* at 25–26 (White, J., concurring in judgment); *id.* at 27–28 (Blackmun, J., concurring in judgment). In dissent, Justice Scalia argued against a neutrality rule, suggesting that "one might . . . simply describe the protection of free exercise concerns . . . as 'secular purpose and effect,' since they are a purpose and effect approved, and indeed to some degree mandated, by the Constitution." *Id.* at 40 (Scalia, J., dissenting).

dated exemptions under the Free Exercise Clause, it endorsed voluntary grants of religious exemptions.[243]

While the Court was generally accepting of legislative "accommodation" of free exercise concerns, it closely scrutinized government acts claiming an Establishment Clause interest in excluding religious entities from public space or funds. The Court began a line of jurisprudence in the 1980s that limited governments' ability to avoid support for religion. These cases essentially treated such efforts as facial religious discrimination—though perhaps to avoid expanding its free exercise jurisprudence, the Court relied instead on the First Amendment's Free Speech Clause.[244] In several cases involving religious groups' access to public facilities, the Court held that the state could not exclude religious speakers while permitting similar secular activities to take place. Where access was provided on a general basis, the government had no basis to fear that allowing religious speakers to use state-owned facilities would violate the Establishment Clause.[245]

Where the state legislated affirmative benefits for religion that could not be framed as exemptions, the Court was even more skeptical. *See* Estate of Thornton v. Caldor, 472 U.S. 703, 710 (1985) (invalidating a state law giving Sabbath observers an unqualified right not to work on their Sabbath); Bd. of Educ. v. Grumet, 512 U.S. 687, 690, 702–05 (1994) (invalidating a school district designed to encompass only one religious community).

[243] When Congress later attempted to reverse *Smith* by enacting the Religious Freedom Restoration Act (RFRA), only one Justice thought that it violated the Establishment Clause by singling religion out for favorable treatment; the other Justices in the majority simply thought that RFRA's application to the states exceeded Congress's Fourteenth Amendment enforcement powers. *Compare* City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) ("[T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment."), *with id.* at 536 (majority opinion) (invalidating the law solely on the ground that it exceeded congressional authority).

[244] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) (holding that a refusal to allow a religious club to meet after hours at a public school violated the club's free speech rights); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995) (holding that a university's refusal to authorize funding of a student religious publication from the student activity fund was unconstitutional viewpoint discrimination); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387–97 (1993) (holding that a school district's refusal to permit church use of school facilitities to show a religious film series was unconstitutional viewpoint discrimination); Widmar v. Vincent, 454 U.S. 263, 265 (1981) (holding that a university's bar on student groups' use of university facilities for religious worship and discussion was a content-based exclusion that violated the First Amendment's Free Speech Clause); *see also* Christian Legal Soc'y v. Martínez, 130 S. Ct. 2971, 2978 (2010) (upholding a law school policy requiring official student groups to comply with a nondiscrimination policy and rejecting free speech and free exercise challenges by a student religious group).

[245] *Good News Club*, 533 U.S. at 112–13, 120; *Lamb's Chapel*, 508 U.S. at 394–95; *Widmar*, 454 U.S. at 273–75.

More controversially, the Court extended this doctrine to state funding decisions. In *Rosenberger v. Rector*,[246] the Court held that the University of Virginia could not bar a student religious publication from receiving funds from the student activities' account when similar secular groups received funding.[247] The Court rejected the argument that funding a religious publication would violate the Establishment Clause because the student activities' fund could remain facially neutral toward religion.[248] The Justices in the majority saw no space for the university to pursue its anti-establishment concerns beyond the formal neutrality compelled by the Constitution. In fact, they thought leaving the funding bar in place "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[249]

By the early 2000s, it seemed clear that some space remained for government to accommodate religion as such, even when its action was not necessary to avoid a free exercise violation. On the other hand, the Court was less open to government policies premised on anti-establishment concerns, tending to invalidate classifications disfavoring religion. While "benevolent neutrality" was the Court's preferred approach, formal neutrality had made inroads in limiting voluntary, religion-conscious government action aimed at substantive constitutional concerns.

2. The "Central Mandate" of "Racial Neutrality"

Early on in its integration cases, the Court indicated that governments could pursue racial integration voluntarily, because the institutional limits on judicial authority that curbed courts' power to enforce integration did not apply to elected actors. In 1971, the Court wrote in influential dicta:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional vio-

246 515 U.S. 819 (1995).

247 *Id.* at 837, 845–46.

248 *Id.* at 840–44.

249 *Id.* at 845–46.

lation, however, that would not be within the authority of a federal court.[250]

In the same year, the Court unanimously upheld a Georgia school district's voluntary integration plan against an equal protection challenge: "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' Any other approach would freeze the status quo that is the very target of all desegregation processes."[251] It seemed well established that voluntary, race-conscious school integration at the elementary and secondary level was permissible.[252]

But the idea that the Equal Protection Clause was best read as a mandate of absolute government racial neutrality persisted. This idea borrowed much of its rhetorical force from the first Justice Harlan's *Plessy v. Ferguson* dissent, where Harlan wrote that the "Constitution is color-blind . . . and [law] takes no account of [man's] surroundings or of his color."[253] When government action intended to benefit minorities directly affected individual Whites, Whites invoked the principle of colorblindness to argue that they should not be disadvantaged on the basis of race. The tension between a colorblindness rule and governments' demand for space to pursue racial equality and integration drove the bulk of the Court's race doctrine over the ensuing decades.[254]

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[250] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); *see also* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 724 & n.7 (1974) (identifying *Swann* dicta as supporting benign racial classifications).

[251] McDaniel v. Barresi, 402 U.S. 39, 40–41 (1971) (citations omitted); *see also* Brief of Petitioners at 10, *McDaniel*, 402 U.S. 39 (No. 420) (noting that the Georgia district assigned students to schools by geographic zone, but the district took the racial composition of various zones into account when designing its integration plan). Chief Justice Burger also referenced the danger of "freezing the status quo" a month earlier in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which adopted a disparate impact interpretation of Title VII. *Id.* at 430 (holding that under Title VII, employment practices that are "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"). For a discussion of *Griggs*, see *supra* note 83 and accompanying text.

[252] *See also* Fiss, *supra* note 176 (arguing, years before the Court weighed in, that voluntary desegregation efforts were constitutionally permissible).

[253] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[254] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476–77 (1989) (plurality opinion) (describing "the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion) (stating that the "related constitutional duties" of eliminating vestiges of segregation and avoiding race discrimination "are not always harmonious; reconciling them requires public employers to act with extraordinary care"); Fullilove v. Klutznick, 448 U.S. 448, 516 (1980) (Powell, J., concurring) ("Distinguishing the rights of all citizens to be free from racial classifications from the rights of some citizens to be made whole is a perplexing, but necessary, judicial task.").

Over several decades, the Court reconceptualized the core equal protection harm as a violation of formal neutrality. Much of the Court's energy was spent on the question of whether race-conscious action aimed at integration or protecting minorities was subject to the same strict scrutiny as invidious discrimination against racial minorities.[255] Proponents of strict scrutiny argued that the Equal Protection Clause granted "personal rights" that covered individuals, not groups, and that its application should be universal, without reference to majority or minority status.[256] Courts, they argued, could not apply varying standards of review because judges lacked competence to engage in the nuanced assessment of political and social variables necessary to distinguish between benign and malign racial classifications.[257] Courts and commentators repeatedly cited Bickel for the idea that adjusting the constitutional test according to the context of majority-minority power was not principled.[258]

Over time, the Court rhetorically reshaped the harm of racial classifications away from the caste-like stigma cited in *Brown*, toward a universal dignitary harm inflicted whenever race shaped government decisions. As Justice O'Connor wrote: "To whatever racial group . . . citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."[259]

Eventually, the Court stretched this harm so far as to suggest that every individual might have a right to race-neutral decision making by

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255 *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224–27 (1995) (reviewing prior case law concerning the constitutional standard of review for remedial racial classifications).

256 *E.g.*, *id.* at 224–25 (describing the rule of "consistency" as requiring strict scrutiny of all racial classifications regardless of the race of those benefited or burdened (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978) (Powell, J.)); *Croson*, 488 U.S. at 493 (plurality opinion) (stating that citizens' "personal rights" to equal protection are implicated by race-based decision making, no matter their race); *Bakke*, 438 U.S. at 289–90 (Powell, J.) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.").

257 *Bakke*, 438 U.S. at 297 (Powell, J.) ("The kind of variable sociological and political analysis necessary to produce such rankings [of groups' relative power] simply does not lie within the judicial competence . . . .").

258 *See Wygant*, 476 U.S. at 273 (plurality opinion) (citing BICKEL, MORALITY, *supra* note 228, at 133, for the idea that equal protection standards should not vary according to the racial group affected); *Bakke*, 438 U.S. at 295 n.35 (Powell, J.) (same); *see also Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and in the judgment) (same); *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment) (same); *Fullilove*, 448 U.S. at 525–26 & n.5 (Stewart, J., dissenting) (same).

259 *Croson*, 488 U.S. at 493 (plurality opinion); *see also Bakke*, 438 U.S. at 294 n.34 (Powell, J.) (rejecting the concept of stigma as a guide for equal protection review, and arguing that "[a]ll state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened").

government actors, even if the challenged decision making did not directly harm the individual in any ordinary sense. In a line of redistricting cases in the 1990s, the Court identified a new type of harm that occurred when government bodies drew electoral districts in a race-conscious manner. The intention was to ensure minority representation in elected offices by creating "majority-minority" districts.[260] But if race became too prominent a factor in districting, the Court held, individual voters in the relevant districts could bring an equal protection claim, even absent any traditional harm to their voting rights.[261] Justice Kennedy wrote that the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking."[262] Justice Stevens said in dissent that the Court had created "a new substantive due process right to 'color-blind' districting."[263]

As the Court honed the idea that equal protection granted a presumptive right to formally neutral treatment, the expanding reach of this right created ever-greater tension with government policies aimed at substantive goals concerning racial equality or integration. In addressing the resulting tension, the Court settled on the lens of strict scrutiny: It permitted racial classifications to be used only where they were narrowly tailored to further a compelling government interest.[264]

Within the context of strict scrutiny, the Court consistently rejected government interests in seeking substantively equal outcomes for racial minorities or integration of public institutions as

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260 *See* Bush v. Vera, 517 U.S. 952, 956 (1996) (considering a "racial gerrymandering" challenge to a state redistricting law); Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 904 (1996) (same); Miller v. Johnson, 515 U.S. 900, 903 (1995) (same); United States v. Hays, 515 U.S. 737, 738 (1995) (same); Shaw v. Reno (*Shaw I*), 509 U.S. 630, 633 (1993) (same).

261 *Miller*, 515 U.S. at 911, 916; *id.* at 929 (Stevens, J., dissenting) (stating that the Court "dispensed with its previous insistence in vote dilution cases on a showing of injury to an identifiable group of voters"). Theorists compared the expressive harms recognized by the Court to those engendered by Establishment Clause violations and suggested that the similarity implied that the Court took a structural view of the Equal Protection Clause. *See, e.g.*, Pildes & Niemi, *supra* note 68, at 506–13 (identifying both the Court's racial redistricting jurisprudence and Establishment Clause's "endorsement test" as targeting expressive harms); Pildes, *supra* note 17, at 46–47 & n.92 (arguing that the Court's racial redistricting cases are best understood as an example of the Court enforcing structural values). But these cases involve process-based harms, at least in the sense that I treat process versus structure in this Article. The Court appeared concerned with institutional or structural outcomes (such as a district's appearance and composition) only to the extent that those outcomes convey the message that the government illicitly considered race during its districting process.

262 *Miller*, 515 U.S. at 904.

263 *Shaw II*, 517 U.S. at 924 (Stevens, J., dissenting).

264 Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); *Croson*, 488 U.S. at 493–95 (plurality opinion).

noncompelling.[265] To date, the Court has approved only two government interests as sufficiently compelling to support race-based decision making, neither reflecting the underlying substantive or structural concerns of the Equal Protection Clause. First, government has a compelling interest in repairing prior discrimination. This remedial interest sometimes may be stretched. But as Alan Freeman has noted,[266] ultimately the scope of the government's remedial interest mirrors and is limited by the Court's narrow definition of prior discrimination.[267] A remedial interest does not permit affirmative pursuit of broader racial goals. And in a step that indicates the degree to which the Court has transferred norms concerning the judicial role to other political actors, the Court also has required the government to justify voluntary remedial programs on an evidentiary record much like a court might require for issuing a race-conscious remedial decree.[268]

Second, the Court has affirmed that student body diversity in higher education—if defined along multiple dimensions beyond race alone and assessed through holistic review of candidates—is a compelling government goal that justifies use of racial classifications.[269] To

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[265] *See Croson*, 488 U.S. at 498–99 (rejecting an interest in remedying the effects of discrimination in the construction industry); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274–76 (1986) (plurality opinion) (rejecting interests in remedying societal discrimination and providing minority teachers as role models for minority students); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305–10 (1978) (Powell, J.) (rejecting interests in "reducing the historic deficit" of minorities in the medical profession and in remedying societal discrimination).

[266] *See* Freeman, *supra* note 72, at 1106 ("The important cases are the ones that define the violations.").

[267] *See Croson*, 488 U.S. at 498–506 (rejecting a strong statistical racial disparity at the city level, anecdotal evidence, and congressional findings of nationwide discrimination in the industry as evidence of prior discrimination); *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment) (agreeing with the plurality's conclusion that a government agency lacks a compelling interest in remedying discrimination unless it is "traceable to its own actions").

[268] Government actors need a "strong basis in evidence . . . that remedial action [i]s necessary" in order to justify race-conscious remedial programs such as affirmative action. *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)); *see also* David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 935, 939–46 (1996) (discussing the Court's criteria for evaluating race-conscious government action). Although some Justices suggested that "findings" of past discrimination were required and that certain government actors were not jurisdictionally competent to make such findings, the Court declined to adopt these additional threshold requirements. *See, e.g.*, *Croson*, 488 U.S. at 513–14 (Stevens, J., concurring in part and concurring in the judgment) (arguing that legislatures, unlike courts, are ill-equipped to fashion remedies for racial harms); *Bakke*, 438 U.S. at 308–09 (arguing that formal findings of past unlawful discrimination were a necessary foundation for race-based remedies, and that university regents were not competent to make such findings).

[269] *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body."). However, the Court

regulate race-conscious admissions, the Court has dictated nonjudicial procedures that mimic the Court's own approach to equal protection. Admissions officials are to avoid attention to group-level or institutional outcomes, treat the individual as primary, and seek fair treatment at the level of process.[270]

By the early 2000s, the Court had made clear that government actors had limited space in which to pursue constitutional concerns relating to race. It refused to recognize that other government actors might legitimately interpret the Equal Protection Clause as providing substantive protections for minorities and structural checks on majorities and then seek to further those goals through race-conscious action. Instead, the Court extended the methodological constraints of formal neutrality—universalism, individualism, and an emphasis on legitimate process—to other state actors.

C. Locke*,* Cutter*,* Parents Involved*, and* Ricci

Over the last ten years, the Court has solidified its differential treatment of government pursuit of constitutional concerns based on religion and race. Four recent cases exemplify the continuing gap between religion doctrine and race doctrine. *Locke v. Davey*[271] and *Cutter v. Wilkinson*[272] demonstrate the Supreme Court's current willingness to allow government to pursue constitutionally grounded concerns in the field of religion. *Parents Involved in Community Schools v. Seattle School District No. 1*[273] and *Ricci v. DeStefano*[274] illustrate the Court's more restrictive attitude in the area of race.

Locke and *Cutter* sketched out a wide space in which government may pursue goals founded on antiestablishment or free exercise concerns—even if those governmental actions appear to favor or disfavor some individuals based on religion and are not compelled by the Constitution.[275] In *Locke*, the Court considered how far a state may

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will revisit the constitutionality of race-conscious university admissions in Fall 2012. *See* Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011) (upholding a public university's use of race in undergraduate admissions against an equal protection challenge), *cert. granted*, 80 U.S.L.W. 3475 (U.S. Feb. 21, 2012) (No. 11-345).

[270] *See Grutter*, 539 U.S. at 337 ("The importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount."); Gratz v. Bollinger, 539 U.S. 244, 271 (2003) (suggesting that a race-conscious admissions process must "consider[ ] each particular applicant as an individual, assess[ ] all of the qualities that individual possesses, and in turn, evaluat[e] that individual's ability to contribute to the unique setting of higher education").

[271] 540 U.S. 712 (2004).

[272] 544 U.S. 709 (2005).

[273] 551 U.S. 701 (2007).

[274] 129 S. Ct. 2658 (2009).

[275] The space is not unlimited. *See supra* text accompanying notes 244–49.

pursue separation of church and state without violating religious individuals' free exercise rights.[276] Northwest College had denied a publicly funded scholarship to a student majoring in devotional religious studies, applying the State of Washington's statutory prohibition on such funding.[277] The student challenged the decision, claiming religious discrimination.[278] Under previous federal Establishment Clause doctrine, the state was not required to deny the scholarship; it could fund religious studies through facially neutral scholarships open to all comers.[279]

Nevertheless, the *Locke* Court held that a "State's antiestablishment interests" in not funding theological studies, though not compelled by the U.S. Constitution, were weighty ones.[280] To the Court, these concerns were predicated on the long history of opposition to taxpayer funding of clergy and it upheld the refusal without applying any form of strict scrutiny.[281] The Court explained that the Free Exercise and Establishment Clauses are frequently in tension, but "that 'there is room for play in the joints' between them. . . . [T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause"—and vice versa.[282]

The next year, the Court addressed the opposite question from that in *Locke*: whether the government may voluntarily promote the free exercise of religion without thereby illegitimately discriminating in favor of religion. In *Cutter*, state prison officials challenged the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires correctional institutions to justify any significant burden on inmates' religious exercise against a compelling interest standard.[283] The prison officials argued that RLUIPA favors religious

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276 *Locke*, 540 U.S. 712.

277 *Id.* at 716–18.

278 *Id.* at 718.

279 *Id.* at 719 (citing Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986)).

280 *Id.* at 713.

281 *Id.* at 722–23 & n.5, 725. Washington's state courts previously held that the establishment clause contained in the Washington State Constitution barred the state from funding ministers' religious studies. *Id.* at 719 (citing Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989) (en banc)).

282 *Id.* at 718–19 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

283 Cutter v. Wilkinson, 544 U.S. 709, 712–13 (2005); *see* 42 U.S.C. § 2000cc-1(a) (2006) (barring substantial burdens on the religious exercise of individuals confined to institutions, unless the burdens are justified as the least restrictive means of furthering a compelling governmental interest). The section also applies to other custodial institutions, such as those housing the mentally ill. *See id.* § 1997(1) (providing a definition of "institution" for the Civil Rights of Institutionalized Persons Act, which was incorporated by reference into RLUIPA). Congress passed the Religious Freedom Restoration Act of 1993 (RFRA) in response to *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Court held

inmates in violation of the Establishment Clause.[284] The Court, emphasizing the institutional restrictions resulting from imprisonment, viewed RLUIPA as "a permissible legislative accommodation of religion" that did not raise significant establishment concerns. The Court reasoned that RLUIPA "alleviates exceptional government-created burdens on private religious exercise" without favoring any particular religion.[285] Again, the Court relied on the "play in the joints" between the two religion clauses to reject a requirement of absolute impartiality toward religion.[286]

Contrast the two recent race cases. Here, the constitutional space for government to voluntarily pursue racial equality goals via race-conscious action appeared far smaller. In 2007, in *Parents Involved*, the Court struck down two school districts' voluntary racial integration programs.[287] Because the programs involved government use of racial classifications, the Court applied strict scrutiny.[288] Firmly distinguishing the voluntary plans from instances in which the schools would have been constitutionally *required* to pursue racial integration as a remedy for past violations,[289] four of the five Justices forming the majority emphasized that racial balancing for its own sake is not a compelling state interest.[290] Justice Kennedy, the fifth vote, wrote in a separate opinion that the substantive goals of assuring "equal educational opportunity" and "avoiding racial isolation" may be compelling interests, but that neither of the plans at issue was sufficiently tailored.[291]

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that it would no longer use the equivalent standard to test constitutional free exercise claims. RLUIPA, adopted in 2000, is a pared-down version of provisions of RFRA that sought to apply this standard to all state actors but were struck down by the Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), as exceeding congressional powers. *See Cutter*, 544 U.S. at 714–17 (explaining the origins of RLUIPA).

284 Brief for Respondent at 1–2, 10–25, *Cutter*, 544 U.S. 709 (No. 03-9877), 2005 WL 363713, at *1–2, *10–25.

285 *Cutter*, 544 U.S. at 720, 724. The Court noted that RLUIPA applies in institutional settings "in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Id.* at 720–21.

286 *Id.* at 713–14 (quoting *Locke*, 540 U.S. at 718 (2004)).

287 *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–11 (2007) (plurality opinion).

288 *Id.* at 720.

289 *See id.* at 725 n.12, 736–37 (distinguishing instances where school districts were required to pursue integration in order to remedy past de jure segregation).

290 *Id.* at 729–33. Justice Thomas separately stated his view that "all race-based government decisionmaking—regardless of context—is unconstitutional" except remediation of prior intentional discrimination. *Id.* at 752 (Thomas, J., concurring).

291 *Id.* at 783–88 (Kennedy, J., concurring in part and concurring in the judgment). Kennedy indicated that schools should seek integration through what he termed "race-conscious measures," without actually classifying any individuals by race. *Id.* at 788–89. By "race-conscious measures," Kennedy appeared to mean measures consciously intended to

Two years later, the Court in *Ricci* upheld a Title VII challenge to the City of New Haven's decision to rescind the results of a fire department promotion exam after seeing extreme racial disparities in the results.[292] The City feared that using the exam's results might violate Title VII's disparate impact provision, which bars employment practices that cause unjustified racial disparities. However, the Court majority held that the City's decision to rescind the results facially violated Title VII's bar on intentional discrimination, indicating the tension between an anticlassification norm and the goal of avoiding unnecessary disparate impacts on racial minorities.[293] Although the Court held the City's action unlawful on statutory grounds, it suggested that its constitutional analysis would have been at least as stringent.[294]

Justice Scalia wrote separately to discuss the constitutional issue.[295] To Scalia, Title VII's disparate impact standard is in serious tension with the Equal Protection Clause: "Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on . . . those racial outcomes. That type of racial decisionmaking is . . . discriminatory."[296] In other words, federal disparate impact law prohibits actions that the Equal Protection Clause would not, while requiring race-based governmental decision making. Is there sufficient flexibility within the Equal Protection Clause for Congress to pursue racial equality goals in this way? Scalia appeared to doubt it.[297]

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address racial disparities without relying on individual racial categorization. Individual racial categorization might be valid as a "last resort." *Id.* at 790.

292 Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009). No African American test takers would have been promoted to the fifteen vacant positions had the test results been used. *Id.* at 2666.

293 *Id.* at 2664, 2673–74.

294 *See id.* at 2664–65, 2675–76 (borrowing the constitutional standard while reserving the question of whether constitutional analysis would be equivalent); *see also* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344 (2010) (describing Title VII disparate treatment analysis and equal protection analysis as "substantively interchangeable" for the purposes of the *Ricci* issue).

295 *Ricci*, 129 S. Ct. at 2681–83 (Scalia, J., concurring). Scalia said that the Court was merely postponing "the evil day" of constitutional reckoning for federal disparate impact law, a phrase evoking biblical references to a day of judgment. *Cf. Amos* 6:3 (New International) ("You put off the evil day and bring near a reign of terror.").

296 129 S. Ct. at 2682.

297 *Id.* at 2682–83; *see also* Primus, *supra* note 294, at 1344, 1362 (discussing the Court's indication in *Ricci* that Title VII's disparate impact standard may conflict with equal protection); Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003) (describing the tension between equal protection doctrine and disparate impact law).

Parents Involved and *Ricci* demonstrate that at present, the space for government to pursue integration of public schools and public employment is quite narrow, constrained by the majority's vision of racial neutrality for the state. The contrast with religion is sharp. Even as the Court authorizes government to implement structural rules aimed at separating church and state and to protect religious adherents from unintentional disparate burdens, it has made it increasingly difficult for government to pursue the structural goal of integrating state institutions and to protect racial minorities from unintentional disparate impacts.

Thus, the movement for neutrality has reshaped equal protection and religion clause doctrine. First there were calls for courts to cease mandating substantive outcomes and structural rules for public institutions, and to retreat to the more neutral world of process. The Court seemed to pay heed. It rejected an equal protection standard that would compare outcomes for different racial groups, or that would impose an affirmative integration mandate. It stopped requiring governments to alleviate burdens on religious minorities and revised its establishment clause doctrine to be more lenient toward public support for religion. In both domains, the Court enforced a general rule of neutrality. Governments were not to use race or religion as an express or covert basis for disfavor.

Eventually, the call for neutrality expanded. Reacting to perceived tensions in both equal protection doctrine and religion clause doctrine, some commentators argued that both areas lacked a neutral principle to govern state action. State programs seeking to improve the lot of racial minorities must by implication disfavor non-minorities—how could this be reconciled with a rule against government discrimination on the basis of race? State programs seeking to protect religious worshippers must by implication disfavor the non-religious—how could this be reconciled with a requirement of government religious neutrality? The answer in both areas, they suggested, was that no reconciliation is possible. The only neutral principle they could identify was blindness—government colorblindness, and religion-blindness.

The Court agreed, in part. Absolute formal neutrality became the presumption in equal protection doctrine governing race. Absent a compelling interest, race-conscious action was unconstitutional. Various state interests associated with substantive racial equality or integration were insufficient.

In contrast, while the Court started down the path of neutrality in the religion clause context by striking down certain government restrictions on support for religion, it stopped short of formal

neutrality. Unwilling to strike down (and indeed supportive of) legislative exemptions favoring the religious, the Court decided that the religion clauses did not require strict neutrality but rather "play in the joints." The Court later concluded that anti-establishment interests could also justify at least some government actions disfavoring religious individuals.

In neither case was the movement for neutrality based on a close reading of text or history.[298] Like scholars themselves, the Court largely acknowledged that the equal protection and religion clauses do not provide such answers.[299] Rather, the Court's move toward formal neutrality was driven—at least as the Court explained it in its decisions—by concerns with relative institutional competence and later by a desire for a "neutral principle," one that would be universal, focused on individuals, and procedural in nature. These concerns echoed the central themes of legal process scholarship.

Of course, at another level, the doctrinal outcomes must also be explained by reference to the Court's growing conservatism.[300] Formal

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[298] The Equal Protection Clause's text and history do not require a colorblindness rule. For example, most agree that the Fourteenth Amendment's framers did not specifically intend to bar segregated education. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY 132–54 (2d ed. 1997) (arguing that the framers supported segregation); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 790, 800 (1983) (stating that the framers did not mean to bar segregation in public education); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 489–90 (1954) (calling the history of the intent behind the Fourteenth Amendment "inconclusive"). In a contrasting but parallel vein, some argue that the same men who adopted the Equal Protection Clause also adopted race-conscious measures to assist African Americans. *See, e.g.*, Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–32 (1997) (pointing to Reconstruction Era federal statutes that provided race-conscious relief to the African American poor and race-based bounties to African American Union soldiers); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (contending that the Reconstruction Congress adopted race-conscious welfare programs); *see also* Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 796 (1995) (arguing that history supports neither "radical color-blindness" nor an "asymmetric caste principle"). Nor do the religion clauses' text or history point toward a rule of religion-blindness. *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 412–27 (2002) (suggesting that Establishment Clause history could be interpreted either to permit government support for religion or to bar it); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1414–15, 1473–513 (1990) (reviewing the history of the Free Exercise Clause and arguing that it does not support a requirement of facial religious neutrality).

[299] *See, e.g.*, Lupu, *supra* note 124, at 572 (noting that the Court did not examine text or intent in Empl. Div. v. Smith, 494 U.S. 872 (1990)); *see also* Kurland, *supra* note 64, at 25 (stating that modern religion cases are not covered by the First Amendment's text or the framers' intent).

[300] On general trends in the Court's conservatism over time, see Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, at A1. Broader political and social changes are also likely causes of shifts in the Court's jurisprudence, but

neutrality serves conservative goals in the race context, since it disfavors race-conscious policies. However, in the religion context, while formal neutrality tends to limit separationist strategies, it simultaneously limits protections for religious exercise.[301] The former was to the liking of many conservatives, the latter less so.[302] That is perhaps the real key to why a doctrine providing for play in the joints emerged in the religion context, but a doctrine providing for similar flexibility towards race-conscious goals did not.[303]

IV
Play in the Joints: Leaving Space for Pursuit of Substantive and Structural Goals

Formal neutrality cannot fulfill its own promises. It also unreasonably limits government's ability to pursue countermajoritarian, constitutionally grounded goals. In this Part, I suggest a compromise with formal neutrality. The Court should clarify and extend the idea of play in the joints to make clear that other government actors may pursue substantive readings of the religion clauses and the Equal Protection Clause beyond the Court's own interpretations. This would have the greatest impact in equal protection jurisprudence, where it would require that integration of public institutions be treated not as a suspect form of "racial balancing" but as a structural policy aimed at enforcing the Equal Protection Clause itself.

A. Formal Neutrality Fails Its Own Tests

As I have argued, formal neutrality cannot truly resolve the perceived tensions in religion and race doctrine because it can only do so at the cost of discarding the substantive and structural concerns underlying those constitutional provisions. Even proponents of formal neutrality must grapple with the failure of the principle to fulfill its original purpose of limiting unelected judges' power. Formal

fall outside the scope of this Article. *Cf.* Jeffries & Ryan, *supra* note 117 (providing a "political history" of the Establishment Clause).

[301] *Cf.* Pfeffer, *supra* note 145, at 401–06 (discussing the ways in which religion-blindness would limit protections for the religious, as well as aid religious institutions).

[302] Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 Seton Hall L. Rev. 1233, 1257–58 (1997).

[303] The Court seems to view race as more explosive than religion. *Compare* Johnson v. California, 543 U.S. 499, 507 (2005) ("[R]acial classifications 'threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.'" (quoting Shaw v. Reno, 509 U.S. 630, 643 (1993))), *with* Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part and dissenting in part) ("The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote . . . .").

neutrality fails in its jurisprudential aspirations because it is not a neutral principle and it does not successfully constrain judicial power. In fact, when extended to govern all state actions, it gives the courts great power to supervise and overrule the other branches of government.[304]

Nor does formal neutrality limit judicial value choices or ensure they are made pursuant to overarching rules of logic and consistency. Courts do not move into a Platonic world of pure ideals and forsake "variable sociological and political analysis" once they adopt formal neutrality.[305] If formal neutrality is adopted only as a presumption, then courts continue to exercise wide-ranging sociological and political judgment in assessing what sorts of religion- or race-conscious actions incur strict scrutiny,[306] what qualifies as a legitimate or "compelling" interest,[307] and what means are constitutionally valid to carry out those interests.[308] If the Court were to adopt formal neutrality as an absolute rule barring any government use of racial or religious classifications, this would in itself be a massive judicial imposition of particular values.

Above all, formal neutrality is not neutral toward the political process and state power. As I have argued, the modern state gives rise to special worries about the role of public institutions in entrenching dominant religious or racial majorities.[309] Public institutions are subject to "capture" insofar as current-day dominance allows majorities to shape those institutions to their own continuing political advantage.

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304 *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (striking down a school district's attempt to achieve racially integrated schools); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding unconstitutional a public university's attempt to limit the use of student fees for religious purposes).

305 *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 297 (1978) (Powell, J.) (arguing that courts are not competent to perform the "variable sociological and political analysis" necessary to distinguish various types of government race-conscious action).

306 For example, not all race-conscious action appears likely to draw strict scrutiny. *See* Tancil v. Woolls, 379 U.S. 19 (1964) (per curiam) (affirming summarily a lower court decision invalidating racial designations in voter and property records but upholding their use in divorce records); Primus, *supra* note 297, at 505–06 (providing examples of government racial classifications that are not subject to strict scrutiny). Determining what qualifies as "state action" also requires sensitive judgments. *See* Strauss, *supra* note 141, at 966–83.

307 *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 401–06 (1998) (arguing that the "compelling interest" test requires both doctrinal analysis and substantive policy judgment).

308 *Compare* Grutter v. Bollinger, 539 U.S. 306, 333–43 (2003) (upholding a race-conscious law school admissions system that involved "a highly individualized, holistic review of each applicant's file"), *with* Gratz v. Bollinger, 539 U.S. 244, 270–75 (2003) (striking down a race-conscious undergraduate admissions system that awarded a set number of points to members of underrepresented minority groups).

309 *See supra* Part I.C.

In some cases, however, majorities actually create structural checks on their own power over public institutions.[310] They actively pursue racial integration of the state or separation of the state from religious entities. Formal neutrality denies majorities this self-checking power. In doing so, it does more than entrench the status quo. It entrenches majority capture by writing the ground rules of political power in such a way that even the majority cannot choose to act against its own entrenchment.[311] This is, at a minimum, non-neutral.[312]

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[310] Majorities regularly limit their own power through constitutionalism. They may do so because of normative ideals, a precommitment strategy to promote long-term preferences, a desire for social peace, or an attempt to gain an advantage in external conflicts, among other possible goals. *See, e.g.*, Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (discussing majorities' interest in using the Equal Protection Clause to end de jure segregation); Klarman, *supra* note 32, at 496–97 (discussing constitutionalism as a precommitment strategy). Majorities, of course, can also attempt to limit their own power through non-constitutional means—to the extent these are structural limits, the redistribution of power affected by those limits may become self-enforcing. *Cf.* Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 38–45, 47–48 (2003) (discussing the success of the Voting Rights Act in this regard).

[311] Current judicial doctrines of formal neutrality ironically echo laws that the Court struck down in decades past, wherein majorities chose to institute special barriers to laws protecting minorities against discrimination. *See* Romer v. Evans, 517 U.S. 620 (1996) (invalidating a state constitutional amendment prohibiting any government action designed to protect against discrimination on the basis of sexual orientation); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (invalidating a state law designed to prevent busing for the purposes of racial integration); Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating a city charter amendment requiring fair housing ordinances to be approved by a majority of voters); *cf.* James v. Valtierra, 402 U.S. 137 (1971) (upholding a state constitutional amendment barring low-income housing development unless approved by a majority of local voters). In those instances, the Court thought that the harm lay in a form of entrenchment, since the laws changed the basic rules of political competition in a way that disadvantaged the minority. *See Romer*, 517 U.S. at 631, 633–34 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws . . . ."); *Seattle Sch. Dist. No. 1*, 458 U.S. at 467–70 (stating that the Equal Protection Clause is implicated by neutral political structures that "subtly distort[ ] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation"); *Hunter*, 393 U.S. at 391–93 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."). But that is exactly what the Court does when it prohibits other government actors from protecting minorities or checking majoritarian power—it creates meta-rules that insulate majority power from ordinary politics, short of constitutional amendment. In effect, the Court entrenches entrenchment.

[312] *Cf. Seattle Sch. Dist. No. 1*, 458 U.S. at 470 (stating that special scrutiny is required when the state "allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process"). Others have observed that strict scrutiny of racial classifications is itself non-neutral. *See, e.g.*, Case, *supra* note 12, at 341 (arguing in the affirmative action context that where institutions explicitly seek other forms of diversity, "it would deny equal protection to racially defined groups to deny them

B. Expanding the Play in the Joints

The Court should reject the substantive premises of formal neutrality. It should recognize that the religion clauses and the Equal Protection Clause are not unitary mandates, exclusively concerned with government process. Rather, the religion clauses and the Equal Protection Clause are countermajoritarian provisions. They protect important substantive values (respectively, religious liberty and racial equality) and they also provide structural checks on religious and racial majorities' power over the state.

The present Court seems unlikely to enforce the religion clauses and the Equal Protection Clause in this way. Therefore, the most straightforward way for the Court to come to terms with the goals of equal protection is to adopt play in the joints for the Equal Protection Clause in the same way it has for the religion clauses. This would allow other government actors to pursue constitutionally based concerns beyond the limits that the Court authorizes judges to enforce.

There is a readily available logic for the Court to explain this move. Lawrence Sager long ago distinguished between institutional and analytical reasons for refusing to enforce a constitutional norm to its full conceptual boundaries.[313] Where the courts limit constitutional enforcement due to institutional concerns about the legitimacy or competence of courts to enforce broader norms, Sager argued that those norms are "underenforced" and should be open to broader enforcement by other government actors.[314]

The reasons the Court has cited for its refusal to fully enforce substantive and structural concerns about religion and race are primarily institutional. The Court has argued that the judiciary is ill-equipped to address group-level and institutional outcomes in a diverse society.[315] However, just as Sager noted, constraints on

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an opportunity afforded other groups"); Rubenfeld, *supra* note 298, at 450–51 ("[J]udicial insistence on strict scrutiny of all racial classifications would itself be a racial classification within its own meaning.").

[313] Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217–18 (1978).

[314] *Id.* at 1221, 1239–40. *But see* Levinson, *supra* note 80, at 920–26 (critiquing the idea of "under-enforced" constitutional norms because there is no such thing as a "pure" constitutional right unaffected by institutional concerns).

[315] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 657–58, 662 n.7 (2002) (questioning whether a focus on net flow of aid to religious institutions, or divisiveness of such aid, is a sufficiently principled standard for courts to administer); Emp't Div. v. Smith, 494 U.S. 872, 886–90 & n.4 (1990) (arguing that religious exemptions require courts to evaluate the importance of particular religious practices, which cannot be done in a principled manner); Washington v. Davis, 426 U.S. 229, 248 (1976) (arguing that the use of a disparate impact test under the Equal Protection Clause would have far-reaching effects on government policies and is thus inappropriate for courts to adopt).

judicial enforcement should not stop other government actors from enforcing constitutional concerns more broadly through legislative or administrative tools. The Court itself said as much when it retreated from active enforcement in the areas of religion and race.[316]

Of course, there are real normative concerns underlying formal neutrality's emphasis on individualism, universalism, and process —particularly the idea that government should not base its decision making on religion or race. The dominant concerns can be summarized as ones of fairness and institutional integrity. The fairness concern is the worry that individuals will be treated arbitrarily.[317] The institutional integrity concern is the worry that government decision making will inevitably become distorted from its public-regarding purposes if aimed at religious or racial goals, while public institutions will become mere channels for dividing up public resources along religious and racial lines.[318]

Fairness and institutional integrity are more universalistic versions of the desire to protect minorities from substantive harms and to prevent majority capture of public institutions. If they are in peril, it suggests that those constitutional goals have been pursued in ways that undermine their own premises: i.e., the substantive protections in question do not actually further racial inequality or religious liberty, or the structural checks at issue do not truly safeguard public institutions. But insofar as fairness and institutional integrity rest on substantive worries about individual treatment and institutional health, courts should address those worries directly and with particularity, rather than by adopting a procedural interpretation of the clauses as a one-size-fits-all prophylactic.

When government seeks to enforce reasonable interpretations of core constitutional norms, fairness and institutional integrity are better addressed by asking whether there is cause for concern with a specific policy during the course of judicial review. There is no need for sweeping presumptions that disable government actors from pursuing constitutionally grounded goals. This is especially true insofar as

316 *Smith*, 494 U.S. at 888–90; *Davis*, 426 U.S. at 248.

317 *See, e.g.*, Laurence H. Tribe, *Perspectives on* Bakke*: Equal Protection, Procedural Fairness, or Structural Justice*, 92 HARV. L. REV. 864, 867–73 (1979) (describing Justice Powell's concern with fairness, which he understood as individualized treatment).

318 *See* David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 25–29 (arguing that the affirmative action cases are explained by the Court's concern that affirmative action plans will reflect interest group politics, not the broader public interest).

other government actors are equally or better positioned to take account of these concerns than are courts.[319]

In the race context, the Court has offered three primary justifications for its strict scrutiny of all race-conscious measures. Each is a response to the idea that policies that burden the majority are adequately vetted by the democratic process and hence should be subject to lesser scrutiny.[320] First, several Justices have argued that the rights at stake are "personal."[321] The idea of equal protection as providing "personal rights" was originally a response to the assertion that segregation laws inflicted similar formal harms on Whites and Blacks. The Court vindicated the rights of the minority even when the same harms were hypothetically inflicted on both the majority and the minority.[322] As a rhetorical device, couching the segregation decisions in terms of personal rights was a mistake. This framing suggested that the harms of segregation could plausibly be inflicted on the majority. Moreover, it implied that the political context of an action does not itself fundamentally shape any resulting harm.

As a moral premise, the idea simply seems wrong. Suggesting that racial classifications inflict equivalent dignitary harms, regardless of context, ignores social reality. The Court has made this same mistake as it has progressively transformed the actual stigmatic harms suffered by segregated Black schoolchildren in *Brown* into abstract, universal injuries suffered by any person subject to a racial classification.[323] The reality is that a majority individual who is burdened by a racial or religious classification is likely to be unhappy, but he may realize that his majority status gives him privileges that minorities do not enjoy and that he is at no risk of suffering systematic subordination based on

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319 The traditional argument for heightened judicial scrutiny applies only where the burdens fall on a group that is not adequately represented in the political process. *See supra* notes 92–98 and accompanying text (discussing *Carolene Products*'s footnote four and John Hart Ely's "political process" justification for judicial review).

320 *Cf.* Ely, *supra* note 250, at 727 ("[I]t is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself.").

321 *E.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (internal quotation marks omitted); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978) (Powell, J.) (internal quotation marks omitted).

322 *See supra* note 49 and accompanying text (discussing the use of the rhetoric of "personal rights" in Sweatt v. Painter, 339 U.S. 629, 634–35 (1950), and Shelley v. Kraemer, 334 U.S. 1, 21–22 (1948)).

323 In the religion context, the Court has rejected arguments against religion-conscious action that claimed similar classificatory harms, apart from any tangible injuries. However, Justice Scalia argued, in dissent, that "[t]he indignity of being singled out for special burdens on the basis of one's religious calling is . . . profound." Locke v. Davey, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting).

his race.[324] He may also be able to understand his injury in light of countervailing constitutional ideals. The Court itself could contribute to that sort of understanding if it were to use its rhetorical power to explain the substance of constitutional ideals related to racial equality and their connection to social reality.

Second, several Justices have suggested that the countermajoritarian premise is not justified, either because the protected minority in question is actually a majority[325] or because the majority is in fact trading off the interests of its least powerful members.[326] Thus, the Court has suggested that affirmative action may result from "simple racial politics" or that elites are pursuing such plans at the cost of less-well-off Whites.[327] But if the Court is worried that government actors are protecting only politically powerful minorities or victimizing the vulnerable, those worries are better addressed specifically, within a consistent framework for doing so, rather than employed as anecdotal evidence to suggest that all actions protecting minorities are suspect.

Finally, the Court has suggested that legitimacy and competence concerns prevent it from addressing issues of political and social power, even to review other actors' attempts to further substantive

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[324] *See, e.g.*, Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957–58 (1993) (examining "transparency," or the tendency of Whites to ignore Whiteness and to treat practices or policies that advantage Whites as racially neutral, and its relationship to equal protection doctrine); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (examining the evolution of Whiteness as a form of "status property," or a set of formal legal privileges based on race, into a more modern form of property resting on the normalization of relative White privilege within the status quo).

[325] *See Croson*, 488 U.S. at 495–96 (plurality opinion).

[326] *See* Grutter v. Bollinger, 539 U.S. 306, 361–62 (2003) (Thomas, J., dissenting) (arguing that a law school could obtain its purported goal of a "racially aesthetic student body" through alternative, race-neutral means if it were willing to give up its elite status); *see also* Johnson v. Transp. Agency, 480 U.S. 616, 676–77 (1987) (Scalia, J., dissenting) (arguing that affirmative action is likely to harm "precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past"); *cf.* Ely, *supra* note 250, at 737–38 (contemplating the possibility that minority preferences might "cause disproportionate harm to a discrete, disfavored, and relatively powerless subset of the majority" but rejecting this risk as a basis for an across-the-board constitutional bar on race-based remedial action).

[327] *Croson*, 488 U.S. at 493 (plurality opinion) (indicating that strict scrutiny is necessary to evaluate when purportedly benign racial classifications originate in "simple racial politics"); *see also* Ricci v. DeStefano, 129 S. Ct. 2658, 2684–88 (2009) (Alito, J., concurring) (suggesting that city officials were motivated to score political points with the African American community, rather than to comply with antidiscrimination law). The idea that "simple racial politics" signals a flawed political process is somewhat perverse. That is, it is odd to deny racial and religious minorities the opportunity to secure better protections through politics when more powerful social interests are not subject to any similar level of constraint on their political bargains. *Cf.* Case, *supra* note 12, at 327–29 (making this point by analogy to religion clause doctrine).

constitutional concerns.[328] Formal neutrality cannot solve those problems. Instead, it obscures the Court's value judgments in doctrinal jargon and imposes judgments on a wholesale—rather than retail—level.[329] In the past and in other contexts, the Court has openly reviewed such complex, charged questions without dire consequences.[330]

C. Opening Space for Other Actors To Enforce Constitutional Norms

What would play in the joints mean in practice for religion-conscious and race-conscious government action? Initially, the Court would have to acknowledge that the substantive goal of racial equality and the structural goal of racial integration represent reasonable conceptions of the Equal Protection Clause, just as protections for religious liberty and antiestablishment safeguards represent reasonable conceptions of the religion clauses. As a consequence, if substantiated and pursued by reasonable means, such goals are sufficient to justify religion- or race-conscious action.[331] Analysis in cases like *Parents Involved* and *Ricci* would then begin from the idea that race-conscious integration goals are grounded in the Equal Protection Clause itself. The real question for judicial resolution would be whether the policies in question properly belong in the play in the joints between substantive ideals and government neutrality.

To evaluate this question in particular cases, the Court would have to abandon the methodological premises of formal neutrality, which have disallowed inquiry into political power, hierarchy, and social meaning. The analysis would hinge in part on whether the

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328 *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295–97 (1978) (detailing the institutional difficulties associated with the judiciary reviewing other actors' substantive judgments).

329 *See, e.g.*, *id.* at 299 (asserting that, while courts are not competent to make the necessary political judgments to vary their scrutiny of racial classifications, they should still evaluate other actors' "[p]olitical judgments regarding the necessity for the particular classification" within the framework of strict scrutiny); Mueller & Schwartz, *supra* note 142, at 586–87 (observing that the "neutral principle" ideal has no true way of limiting courts' role in choosing substantive values because any given constitutional principle will, if logically extended, compete with another).

330 *E.g.*, Georgia v. Ashcroft, 539 U.S. 461, 479–85 (2003), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81 (assessing the meaning of "effective exercise of the electoral franchise" for minorities in the context of Section 5 of the Voting Rights Act and outlining the factors lower courts should consider).

331 I do not want to imply that I accept the current framework of strict scrutiny, so I intentionally avoid the term "compelling interest." In the end, though, I am less concerned with whether the Court calls its review "strict scrutiny" and more concerned with the substance of the review.

government actor is truly pursuing the countermajoritarian goals underlying the religion clauses and the Equal Protection Clause. That can only be answered by inquiry into group- and institutional-level dynamics and outcomes.

In undertaking this review, the Court need not abandon principled reasoning. The neutral principles mandate is far from self-defining. As critics have pointed out, it might range anywhere from being a rule against using proper names in constitutional principles to a rule that no group-specific or subjective assessments can ever be required in applying a neutral principle.[332] There is no obvious reason to require that a constitutional principle ignore actual political and social dynamics at the level of groups, institutions, and outcomes.

Inquiry into context tends to alleviate the tension that drives formal neutrality: the tension between impartial process and substantive constitutional goals. A neutral principles approach that disallows inquiries into political and social context makes pursuit of any substantive goal appear self-contradictory: How can government disfavor religion in one area and favor it in another? Why should government be allowed to pursue race-based decision making in one setting and not another? Taken at face value, without context, these contradictions can only be resolved in a singular, simplistic fashion—by either prohibiting or permitting all actions based on religion or race.

But if one sees the goals of the religion clauses and Equal Protection Clause as essentially countermajoritarian, rather than as embodying rules of formal neutrality, and evaluates policies pursuing those goals within the relevant political and social context, the apparent contradiction subsides. A state's refusal to fund theological studies is not intended to discriminate against the religious individual as such, but rather to address structural concerns about state aid to religion. In innumerable other encounters with the state, the religious individual is treated like any other. In the context of race, when the state seeks to integrate its workforce or its schools, it is pursuing a structural concern related to majority capture of public institutions. It is not systematically consigning White individuals to a lower social status that would undermine substantive racial equality. Pursuit of one

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332 *See, e.g.*, Friedman, *supra* note 149, at 513 (noting that "the 'antisubordination' principle" suggested by Wechsler's critics is a neutral principle, despite Wechsler's doubts); Siegel, *supra* note 158, at 1489–94 (stating that Wechsler intended neutral principles to be principles that did not refer to identifiable social groups and discussing critiques of this position by his contemporaries); Tushnet, *supra* note 298, at 805–06 ("[In pursuing neutral principles, w]e might coherently require that rules not use proper names, but there is no principled way to distinguish between the general terms that in effect pick out specific groups or individuals and those that are 'truly' general.").

countermajoritarian goal will not inevitably threaten another; judicial review can police instances where a policy threatens other constitutional goals.

D. Review for Sincerity, Fairness, and Institutional Integrity

Once substantive and structural constitutional concerns are accepted as interests capable of justifying race-conscious or religion-conscious action, the relevant questions involve sincerity and reasonableness. Is there actually a countermajoritarian concern at stake? Did the government entity pursue it through reasonable means, ones that adequately respect fairness and institutional integrity? Under the Court's traditional method, sincerity is tested by weighing the objective basis for the governmental concern and reasonableness by "fit," or the extent to which the action effectively addresses that concern.[333] Both prongs would change under a play in the joints approach.

Testing sincerity means examining the evidence that a countermajoritarian concern was truly at stake when the policy in question was adopted. Was there in fact a differential burden on a minority group to be ameliorated? Was there a realistic threat that state institutions would entrench the majority? The Court's prior constitutional jurisprudence offers potential guidance, as does state constitutional jurisprudence interpreting state law counterparts,[334] in recognizing how far the constitutional concepts may plausibly extend.

By inquiring into sincerity, the Court may address its concern that the majority is not checking its own power, but rather distributing benefits to itself or to a favored minority. That concern should not be addressed simplistically. The question should be whether the government had a sound basis for its concern, in light of history, political dynamics, and social reality.[335]

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[333] *See* Liu, *supra* note 307, at 401 (stating that a compelling interest analysis tests in part "whether a governmental actor has produced sufficient evidence to substantiate its alleged interest," a standard "designed to assess the veracity of the government's stated interest").

[334] Sager suggests that the Court should permit state courts to enforce "underenforced" federal constitutional norms to their full extent. *See* Sager, *supra* note 313, at 1248–50 (arguing that the Court should avoid vacating such state court decisions, even when the Court itself would read the constitutional norm more narrowly).

[335] For example, an entrenchment problem may still exist even where a racial minority forms a demographic majority in a particular jurisdiction. In these cases, entrenchment must be evaluated in light of greater political and social realities, including larger structures of political power in the region, the history of racial exclusion from public institutions and resources there, and minorities' extant opportunities to access those resources. *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495–96 (1989) (plurality opinion) (pointing out that, in Richmond, Blacks constituted about half of the population and held a majority of the seats on the city council at the time that a minority set-aside program for local

Examination of a policy's reasonableness would move away from testing fit[336] and toward promoting fairness and institutional integrity. Scrutiny for fairness would seek indications that the policy was tailored in light of the costs it would impose on others and examine whether the policy's designer accounted for those costs. A system that is general enough to allow for others' competing claims will often be the ideal. In the religious exemptions context, ensuring that the policy expressly permits exemptions to all those with a deeply rooted moral claim is one means of satisfying this check.[337] In the affirmative action context, two possible means of promoting the goal of generalized fairness include ensuring that the policy provides some version of individualized review for all candidates and verifying that the policy does not unfairly revise selection criteria midstream.

Inquiry into reasonableness should also be guided by the notion that the policy or institution in question not be distorted to serve only the religious or racial goal. The institution should instead continue to serve whatever broader public goals it is designed to achieve, balanced against the relevant religious or racial constitutional concerns.[338] This is an institutional integrity rule that the Court itself sometimes implicitly follows. From this perspective, the public interest in multi-faceted student body diversity at universities cited by the majority in *Grutter v. Bollinger*[339] is best understood not as the compelling interest

government contracts was adopted); *id.* at 534 (Marshall, J., dissenting) ("[O]nly 0.67% of the $24.6 million which Richmond had dispensed in construction contracts during the five years [prior to adoption of the set-aside] had gone to minority-owned prime contractors.").

336 Focusing on fit frontloads the question of reasonableness into the definition of acceptable government interests. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (indicating that the government has a compelling interest only in promoting a particular form of diversity, one comprising many qualities besides race or ethnicity).

337 *See* United States v. Seeger, 380 U.S. 163, 164–66 (1965) (interpreting the federal draft exemption for conscientious objectors, which called for a "belief in a relation to a Supreme Being" to test whether the applicant had a sincere belief that played a role in his life parallel to that of a belief in God (internal quotation marks omitted)); *see also* Welsh v. United States, 398 U.S. 333, 344 (1970) (plurality opinion) ("[The] section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs [bar them from war.]"); Berg, *supra* note 90, at 973–76 & n.293 (suggesting that where religious exemptions benefit one sect in particular, they should be broadened to cover all religions, as well as atheists, and citing *Welsh* and *Seeger* as illustrations).

338 *See* Pildes & Niemi, *supra* note 68, at 500 (describing this problem as one of "value reductionism" wherein "[policymakers] have permitted one value to subordinate all other relevant values"). Reva Siegel also argues that concern with divisiveness, or racial "balkanization," has pushed swing justices like Kennedy to reject policies demonstrating excessive concern with race. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1300–03, 1307–08, 1351–52 (2011). The problem of divisiveness is better addressed through the lens of institutional integrity, as an aspect of the reasonableness inquiry.

339 539 U.S. 306, 329–33, 337–39 (2003).

justifying the program, but rather as a basis for ensuring that the chosen means were consistent with institutional integrity. A focus on multifaceted diversity suggested that the university was selecting applicants in a way likely to further broad educational goals as well as racial equity. In general, institutional integrity would disfavor sweeping rules that pursue a particular substantive constitutional concern to the exclusion of all other interests, such as across-the-board exclusions of religious entities from programs of general aid.[340]

Disparate impact law is an example of a policy engineered to promote both racial equity and institutional integrity. For instance, under Title VII's disparate impact provisions, employers may use a hiring test that disproportionately eliminates minority candidates. However, such a test may only be used if it accurately screens for the actual skills required on the job, rather than for arbitrary criteria.[341] Employers also can be required to adopt practices shown to have less disparate impact if those practices would still effectively screen for the needed job skills.[342] In this way, disparate impact law tends to purge institutions of arbitrary and biased practices, while encouraging fidelity to the institution's mission.

In general, the fairness and institutional integrity concerns that implicitly drive the absolute state neutrality position are better addressed in their specific manifestations, rather than through sweeping and reductionist visions of the constitutional values at stake. A fully realized doctrinal standard is beyond the scope of this Article; here, I have only sketched its essential principles.

CONCLUSION

Does providing play in the joints actually satisfy the substantive demands and structural premises of countermajoritarian

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340 The *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases also suggests a concern with institutional integrity. By ruling that race-based redistricting violates equal protection only when race is the "predominant factor" in drawing districts, the Court indicated its concern that race should not drown out other state interests in redistricting. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 913–16 (1995); *see also* Pildes & Niemi, *supra* note 68, at 500–05 (comparing the concern with race as a predominant factor in *Shaw* to a similar concern in Justice Powell's opinion in *Bakke*).

341 *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (requiring that any practice causing disparate impact be "job related for the position in question and consistent with business necessity"); *cf.* Ricci v. DeStefano, 129 S. Ct. 2658, 2704 & n.12 (2009) (Ginsburg, J., dissenting) (questioning whether written tests actually select good firefighter candidates and noting: "If the Boston Red Sox recruited players on the basis of their knowledge of baseball history and vocabulary, the team might acquire [players] who could not bat, pitch or catch." (quoting Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1023 (1st Cir. 1974))).

342 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006).

constitutional provisions? There is something deeply dissatisfying about the idea of leaving the task of checking majority power to majorities and their representatives. For one thing, majorities may not voluntarily check their own power. For another, they may do the opposite. Witness recent successful attempts to dismantle government efforts toward integration via ballot initiative.[343] Even where majorities enact self-checking measures, these may tend to favor minorities with greater political clout or social status.[344]

These are serious problems. I am the first to admit that allowing play in the joints for democratic actors to pursue constitutional concerns is not a first-best solution. Play in the joints will not solve the underlying problems of minority disempowerment and majority entrenchment. Nor does it accord full value to religious liberty or racial equality. Yet because courts themselves do not sit outside politics, providing space for other actors to address these constitutional concerns is presently the only viable avenue. The current Court is highly unlikely to begin enforcing religion and race doctrine in a more robust, less formalistic way. Leaving some daylight open for substantive and structural approaches to religion and race by other actors seems preferable to shutting the door entirely.

There is reason to think that our governmental structures, including federalism, representative government, and administrative bodies, do create space for broader, more long-range perspectives. These structures in turn make it possible that government actors will take seriously, deliberate upon, and enact countermajoritarian measures based on broadly conceived, long-term ideals.[345] Even majorities

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[343] *E.g.*, CAL. CONST. art. I, § 31(a) (approved Nov. 5, 1996) (codifying Proposition 209); MICH. CONST. art. I, § 26 (approved Nov. 7, 2006) (codifying Ballot Proposal 06-2); NEB. CONST. art. I, § 30 (approved Nov. 4, 2008) (codifying Initiative Measure No. 424); WASH. REV. CODE ANN. § 49.60.400 (West 2010) (approved Nov. 3, 1998) (codifying Initiative Measure No. 200).

[344] This has been a prominent concern in the religious exemptions context. *See* Goldman v. Weinberger, 475 U.S. 503, 512–13 (1986) (Stevens, J., concurring) (worrying that exemptions cannot be administered impartially), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508(a)(2), 101 Stat. 1019, 1086 (1987); Berg, *supra* note 90, at 922 (noting that leaving discretion over religious choices to states "will tend to produce majoritarian results"); Lupu, *supra* note 124, at 586–87 (suggesting that legislative accomodations will be "highly likely to privilege mainstream, well-known religions, or locally dominant ones").

[345] *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 20, at 55–57 (discussing the virtues of representative government and the extended republic); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541–62 (1992) (arguing that agencies are relatively well-positioned to engage in deliberative decision making). Large literatures highlight the flaws of our governance structures. My point is simply that these structures may sometimes allow more deliberative outcomes than would occur through direct democracy.

themselves may realistically perceive the risk of entrenchment and act to prevent it. Where this occurs and government actors adopt substantive or structural policies toward religion or race, the standard of review I have outlined should curb the worst forms of under-inclusion since it demands generality in application.

All governance structures rest ultimately on ordinary politics. The general likelihood that majorities will support the substantive and structural ideals underlying the religion clauses and the Equal Protection Clause is uncertain. This is the paradox of democracy, even a constitutional democracy with judicial review: In the end, our constitutional ideals are only as powerful as the majoritarian political process allows.