EFFECTING FREE EXERCISE AND EQUAL PROTECTION

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ABSTRACT

There is an emerging discrepancy in free exercise and equal protection law. For decades, the Supreme Court has maintained that a law's effects on a protected group are usually insufficient to trigger heightened scrutiny under either the Free Exercise or Equal Protection Clause. This longstanding rule has rendered it virtually impossible to challenge facially neutral laws on constitutional race, sex, and religious discrimination grounds, even where such laws inflict substantial harms on protected groups. Recent free exercise decisions, however, have abandoned this traditional barrier to enforcing constitutional equality rights. In doing so, they have subverted the usual rule that a law's effects do not much matter, not just under the Free Exercise Clause, but also under the Equal Protection Clause.

This Article argues that recent free exercise law makes a powerful case that a law's effects both can and should play a meaningful role in triggering equal protection scrutiny. Free exercise and equal protection cases historically relied on the same theoretical and doctrinal principles to dismiss a meaningful role for effects in triggering heightened scrutiny. Recent free exercise law—by providing such a role for effects—has overcome each objection. In the process, it has created a doctrinal roadmap for overcoming the same objections in the equal protection context. It has also provided good reason to do so. Recent free exercise decisions have justified attention to effects by insisting that laws that devalue protected interests merit heightened scrutiny. In doing so, they have endorsed a broad new theory of equality that applies to, and requires attention to effects in, the equal protection context.

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INTRODUCTION

Constitutional race and sex equality jurisprudence tends to ignore the real-world effects of laws and regulations. Take abortion. Despite clear evidence that abortion restrictions disproportionately harm

women,[1] particularly women of color,[2] the Supreme Court has never credited an equal protection claim for abortion based on those disparities. To the contrary, in *Dobbs v. Jackson Women's Health Organization*[3]—the decision rescinding the federal right to abortion—the Court openly denied that abortion restrictions implicate women's equality.[4] The Court did not consider whether such restrictions

1. About one in four women in the United States has an abortion before age 45. GUTTMACHER INST., INDUCED ABORTION IN THE UNITED STATES (2019), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf [https://perma.cc/A2FZ-D2RK]. Abortion restrictions also disproportionately harm other gender groups, including trans and gender nonconforming people, largely because of the serious barriers to obtaining preventive reproductive care such populations face. Heidi Moseson, Laura Fix, Sachiko Ragosta, Hannah Forsberg, Jen Hastings, Ari Stoeffler, Mitchell R. Lunn, Annesa Flentje, Matthew R. Capriotti, Micah E. Lubensky & Juno Obedin-Maliver, *Abortion Experiences and Preferences of Transgender, Nonbinary, and Gender-Expansive People in the United States*, 224 AM. J. OBSTETRICS & GYNECOLOGY 376e.1, 376e.3–e.9 (2021) (documenting a need for abortion among trans and gender nonconforming patients and noting special barriers to obtaining such care); Laura Fix, Mary Durden, Juno Obedin-Maliver, Heidi Moseson, Jen Hastings, Ari Stoeffler & Sarah E. Baum, *Stakeholder Perceptions and Experiences Regarding Access to Contraception and Abortion for Transgender, Non-Binary, and Gender-Expansive Individuals Assigned Female at Birth in the U.S.*, 49 ARCHIVES SEXUAL BEHAV. 2683, 2684 (2020) (highlighting barriers to contraceptive and abortion care that trans and gender nonconforming people face, including "discrimination in the healthcare setting based on gender identity, limited clinician knowledge and/or refusal to provide care, and lower rates of insurance coverage than the general U.S. population").

2. A broad range of inequities that Black, Latina, Asian and Native women face produce this disparate effect. Women of color, for example, seek abortions at higher rates because they, among other things, face disproportionate barriers to accessing contraceptive and other reproductive health care. Samantha Artiga, Latoya Hill, Usha Ranji & Ivette Gomez, *What Are the Implications of the Overturning of* Roe v. Wade *for Racial Disparities?*, KAISER FAM. FOUND. (July 15, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities [https://perma.cc/UMS9-Z5CN]. Further, women of color's disproportionate rates of poverty mean that they are especially unlikely to have the resources to travel to seek abortion care if their locality restricts it. *Id.* Moreover, when such women are unable to obtain abortion care, they face worse consequences. Women of color are far more likely to die from pregnancy-related complications or experience other adverse health outcomes related to pregnancy. *Id.*

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

4. Specifically, the Court rejected the argument that abortion restrictions discriminate on the basis of sex in violation of the Equal Protection Clause. *Id.* at 2245–46. This rejection was arguably dicta, given the parties did not raise the sex equality argument, either at the Supreme Court or below. *See id.* at 2245 (crediting the argument to *amici*).

implicate race equality,[5] despite briefing that highlighted these laws' especially devastating effects on Black women.[6]

A longstanding rule of constitutional equality doctrine facilitates this insensitivity to effects. Specifically, courts presume that laws are nondiscriminatory so long as those laws are facially neutral and lack a discriminatory purpose.[7] Discriminatory effects generally cannot rebut this presumption.[8] This rule has long governed in not just the race and sex discrimination context but also the religious discrimination context.[9] The practical import of this rule is to make it virtually impossible to challenge facially neutral laws on free exercise or equal protection grounds, even where such laws impose substantial harms on religious, sex, or racial groups.[10]

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5. The Court invoked race only to promote the discredited claim that abortion rights supporters are "motivated by a desire to suppress the size of the African-American population." *Id.* at 2256 n.41. As Professor Melissa Murray has powerfully shown, this claim relies on a highly selective and misleading historical account, "fails to account for the systemic inequities that shape Black women's reproductive choices and paints Black women as either unwitting victims or eager eugenicists." Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2094 (2021).

6. In an amicus brief, reproductive justice scholars documented how abortion regulations particularly burden Black women by denying them "a form of healthcare that helps them negotiate the profound constraints that limit the fullness of their lives." Brief of Amici Curiae Reproductive Justice Scholars Supporting Respondents at 21, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392). These constraints include the disproportionately high poverty rates, lack of access to contraception, and special vulnerability to sexual violence that Black women experience. *Id.* at 16–20.

7. *See infra* Part I.

8. *Id.*

9. *Id.*

10. Many scholars have noted the devastating effect of this rule on the viability of equal protection challenges to facially neutral laws. *See, e.g.*, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783 (2012) (noting that, under this rule, "the Court defaults to the most lenient level of review and then rejects the discrimination claim in all cases involving allegations" that a facially neutral law "discriminat[es] against" racial minorities); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136–37, 1137 n.129 (1997) [hereinafter Siegel, *Equal Protection*] (arguing that this rule "raises a substantial barrier to suits challenging facially neutral state action" and ensures that "most race-dependent" and "gender bias[ed]" "governmental decisionmaking will elude equal protection scrutiny"). Scholars have similarly noted the devastating effect of this rule on the viability of free exercise challenges to facially neutral laws. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 54–55 [hereinafter, Laycock, *Remnants*] (explaining that this rule, as it has historically been applied by courts, leaves "minority religions . . . effectively . . . at the mercy of the political branches"); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 157–58 (1997) (arguing that this rule renders "the Free Exercise Clause . . . of little practical importance" and leaves "religious claimants [with] no legal leverage under federal law").

Recent free exercise decisions, however, have abandoned this traditional barrier to enforcing constitutional equality rights. In recent years, the Supreme Court has increasingly relied on evidence of laws' effects on religious litigants to conclude that those laws are presumptively unconstitutional under the Free Exercise Clause.[11] It has done so by modifying its free exercise "triggering rules"—that is, the threshold showing required to demonstrate that a law burdens a right—such that effects can satisfy them, and thus trigger heightened scrutiny, in a broad array of circumstances.[12] This doctrinal change has not only led to striking success for religious litigants at the Supreme Court.[13] It has afforded a meaningful role for effects in the free exercise context that the Court has historically denied, and continues to deny, in the equal protection context. This Article will show that this growing discrepancy is unwarranted.

This Article argues that recent free exercise jurisprudence demonstrates that a law's effects both can and should play a meaningful role in triggering equal protection scrutiny.[14] Through a doctrinal

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11. *See infra* Part II.

12. *Id.*

13. After concluding that no facially neutral law triggered heightened free exercise scrutiny for more than twenty years, the Court—relying on evidence of effects—concluded that three such laws did so between 2018 and 2021. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–77 (2021); Tandon v. Newsom (*Tandon*), 141 S. Ct. 1294, 1297 (2021) (per curiam); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1728–32 (2018); *see also infra* Part II (explaining how these decisions relied on evidence of effects). Evidence of effects also played a dispositive role in triggering free exercise scrutiny of two additional laws, though those laws were arguably not facially neutral. *See* S. Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716, 717–18 (2021) (statement of Gorsuch, J.); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam); *see also infra* Part II.B (explaining how these decisions relied on evidence of effects).

14. In doing so, this Article addresses an increasingly salient question in equal protection and free exercise literature: does the Court's recent expansion of religious equality rights call for the expansion of other constitutional equality rights? *See* Leah Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 3–12 (2022) (contrasting the Court's inconsistent enforcement of religious equality and racial equality rights and arguing that this differential results from a flawed theory of judicial review that prioritizes dubious concerns about groups' social power over more important concerns about groups' political power); Cass R. Sunstein, *Our Anti*-Korematsu, 2021 AM. J.L. & INEQUAL. 221, 236–37 (wondering whether the Court's recent "solicitude" for religious discrimination claims might entail greater solicitude for other constitutional discrimination claims); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2458–60 (2021) [hereinafter Tebbe, *Equal Value*] (exploring recent free exercise law's "possible applicability to racial equality" and other areas of constitutional law). *See generally* Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699 (2022) (arguing that recent free exercise case law is inconsistent, at least as a procedural matter, with other areas of constitutional adjudication).

exegesis, it uncovers deep connections between the development of free exercise and equal protection triggering rules to show that these rules have historically rested on similar theoretical and doctrinal foundations. Both free exercise and equal protection decisions rejected a meaningful role for effects on the same three bases: a contrary rule would impose overly broad liability, effects alone cannot prove purpose, and only extreme effects burden protected interests. Recent free exercise law has overcome each objection. In the process, this body of law has created a roadmap for overcoming the same objections in the equal protection context. It has also provided good reason to do so. The Court has justified renewed attention to effects in the free exercise context by urging that laws that devalue protected interests are discriminatory.[15] In doing so, it has endorsed a broad new theory of equality that suggests that increased attention to effects is necessary to adequately enforce race and sex equality rights.[16]

This Article sets out the free exercise case for effecting equal protection in three parts. Part I provides a historical examination of free exercise and equal protection triggering rules for facially neutral laws. This analysis uncovers deep—and often explicit—connections between the Court's rejections of a meaningful role for triggering in both contexts, as a matter of both theory and doctrine. These connections emerged in the wake of *Washington v. Davis*,[17] where the Court proclaimed that a law's purpose, rather than its effect, was the touchstone for heightened equal protection scrutiny of facially neutral laws.[18] The Court incorporated this same rule into the free exercise context in *Employment Division v. Smith*.[19] In both contexts, the Court justified its turn away from effects through the same theory: a meaningful effects-based triggering rule would be too sensitive and require it to invalidate too many laws. Nevertheless, in the wake of *Davis* and *Smith*, the Court hinted that effects could still play some meaningful role in triggering heightened review. Specifically, effects

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This Article answers this question by making three principal contributions: (1) providing a detailed comparison of historical free exercise and equal protection triggering doctrine; (2) offering a novel account of how, precisely, the Court has liberalized its free exercise jurisprudence; and (3) clarifying that the theory underlying recently liberalized free exercise law is not *sui generis*, but instead has a long pedigree in equal protection scholarship.

15. *See infra* Part III.A.

16. *Id.*

17. Washington v. Davis, 426 U.S. 229 (1976).

18. *Id.* at 242–45.

19. Emp. Div. v. Smith, 494 U.S. 872, 878 (1990).

might indirectly trigger scrutiny by serving as important evidence of a discriminatory purpose. Further, effects might even directly trigger scrutiny through a residual effects-based triggering rule. Ultimately, however, the Court rejected this twofold role for effects by substantially narrowing these two triggering rules. Accordingly, by the turn of the twenty-first century, a law's effects could not play a meaningful role in triggering either free exercise or equal protection scrutiny.

Part II documents effects' recent—and precipitous—revival as a meaningful trigger for heightened scrutiny in the free exercise context alone. In free exercise decisions since 2016, the Court has provided for an increasingly important, even dispositive, role for a law's effects in triggering heightened free exercise scrutiny. The Court has accomplished this doctrinal reversal by allowing evidence of effects to play precisely the two roles that prior free exercise precedents suggested it could not. First, the Court has expanded its discriminatory purpose, or "lack of neutrality," rule. Whereas previous doctrine held that a law lacked neutrality only where lawmakers acted out of malice, recent free exercise doctrine has held that laws also lack neutrality where lawmakers have simply "devalued" religious interests. Second, the Court has expanded its residual effects-based free exercise triggering rule. Whereas previous doctrine required an exclusive or nearly exclusive effect on protected interests, recent doctrine only requires a minor disparate effect. The Court has thus redefined its free exercise triggering rules to be far more sensitive to effects. Despite the tension between this development and prior free exercise doctrine and theory, the Court has insisted that there is no need to overrule *Smith* or its progeny.

Part III shows how these developments in free exercise jurisprudence interact with the history of free exercise and equal protection law to produce a powerful case that effects should play a meaningful role in triggering equal protection scrutiny too. Recent free exercise decisions have both refuted the theory underlying the Court's initial rejection of effects in the equal protection context and set forth a positive theory for considering effects therein. Specifically, the Court has embraced the theory that a law should trigger heightened scrutiny where it "devalues" protected interests. As equal protection scholars have long argued, this "devaluation" theory of discrimination supports a meaningful role for effects in triggering equal protection scrutiny. Recent free exercise doctrine has, additionally, cleared a doctrinal path to making equal protection doctrine more sensitive to effects.

Historical similarities between these two doctrines mean that the tools the Court has used to provide a meaningful role for effects in the free exercise context should work in the equal protection context, too. This will continue to be true, even if *Smith* is overruled.

Recent religious equality law has, in short, made a compelling case that effects should play a more meaningful role in race and sex equality law. The Court should thus remedy the emerging discrepancy between free exercise and equal protection doctrine by adopting equal protection triggering rules that are more sensitive to effects. This change might necessitate some other changes to constitutional discrimination law, such as lowering the level of scrutiny that courts apply to free exercise and equal protection claims. Such a change, however, would be good. It would help move the Court toward a more transparent approach to rights adjudication that both recognizes a broader swath of rights claims and lowers the stakes of such recognition.

If recent free exercise law has made a powerful case for effecting equal protection, however, some may question its practical import. In particular, even those persuaded of this case might doubt its ability to persuade a Supreme Court that has proven unwilling to protect the rights of women and racial minorities. In its substantive conclusion, this Article addresses this reality. It shows why this Article's sincere engagement with Supreme Court doctrine and theory matters even if the Supreme Court itself is unlikely to be persuaded by it.

To begin with, this Article's rigorous engagement with the doctrinal and theoretical terms of the Court's decisions demonstrates that those terms cannot explain discrepancies between religious equality law and race and sex equality law. This finding bolsters a growing body of literature suggesting that it is not neutral equality or liberty principles but instead unspoken preferences that explain much of recent First Amendment law. Indeed, recent First Amendment law appears to reflect the very selective valuation (of the interests of mainstream religious groups) and devaluation (of the interests of women and racial or gender minorities) that the Court has itself condemned.

Beyond contributing to this critique of present-day equality law, this Article's analysis contributes to the long-term goal of reforming it. Even if the Supreme Court is not sympathetic to the equality claims set forth in this Article, other government or popular actors may be. This Article offers a way for such actors to lay claim to a broad new theory of equality that is ascendant at the Court. Such actors may rely on this

theory to push for broader protections for racial minorities, gender minorities, and women, regardless of what the Court is willing to do. Thus, understanding the growing discrepancy between free exercise and equal protection law may ultimately help to rectify it.

I. THE REJECTION OF EFFECTS UNDER THE FREE EXERCISE AND EQUAL PROTECTION CLAUSES

Effects' relevance to a law's constitutionality under the Free Exercise and Equal Protection Clauses is largely a function of equal protection and free exercise "triggering rules." A "triggering rule," as defined in this Article, is the threshold showing required to demonstrate that a law burdens a right. A plaintiff's satisfaction of a triggering rule shifts the burden of proof to the government to justify its law under some level of judicial scrutiny.[20] Triggering rules have been central to constitutional law since the end of the *Lochner* era,[21] when the Court eschewed discerning review of ordinary social and economic regulation in favor of a tiered-scrutiny approach that conditioned both the exercise and level of judicial scrutiny on the right burdened.[22] Triggering rules are especially important to free exercise and race- or sex-based equal protection litigation, where satisfaction of

20. Professor John Hart Ely, while not using the language "triggering rule," has described the same concept as the "showing . . . required to trigger the demand for a legitimately defensible difference." John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1228 (1970) (emphasis omitted).

21. This era is named after *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court struck down a maximum working hours law as a violation of workers' and their employers' constitutional liberty right to contract. *Id.* at 57–58. *Lochner* has become synonymous with the Court's practice at the beginning of the twentieth century of routinely invalidating social welfare and regulatory measures in the name of property and economic liberty interests the Court located in the Due Process Clauses of the Fifth and Fourteenth Amendments. *See* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (describing the features of Lochnerism); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 877–83 (1987) (same).

22. This approach emerged from *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). In that case, the Court explained that "regulatory legislation affecting ordinary commercial transactions" should be afforded a strong presumption of constitutionality and thus subject to only highly deferential rational basis review. *Id.* at 152. The Court, however, noted in its famous Footnote Four that "more searching judicial inquiry" might be appropriate where a law implicates a "specific prohibition of the Constitution," "restricts" ordinary "political processes," or is "directed at . . . discrete and insular minorities." *Id.* at 152 n.4. This language led to the development of modern tiers of constitutional scrutiny. *See* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 221–26 (1991); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 71 (2005).

such a rule triggers either strict[23] or intermediate scrutiny.[24] Because these levels of scrutiny are nearly impossible to satisfy in practice,[25] whether a law burdens such a free exercise or equal protection right is usually dispositive.

This Part traces the intertwined development of the Court's free exercise and equal protection triggering rules, and particularly their treatment of effects. It focuses on the triggering rules for facially neutral laws—that is, laws that do not expressly classify based on religion, race, or sex. While the Court once considered both a law's purpose and its effects[26] to determine whether a facially neutral law triggered free exercise and equal protection scrutiny, the Court functionally rejected the relevance of effects by the end of the twentieth century. This mutual turn away from effects was not happenstance but instead reflected deep and often explicit links between equal protection and free exercise theory and doctrine. As a theoretical matter, this joint rejection of the relevance of effects was rooted in identical structural and prudential concerns about the judicial role rather than any substantive feature of free exercise or equal protection rights. As a doctrinal matter, the Court relied on the same principles, and sometimes the same cases, to reject a meaningful role for effects in triggering. This theoretical and doctrinal interplay resulted, until recently, in free exercise and equal protection triggering rules that precluded evidence of a law's effects from playing a

23. Laws burdening free exercise and race-based equal protection rights are subject to strict scrutiny, which requires the government to show that its law is narrowly tailored to serve a compelling state interest. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254–55 (2020) (free exercise rights); Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 376 (2016) (race-based equal protection rights).

24. Laws burdening sex-based equal protection rights are subject to intermediate scrutiny, which, in its modern form, requires the government to show that its law is substantially related to an important state interest. *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017).

25. Professor Gerald Gunther famously quipped that strict scrutiny is "fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). While intermediate scrutiny is nominally less rigorous, its modern form has proven as difficult to satisfy. Since *United States v. Virginia*, 518 U.S. 515 (1996), where the Court adopted its modern intermediate scrutiny standard, *id.* at 532–33, only one sex-based equal protection challenge has failed, *see* Nguyen v. INS, 533 U.S. 53, 73 (2001).

26. This Part, and the rest of this Article, often distinguishes between triggering rules that rely on evidence of a law's "purpose" and those that rely on evidence of a law's "effect." A law's "purpose" describes the state of mind that led governmental decisionmakers to adopt that law. A law's "effect" describes the impact a law has in its application.

meaningful role in triggering heightened scrutiny for strikingly similar reasons and in strikingly similar ways.

A. Early Attention to Effects

Before the late 1970s, the Court regularly applied meaningful scrutiny to facially neutral laws under both the Free Exercise and Equal Protection Clauses. It did so largely through meaningful consideration of a law's effects in its triggering analysis. In its early race discrimination cases, for example, the Court hinged the application of heightened review on a holistic examination of government action, including both its purpose[27] and effects.[28] This approach was flexible. In some cases, the Court emphasized the importance of a law's effects while downplaying the importance of its purpose. In others, it emphasized the importance of a law's purpose while downplaying the importance of its effects.[29] This flexible approach facilitated heightened review of numerous forms of facially neutral state action, including

27. Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 231 (1964) (finding that a facially neutral Virginia scheme that closed rather than integrated public schools violated the Equal Protection Clause because "the record . . . could not be clearer that [the] public schools were closed . . . for one reason, and one reason only: to ensure . . . that white and colored children . . . would not, under any circumstances, go to the same school"); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (invalidating a facially neutral redistricting measure on equal protection grounds partly because "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end" (quoting W. Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918))).

28. Wright v. Council of Emporia, 407 U.S. 451, 462 (1972) ("[W]e have focused upon the effect—not the purpose or motivation—of a school board's [facially neutral] action in determining whether it is a permissible method of dismantling a [segregated schooling] system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect."); Palmer v. Thompson, 403 U.S. 217, 225 (1971) (finding that a town's facially neutral decision to close public pools rather than integrate them was not discriminatory because, despite evidence of illicit governmental purpose, the decision did not "affect[] blacks differently from whites").

29. Justice Marshall noted that the Court's approach to "the relevance of purpose-and/or-effect analysis in testing the constitutionality of legislative enactments [was] somewhat less than a seamless web," with some cases emphasizing purpose and others emphasizing effects. Beer v. United States, 425 U.S. 130, 148 n.4 (1976) (Marshall, J., dissenting). For a comprehensive account of the Supreme Court's race discrimination jurisprudence during the 1960s, and its sometimes-contradictory nature, see *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1087–1123 (1969).

nominally race-blind redistricting schemes,[30] school districts,[31] and jury selection processes.[32]

The Court also considered a law's effects in determining whether a facially neutral law triggered heightened scrutiny under the Free Exercise Clause. This was a function of the two-part test, developed in *Sherbert v. Verner*,[33] that the Court employed to determine whether a law violated the Free Exercise Clause. Under this test, the Court first asked whether a law imposed a substantial burden on (i.e., substantially affected) an individual's religious exercise.[34] If the law did impose such a burden, the Court then asked whether the law was the least restrictive means of achieving a compelling government interest.[35] A plaintiff's showing of an effect on religious exercise—part one of the test—was thus the trigger for application of free exercise scrutiny—part two of the test.[36] This effects-based triggering rule meant that the Court regularly subjected facially neutral laws to heightened free exercise scrutiny.[37]

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30. *Gomillion*, 364 U.S. at 347.

31. *Wright*, 407 U.S. at 462; *Griffin*, 377 U.S. at 231.

32. Hernandez v. Texas, 347 U.S. 475, 482 (1954) (invalidating a facially neutral jury selection process that resulted in no Mexican-Americans being placed on a jury because "[t]he result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner").

33. Sherbert v. Verner, 374 U.S. 398, 403–09 (1963).

34. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257 (1982); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972); *Sherbert*, 374 U.S. at 403; *see also* Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 944–45 (1986) (summarizing the pre-*Smith* free exercise test).

35. *Thomas*, 450 U.S. at 718; *see also Lee*, 455 U.S. at 257–58 ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Yoder*, 406 U.S. at 220–21 (considering whether the state's interest in a "system of compulsory education is so compelling that . . . the established religious practices of the Amish must give way"); *Sherbert*, 374 U.S. at 406–09 ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right.").

36. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 933–34 (1989) (explaining that the existence of a "burden" was the trigger for heightened free exercise scrutiny).

37. *See, e.g.*, *Lee*, 455 U.S. at 257–60 (applying free exercise scrutiny to facially neutral social security tax requirements); *Thomas*, 450 U.S. at 718–19 (applying free exercise scrutiny to a facially neutral unemployment benefits regulation); *Yoder*, 406 U.S. at 207, 214 (applying free exercise scrutiny to a facially neutral mandatory schooling requirement). While scrutiny under this standard was not as strict as its phrasing suggests, it was more stringent than the bare rationality review that otherwise applied. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1127–28 (1990) [hereinafter McConnell, *Free*

B. The Turn to Purpose

If the Court's triggering rules under the Free Exercise and Equal Protection Clauses were loosely united by consideration of effects in their early years, they became fundamentally intertwined beginning in the late 1970s through their rejection of this very consideration. This change began with the Court's equal protection doctrine. After decades of considering a law's purpose and effects as capable of triggering heightened scrutiny, the Court began to consider purpose exclusively in *Washington v. Davis*.[38] In *Davis*, the Court addressed an equal protection challenge to the District of Columbia police department's use of an employment test that disqualified a disproportionately high number of Black applicants.[39] Both lower courts found that the plaintiffs' production of evidence of a differential racial effect was sufficient to shift the burden of proof to the defendants to justify the policy.[40]

The Supreme Court reversed. In a departure from precedent,[41] the Court concluded that a law's effects "[s]tanding alone" could "not trigger the rule that racial classifications are to be subjected to the strictest scrutiny."[42] Instead, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[43] Notably, *Davis* did appear to contemplate one exception to this rule. Specifically, the Court explained that a "seriously disproportionate" effect "may for all practical purposes demonstrate unconstitutionality because in various circumstances the

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Exercise Revisionism] (explaining that this standard of scrutiny was "far more relaxed" than the "compelling interest" language suggests, but still more robust than "toothless rationality review").

38. Washington v. Davis, 426 U.S. 229, 240–42 (1976).

39. *Id.* at 232–34.

40. Davis v. Washington, 512 F.2d 956, 958–61 (D.C. Cir. 1975) (concluding that "[a]s a result of appellants' showing that Test 21 has a disproportionate racial impact, there is a heavy burden on appellees to prove that the examination bears a demonstrable relationship to" its purpose of ensuring "successful [job] performance"); Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972) (concluding that a "minimal" showing of a disparate impact was "sufficient to shift the burden of the inquiry to defendants").

41. *Davis*, 426 U.S. at 242–44; *see also* Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 S. CT. REV. 397, 410 (noting that the Court's decision ignored "a substantial weight of" its own "equal protection precedent focuse[d] on effects rather than on intent").

42. *Davis*, 426 U.S. at 242 (citation omitted).

43. *Id.* at 240.

discrimination is very difficult to explain on nonracial grounds."[44] The Court, however, indicated that this rule was narrow and only discussed its applicability in the jury selection context.[45] Accordingly, *Davis* was the genesis of discriminatory purpose as the near-exclusive trigger for heightened scrutiny of a facially neutral law under the Equal Protection Clause.

To justify this shift to a largely purpose-only triggering rule, the *Davis* Court relied on prudential and structural concerns about the Court's role, not any substantive requirement of the Equal Protection Clause. Nothing about the equal protection right itself—not the text of the Equal Protection Clause, its history, or the nature of the right against racial discrimination—required the Court to raise the bar for judicial scrutiny.[46] Nor did the Court meaningfully rely on prior doctrine, referencing it only to (dubiously) confirm that it had never held that effects alone were a trigger for heightened equal protection scrutiny.[47] Instead of relying on these sources, the Court raised prudential concerns: Given the rigorous scrutiny applied to equal protection claims, a purely effects-based triggering 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."[48] "[S]uch consequences," the Court reasoned, would not properly flow from the Court but instead "should await legislative prescription."[49] The purpose-based triggering rule rested on the Court's understanding of its own limited role in enforcing individual rights.

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44. *Id.* at 242.

45. *See id.* (listing only racially exclusionary jury selection as an example of the kind of state action that violates this rule).

46. Indeed, the Court simply noted, "we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory . . . simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245–46; *see also* Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 544 (1977) ("The Court barely proffered an argument to support its rejection of disproportionate impact theory of racial discrimination.").

47. The Court appeared aware that this conclusion was selective, noting that "[t]here are some indications to the contrary in our cases." *Davis*, 426 U.S. at 242.

48. *Id.* at 242, 248.

49. *Id.* at 248.

A decade later, in *Employment Division v. Smith*, the Court imported *Davis*'s new purpose-based triggering rule, and its underlying theoretical justification, into the free exercise context. In *Smith*, two members of the Native American Church challenged, pursuant to the Free Exercise Clause, Oregon's denial of unemployment benefits to them after they were fired for their sacramental use of peyote.[50] Applying the two-part test set out in *Sherbert v. Verner*, the Oregon Supreme Court concluded that heightened scrutiny should apply because the denial of benefits significantly burdened the plaintiffs' religious exercise.[51] Echoing the lower courts in *Davis*, the Oregon court concluded that the law's effect on the religious plaintiffs was sufficient to trigger heightened review.

Once again, the Supreme Court reversed. As in *Davis*, the Court departed from prior case law to hold that the Free Exercise Clause was not implicated merely because a law "requires (or forbids) the performance of an act that [an individual's] religious belief forbids (or requires)."[52] Instead, free exercise scrutiny was triggered only where a law was not a "neutral law of general applicability."[53] A law would not qualify as neutral where it was "specifically directed at . . . religious practice" or where "prohibiting the exercise of religion" was its "object."[54] A law was not generally applicable where "the State has in place a system of individual exemptions" that it "refuse[s] to extend . . . to cases of 'religious hardship.'"[55] Although this latter rule seems to allow a law's effects to trigger scrutiny, the Court clarified that it applied only to a narrow set of cases that likely did not extend "beyond the unemployment compensation field."[56] Outside of a narrow set of

50. Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

51. Smith v. Emp. Div., 301 Or. 209, 217–20 (1986).

52. *Smith*, 494 U.S. at 878.

53. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

54. *Id.* at 878.

55. *Id.* at 884.

56. *Id.* Michael McConnell has argued that this "general applicability" trigger essentially lacked any substantive content and functioned primarily "to enable the Court to reach the conclusion it desired in *Smith* without openly overruling any prior decisions." McConnell, *Free Exercise Revisionism*, *supra* note 37, at 1122–24. In other words, the "general applicability" rule was designed to limit prior cases allowing a disparate effect to trigger heightened scrutiny to their facts, not to allow effects to play a meaningful role in triggering free exercise scrutiny going forward. *See id.* at 1123 (arguing that the rule used to distinguish *Smith* from previous free exercise cases was hollow and would allow a government's "compelling interest" to overcome almost any future free exercise claim).

unemployment cases, a mere "effect of burdening a particular religious practice" was not enough to trigger heightened scrutiny.[57] Instead, as under the Equal Protection Clause, a nearly purpose-only triggering rule would be the threshold question in free exercise cases.

In shifting to this purpose-only triggering rule, the Court not only evoked *Davis* but also explicitly invoked it. The new free exercise triggering rule was necessary, the *Smith* Court explained, because it was "the only approach compatible with" its holding that "race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see *Washington v. Davis*."[58] The *Smith* Court thus expressly justified its rejection of an effects-based rule in the free exercise context in part by reference to the equal protection doctrine set out in *Davis*.

Smith's reliance on *Davis* was not merely superficial; it reflected *Smith*'s adoption of the same theory of triggering as *Davis*. As in *Davis*, the Court did not look to the text of the Free Exercise Clause, its history, or the nature of the right it protected to determine the proper triggering rule.[59] Nor did it substantially rely on doctrine, citing its case law only selectively to suggest that it had never used an effects-based standard beyond a few unemployment cases.[60] Instead, the Court justified the purpose-based standard with the same exogenous structural and prudential considerations that it referenced in *Davis*. According to the *Smith* Court, a purpose-based rule was necessary because, given the rigor of free exercise scrutiny, an effects-based triggering rule "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of

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

58. *Id.*

59. While the Court did discuss text, it did so only to note that the Free Exercise Clause was susceptible to the meaning that the Court chose, not to justify this choice independently. *Id.* at 878; *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1892–93 (2021) (Alito, J., concurring) (noting that *Smith* did not justify its approach based on text, history, or a fair reading of prior precedent).

60. *Smith*, 494 U.S. at 878–82. For a detailed analysis of how *Smith*'s treatment of precedent was both selective and dubious, see McConnell, *Free Exercise Revisionism*, *supra* note 37, at 1120–28 (noting that the *Smith* court unpersuasively distinguished good precedent while simultaneously relying on "overruled and minority positions") and James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 719 (characterizing *Smith*'s treatment of free exercise precedent as "shamelessly dishonest").

taxes, to health and safety regulation . . . to social welfare legislation."[61] Because this "would be courting anarchy,"[62] the job of considering a law's effects on religious exercise was better suited to the democratic branches of government.[63] *Smith*, in other words, set forth the same role-based theory of triggering as *Davis*.

The Court's unified turn to a purpose-only standard in the free exercise and equal protection contexts, then, was not a coincidence but a function of a unified theory of triggering across these contexts. The Court did not base its turn to purpose on careful consideration of the substantive requirements of the Free Exercise or Equal Protection Clauses; it did so based on the common concern that an effects-based triggering standard would swing courthouse doors too wide and require judges to strike down laws with a frequency inconsistent with the judicial role.

C. The Fleeting Promise of Effects' Revival

In light of the Court's unified theory of free exercise and equal protection triggering rules, it is unsurprising that these rules followed a similar trajectory after *Davis* and *Smith*. This began with the fleeting promise of a retreat from a purpose-only triggering rule in the first cases to apply *Davis* and *Smith* to facially neutral laws. These cases suggested readings of *Davis* and *Smith* that were consistent with a twofold role for effects in triggering heightened scrutiny. First, these cases suggested that a law's effects could serve as dispositive evidence of a discriminatory purpose or lack of neutrality, thus satisfying *Davis* and *Smith*'s purpose-based triggering rules. Second, these cases suggested that a law's effects could satisfy a standalone effects-based triggering rule—that is, a triggering rule that did not require showing a discriminatory purpose—that survived *Davis* and *Smith*.

The Court first announced that effects might still play a meaningful role in triggering heightened review in the equal protection context. It did so in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[64] the first Supreme Court case to interpret *Davis*'s purpose-based triggering rule. In *Arlington Heights*, plaintiffs brought an equal protection challenge to the defendants'

61. *Smith*, 494 U.S. at 888–89 (citations omitted).
62. *Id.* at 888.
63. *Id.* at 890.
64. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

refusal to rezone a plot of land to allow for affordable housing that would have disproportionately benefited racial minorities.[65] While the Court rejected the plaintiffs' claims,[66] it read *Davis* to allow evidence of a law's effects to play two roles in triggering heightened equal protection scrutiny.[67]

First, *Arlington Heights* reasoned that, under *Davis*, effects could be dispositive evidence of a discriminatory purpose. Quoting *Davis*, the Court explained that whether a law "bears more heavily on one race than another" could serve as "important" circumstantial evidence of a discriminatory purpose.[68] While the Court emphasized that evidence of a law's effects would not usually suffice to show a discriminatory purpose,[69] it indicated that it could in some cases. Specifically, certain "stark" impacts on a protected group could be "determinative" of discriminatory purpose even absent other evidence.[70]

Second, *Arlington Heights* articulated a standalone effects-based triggering rule that did not require showing a discriminatory purpose. In particular, as the Court emphasized in a later decision, *Arlington Heights* permitted a law's effects to trigger heightened scrutiny "regardless of purported motivation" where that law's effects could not be plausibly explained on a race- or sex-neutral ground.[71] Under this rule, a law's effects alone could trigger scrutiny because they signaled that a law had "covertly" classified based on a protected characteristic.[72] While this "covert classification" rule may appear closely related to the question of legislative purpose, subsequent equal protection doctrine insisted that this covert classification rule was doctrinally distinct.[73]

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65. *Id.* at 254.

66. *Id.* at 268–71.

67. *Id.* at 264–68.

68. *Id.* at 266 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

69. *Id.*

70. *Id.*

71. Pers. Adm'r of Mass. v. Feeney (*Feeney*), 442 U.S. 256, 272 (1979). While *Arlington Heights* itself arguably appeared concerned solely with discriminatory purpose, *Feeney* characterized the case as setting out a standalone effects-based triggering rule. *Id.* at 272. *Feeney* traced this rule to *Davis* itself, and its suggestion that a law's effect alone could trigger heightened scrutiny where it "is very difficult to explain on nonracial grounds." *Davis*, 426 U.S. at 242.

72. *Feeney*, 442 U.S. at 274–75.

73. *Feeney*'s suggestion that the "covert classification" rule should be satisfied where a law is "pretext for racial" or "gender discrimination," for example, may initially appear addressed to the question of discriminatory purpose. *Id.* at 272–73. However, the Court emphasized that the

The Court drew on this reading of equal protection doctrine to permit a similar twofold role for effects under free exercise doctrine in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[74] *Lukumi* addressed a challenge to a local ordinance that forbade the ritual sacrifice of animals.[75] Plaintiffs, whose Santeria faith required animal sacrifice, argued that the facially neutral law violated their free exercise rights.[76] Despite restating *Smith*'s rule that neutral, generally applicable laws do not trigger free exercise scrutiny, regardless of their effects,[77] the Court concluded that the facially neutral law at issue triggered heightened scrutiny.[78] The Court reached this conclusion by interpreting *Smith* to permit evidence of a law's effects to play the same two roles in triggering heightened scrutiny suggested by *Arlington Heights*.

First, *Lukumi* suggested that evidence of a law's effects could serve as important, even dispositive, evidence of whether a law had a discriminatory purpose, or lacked "neutrality." The Court explained that "the effect of a law in its real operation" remained "strong

question of whether a law covertly classified was separate from, and in fact antecedent to, the question of whether a law had a discriminatory purpose. *Id.* at 274 ("The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination."). Moreover, as indicated above, the Court explained that this rule could be violated "regardless of [a law's] purported motivation." *Id.* at 272.

Another line of cases beginning with *Washington v. Seattle School District No. 1* (*Seattle*), 458 U.S. 457 (1982), discussed further below, similarly insisted that this "covert classification" rule was distinct from the question of discriminatory purpose. In that case, the Court—applying the "covert classification" rule—found that a facially neutral law banning school busing constituted a "racial classification" because it "impose[d] direct and undeniable burdens on minority interests" alone. *Id.* at 471, 484–85; *see also* Seattle Sch. Dist. No. 1 v. Washington (*Seattle I*), 633 F.2d 1338, 1344 n.4 (9th Cir. 1980) (noting that the law constituted a "covert racial classification" under *Feeney*). The defendants argued that this conclusion violated *Davis* and *Arlington Heights*, which they urged had eliminated any standalone effects-based triggering rule. *Seattle*, 458 U.S. at 484. The Court rejected this argument, citing *Feeney* for the proposition that it had never "insisted on a particularized inquiry into motivation in all equal protection cases" and that "[a] racial classification, regardless of its purported motivation, is presumptively invalid." *Id.* at 485 (quoting *Feeney*, 442 U.S. at 272). The *Seattle* Court insisted, in other words, that the "covert classification" rule it was applying was a standalone effects-based triggering rule that survived *Davis* and that was distinct from any purpose-based rule. *See id.* at 484–86.

74. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

75. *Id.* at 527–28.

76. *Id.* at 524–25, 528.

77. *Id.* at 531.

78. *Id.* at 534–46.

evidence of its object."[79] Where, for example, a law accomplished a "religious gerrymander" by failing to apply to substantial nonreligious conduct, a court could infer an impermissible purpose.[80] In reaching this conclusion, the Court drew on equal protection triggering doctrine. The Court, for example, drew its "gerrymandering" language from a case analogizing free exercise and equal protection triggering rules.[81] Moreover, the *Lukumi* opinion—albeit in a passage not endorsed by a majority of the Court[82]—noted that "[n]eutrality in its application requires an equal protection mode of analysis"[83] and cited *Arlington Heights* for the proposition that evidence of effects was relevant to determining a law's purpose.[84]

Second, *Lukumi* concluded that evidence of a law's effects could satisfy a standalone effects-based triggering rule: the "general applicability" rule.[85] As noted above, *Smith* had mentioned a general applicability rule. It had defined the rule narrowly, however, to apply only where the state had in place a system of individual exemptions that it refused to extend to religious objectors.[86] *Lukumi* redefined this general applicability requirement at a higher level of generality, explaining that a law lacked general applicability whenever it "in a selective manner impose[d] burdens only on conduct motivated by religious belief."[87] Like *Arlington Heights*'s covert classification rule, this new general applicability rule permitted effects to trigger heightened scrutiny where those effects indicated that the state had

79. *Id.* at 535.

80. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

81. *See Walz*, 397 U.S. at 696 (Harlan, J., concurring) ("Neutrality in its application requires an *equal protection* mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." (emphasis added)).

82. Although only two Justices joined this portion of the opinion, a majority later endorsed *Lukumi*'s analogy between the neutrality test and the discriminatory purpose test set out in *Arlington Heights*. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (citing the *Arlington Heights* factors as "[f]actors relevant to the assessment of governmental neutrality" (citing *Lukumi*, 508 U.S. at 540 (citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977)))).

83. *Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.) (quoting *Walz*, 397 U.S. at 696 (Harlan, J., concurring)).

84. *Id.* (citing *Arlington Heights*, 429 U.S. at 266).

85. *Id.* at 553 (majority opinion); *id.* at 558 (Scalia, J., concurring); *id.* at 561 (Souter, J., concurring); *id.* at 577–78 (Blackmun, J., concurring).

86. Emp. Div. v. Smith, 494 U.S. 872, 884 (1990).

87. *Lukumi*, 508 U.S. at 543.

functionally classified based on a protected characteristic.[88] As with the covert classification rule, this general applicability rule appears closely related to the question of discriminatory purpose. Nevertheless, as in the equal protection context, the Court emphasized that the rule was distinct and required no showing of a discriminatory purpose.[89]

Thus, in the wake of *Davis* and *Smith*, both equal protection and free exercise doctrine permitted a twofold role for effects in triggering heightened review. First, effects could indirectly trigger heightened scrutiny by serving as important evidence of a discriminatory purpose or lack of neutrality. Second, effects could independently trigger heightened review through the standalone effects-based covert classification and general applicability rules.

D. Effects' Final Rejection

Arlington Heights and *Lukumi*'s suggestion that *Davis* and *Smith* afforded a meaningful role for effects was short-lived. In the years following *Arlington Heights* and *Lukumi*, the Court clarified that *Davis* and *Smith* meant what they appeared to say—namely, that effects alone could not trigger free exercise and equal protection scrutiny except in rare circumstances. The Court did so by clarifying that the two roles for effects contemplated by *Arlington Heights* and *Lukumi* were, while nominally valid, so narrow as to be functionally meaningless. First, the Court defined discriminatory purpose and lack of neutrality so narrowly that a law's effects alone could essentially never evidence either. Second, it explained that the standalone effects-based triggering rules that survived *Davis* and *Smith* required burdens to be so unequally distributed that virtually no law would satisfy those rules.

As before, the Court's adjustment of its triggering rules was an innovation of the equal protection context. This time, however, the Court's revanchism occurred in a sex-based equal protection case, *Personnel Administrator of Massachusetts v. Feeney*.[90] In *Feeney*, the

88. *Compare id.* at 545–46 (noting that the "precise evil . . . the requirement of general applicability is designed to prevent" is the government's "pursu[it]" of its "interests only against conduct motivated by religious belief"), *with Seattle*, 458 U.S. 457, 470, 485–86 (1982) (noting that a law triggers equal protection scrutiny "regardless of purported motivation"—that is, under the covert classification rule—where it "imposes substantial and unique burdens on racial minorities" by "singl[ing] out" minority interests alone "for peculiar and disadvantageous treatment").

89. *Lukumi*, 508 U.S. at 531–46.

90. Pers. Adm'r of Mass. v. Feeney (*Feeney*), 442 U.S. 256 (1979).

Court addressed a sex equality challenge to a Massachusetts civil service preference for veterans.[91] The preference had a severe effect on women, who had historically been excluded from military service.[92] The effect was so severe, in fact, that the law effectively excluded women from the upper levels of civil service employment in the state.[93] The district court, concluding that *Davis* and *Arlington Heights* continued to place importance on a law's effects in demonstrating a discriminatory purpose,[94] found that this severe effect revealed that the state had "intentionally sacrific[ed] the career opportunities of its women in order to benefit veterans."[95] As *Arlington Heights* had suggested, in other words, the law's effect had a near-dispositive[96] role in meeting *Davis*'s purpose-based triggering rule.

The Supreme Court reversed, clarifying that effects should rarely play the evidentiary role contemplated in *Arlington Heights*.[97] It did so primarily by defining discriminatory purpose so narrowly that a law's effects would almost never suffice to show it. Specifically, the Court noted that the district court had mistakenly defined discriminatory purpose to include "intent as volition or intent as awareness of consequences."[98] Were a discriminatory purpose so expansive, the Court conceded, a foreseeable effect on a protected group could be probative of impermissible motive.[99] According to the Court, however, discriminatory purpose was not so broad. Instead, it required the decisionmaker to have acted "at least in part 'because of,' not merely

91. *Id.* at 259.

92. *Id.* at 260.

93. *Id.* The district court concluded that the policy "absolutely and permanently foreclose[d], on average, 98% of th[e] state's women from obtaining significant civil service appointments." Feeney v. Massachusetts (*Feeney I*), 451 F. Supp. 143, 148 (D. Mass. 1978).

94. *Feeney I*, 451 F. Supp. at 146–50.

95. *Id.* at 150.

96. The district court focused almost exclusively on the drastic effect that the veterans' preference had on women in concluding that the state had acted with discriminatory purpose. *Id.* at 147–50. Nevertheless, the district court also noted that other factors, such as "the fact that the criteria set forth in the challenged statutory formula fail to measure job performance," constituted additional evidence of discriminatory purpose. *Id.* at 148. Accordingly, the district court may not have been relying on the law's effect alone, even if it relied on it almost exclusively.

97. *Feeney*, 442 U.S. 256, 272, 281 (1979). The Attorney General directly appealed the district court's order pursuant to 28 U.S.C. § 1253, so the Supreme Court directly reviewed the district court's opinion. *Id.* at 261.

98. *Id.* at 279 (quoting *Feeney I*, 451 F. Supp. at 151).

99. *Id.* at 278.

'in spite of,' . . . adverse effects upon an identifiable group."[100] That is, lawmakers must not only have reasonably known that their actions would harm a protected group but also have "desired" such an outcome.[101] While "adverse effects" were probative of the former state of mind, they were not probative of the latter.[102] By defining discriminatory purpose to require this latter, "malice"-like state of mind,[103] the Court thus ensured that a law's effects alone could not satisfy *Davis*'s purpose-based triggering rule.

Feeney also indicated that a law's effects could rarely trigger equal protection scrutiny by satisfying a standalone effects-based triggering rule. Remember that *Arlington Heights* provided for a standalone effects-based triggering rule that required heightened scrutiny where a law was a "covert classification."[104] Although *Feeney* recognized this standalone effects-based triggering rule, it also indicated, through its application of the rule, that it was very narrow. The Court explained that the veterans' preference was not a covert classification because, even though it had a "severe" impact on the employment opportunities of women and worked "overwhelmingly" to the advantage of men,[105] "[t]oo many men" were disadvantaged by the preference to merit constitutional scrutiny.[106] Put differently, a negative effect on "too many" members of an unprotected class defeated a finding of a covert classification.[107] While *Feeney* did not define how many was too many, it indicated that "substantially all" of those affected needed to be members of a protected class.[108] Thus, a law needed to have an exclusive or nearly exclusive effect on a protected class to qualify as a covert classification.

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100. *Id.* at 279.

101. *Id.* at 279 n.25.

102. The Court explained that while "the inevitability or foreseeability of consequences of a neutral rule has" some "bearing upon the existence of discriminatory intent," it is not enough standing alone. *Id.* In the case at hand, for example, the veterans' preference could "reasonably" be characterized as raising "a strong inference that the adverse effects were desired." *Id.* But, this "inference simply fail[ed] to ripen into proof" absent other evidence suggesting a discriminatory purpose. *Id.*

103. *See* Siegel, *Equal Protection*, *supra* note 10, at 1135 (noting that this heightened standard essentially required "a legislative state of mind akin to malice").

104. *See supra* notes 71–73 and accompanying text.

105. *Feeney*, 442 U.S. at 259, 271.

106. *Id.* at 275.

107. *Id.*

108. *See id.*

A subsequent equal protection case, *Washington v. Seattle School District No. 1*,[109] buttressed this conclusion. In that case, the Court—evidently applying the "covert classification" rule[110]—found that a law that prohibited school busing triggered heightened scrutiny because, although it was facially neutral,[111] it qualified as a "racial classification."[112] The Court based this determination on the fact that the law provided exemptions allowing school districts to "bus their students 'for most, if not all,' of the nonintegrative purposes required by their educational policies" but omitted any exemption for busing to desegregate.[113] This pattern of exemptions meant that the law's effect was solely to prohibit busing to desegregate. The law qualified as a "distinction[] based on race" because it "only . . . singled out for peculiar and disadvantageous treatment"[114] those forms of government action "designed to benefit minorities"[115] and thus "impose[d] . . . unique burdens on racial minorities."[116] The Court's reliance on the fact that the law "only" and "unique[ly]" affected minority interests to support its finding of a covert classification reinforces *Feeney*'s suggestion that an exclusive or nearly exclusive effect on a protected class was necessary to satisfy the covert classification rule.[117] Such a heightened effect requirement meant that plaintiffs could rarely satisfy this effects-based triggering rule. Thus, in the wake of *Arlington*

109. Washington v. Seattle Sch. Dist. No. 1 (*Seattle*), 458 U.S. 457 (1982).

110. While the Supreme Court did not use the precise nomenclature of "covert classification," the Ninth Circuit opinion that it affirmed did. Specifically, the Ninth Circuit explained that the facially neutral busing law triggered heightened review because it was the kind of "covert racial classification" contemplated in *Feeney*. *Seattle I*, 633 F.2d 1338, 1344 n.4 (9th Cir. 1980) (citing *Feeney*, 442 U.S. at 274). The Supreme Court's reasoning made clear that it, too, was applying the "covert classification" rule. Specifically, the Court concluded that the busing law was impermissible based on its effects because, although facially neutral, it constituted the kind of "racial classification" that was invalid regardless of its purpose under *Feeney*. *Seattle*, 458 U.S. at 484–85 (citing *Feeney*, 442 U.S. at 272).

111. The initiative provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student . . . ." *Seattle*, 458 U.S. at 462 (omissions in original) (quoting WASH. REV. CODE. § 28A.26.010 (1981) (repealed 1991)).

112. *Id.* at 485.

113. *Id.* at 471 (quoting Seattle Sch. Dist. No. 1 v. State, 473 F. Supp. 996, 1008 (W.D. Wash. 1979)).

114. *Id.* at 485 (quoting James v. Valtierra, 402 U.S. 137, 141 (1971)).

115. *Id.*

116. *Id.* at 470.

117. *Id.* at 470, 480.

Heights, the Court narrowed both its purpose- and effects-based equal protection triggering rules such that effects would rarely satisfy them.

The Court similarly modified both its purpose- and effects-based free exercise triggering rules in the wake of *Lukumi* such that effects could rarely satisfy them. This began in *Lukumi* itself, where two members of the Court would have incorporated *Feeney*'s narrow malice-based definition of discriminatory purpose into the definition of a lack of neutrality. This portion of the opinion, noting that it was looking to equal protection law for "guidance" and directly quoting *Feeney*, explained that laws are not neutral where they "were enacted 'because of,' not merely 'in spite of' their effects."[118] By importing this definition of a discriminatory purpose into the neutrality requirement, these Justices indicated that they would have, as the Court had in *Feeney*, eliminated effects' power to show a lack of neutrality.

In *City of Boerne v. Flores*,[119] the majority adopted this approach. *Boerne* concerned the validity of the Religious Freedom Restoration Act of 1993 ("RFRA"), which Congress passed to protect free exercise rights after *Smith*. RFRA restored, by statute, the pre-*Smith* free exercise test that had allowed plaintiffs to trigger heightened scrutiny by showing a substantial burden on their religious exercise.[120] The Court held that RFRA was unconstitutional as applied to the states because it was not calibrated to the free exercise rights it aimed to enforce and thus exceeded Congress's powers under Section 5 of the Fourteenth Amendment.[121] RFRA was disproportionate because it invalidated laws "without regard to whether they had the object of stifling or punishing free exercise" or were "motivated by religious bigotry."[122] By invalidating such laws, the *Boerne* Court explained, RFRA swept far broader than the requirements of *Smith* and *Lukumi*, which prohibited only "laws which are enacted with the unconstitutional object of targeting religious beliefs and practices."[123] *Boerne*, in other words, characterized prior free exercise law as

118. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (opinion of Kennedy, J.) (quoting *Feeney*, 442 U.S. 229, 279 (1979)).

119. City of Boerne v. Flores, 521 U.S. 507 (1997).

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

121. *Boerne*, 521 U.S. at 532–36.

122. *Id.* at 534–35.

123. *Id.* at 529 (citing *Lukumi*, 508 U.S. at 533, for the proposition that "the free exercise of religion as defined by *Smith* . . . prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices").

defining neutrality precisely as *Lukumi*'s citation to *Feeney* suggested: as requiring a showing of malice. As in the equal protection context, this approach rendered evidence of a law's effects of little evidentiary value in satisfying this purpose-based triggering rule.

Boerne also confirmed that a law's effects would rarely satisfy the standalone effects-based general applicability rule. The seeds of this limitation were also in *Lukumi*, where the Court defined general applicability identically to *Feeney*'s covert classification rule. Just as *Feeney* suggested that a covert classification existed only where there was an exclusive or nearly exclusive effect,[124] *Lukumi* explained that a law lacked general applicability where it "in a selective manner impose[d] burdens *only* on conduct motivated by religious belief."[125] This strongly suggested that, as in the equal protection context, any effects-based rule was narrow and required showing an exclusive effect on religious interests. *Lukumi*'s caveat that it had not defined the general applicability standard "with precision," however, left unclear whether the rule might be broader than *Lukumi* suggested.[126]

Boerne removed all doubt about the scope of the effects-based general applicability rule. There, the Court clarified that the general applicability rule was just as narrow as the plain reading of *Lukumi* suggested. *Boerne* held that RFRA was disproportionate under Section 5 because "[i]n most cases" it would invalidate laws that were "not . . . motivated by religious bigotry" and thus not "likely to be unconstitutional" under the Free Exercise Clause.[127] This reasoning implies that laws not evincing a discriminatory purpose do not typically burden free exercise rights. This strongly suggests that the general applicability rule set out in *Lukumi* was just as narrow as that case's text implied and required a showing of an exclusive or near-exclusive effect to be satisfied.[128]

In summary, the Court employed a two-step approach to foreclose the effects-permissive reading of *Davis* and *Smith* that *Arlington*

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124. *Feeney*, 442 U.S. 256, 275 (1979).

125. *Lukumi*, 508 U.S. at 543 (emphasis added).

126. *See id.* Some scholars have relied on this language to argue that the extreme facts of *Lukumi* led the Court to state the general applicability requirement in stricter terms than it meant. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 5–6, 12–13, 23–26 (2016); *see also infra* note 261 and accompanying text.

127. *Boerne*, 521 U.S. at 534–35.

128. *See* Oleske, *supra* note 60, at 729–30 (arguing that *Boerne* rendered anything but a very narrow reading of the general applicability rule doctrinally untenable).

Heights and *Lukumi* contemplated. First, the Court clarified that showing a discriminatory purpose or lack of neutrality required demonstrating that government decisionmakers acted with malice, a state of mind that effects alone could not prove. Second, the Court clarified that any standalone effects-based triggering rule that survived *Davis* and *Smith* was very narrow and would be satisfied only by a showing of a virtually exclusive effect. Accordingly, and at least until recently, a law's effects had little relevance to triggering heightened scrutiny of facially neutral laws in either the free exercise or the equal protection context.

II. THE RECENT REVIVAL OF EFFECTS IN THE FREE EXERCISE CONTEXT

In recent years, and in the free exercise context alone, the Supreme Court has reversed the rule that effects cannot play a meaningful role in triggering. During this time, the Court has allowed evidence of a law's effects on religious litigants to play an increasingly important, even dispositive, role in triggering free exercise scrutiny. Surprisingly, this reversal has come about in precisely the two ways the Court's prior precedents suggested it could not. First, the Court has revised its definition of neutrality such that evidence of a law's effects can serve as dispositive evidence of impermissible purpose. Second, the Court has expanded its standalone effects-based triggering rule to encompass a broad swath of cases. By examining these developments in detail, this Part accomplishes two tasks. First, it offers a detailed account of the Court's recent liberalization of its free exercise doctrine. Second, it identifies the theoretical and doctrinal innovations of recent free exercise law that, as Part III will explain in detail, support a similar revival of effects in the equal protection context.

A. Early Signals

Members of the Court first signaled their willingness to revive effects as a meaningful trigger for free exercise scrutiny in 2015 in *Stormans, Inc. v. Weisman*.[129] That case addressed a free exercise challenge to facially neutral Washington State pharmacy regulations that required pharmacies to stock and deliver a representative

129. Stormans, Inc. v. Wiesman (*Stormans*), 579 U.S. 942 (2016) (denying certiorari).

assortment of drugs, including emergency contraceptives.[130] The regulations also obligated pharmacists to deliver such drugs.[131] The plaintiffs, a pharmacy and two pharmacists, argued that the regulations should be subject to heightened free exercise scrutiny, primarily because they disparately burdened religious objectors.[132] The Ninth Circuit rejected this argument, concluding, based on the Court's purpose-only approach, that any disparate burden imposed by the regulations was not sufficient to demonstrate that the law lacked either neutrality or general applicability.[133] Accordingly, the Ninth Circuit upheld the law under rational basis review.[134] When the plaintiffs appealed to the Supreme Court, a majority of the Justices, in line with the limited role for effects in triggering set out in *Smith* and its progeny, declined to grant certiorari.[135]

Justice Samuel Alito, joined by Chief Justice John Roberts and Justice Clarence Thomas, dissented from the denial of certiorari, signaling their willingness to expand effects' role in triggering free exercise scrutiny. Initially, the dissenters appeared to object to the Court's denial of certiorari on grounds consistent with prior precedent. Specifically, they concluded that the regulations were not neutral based on statements by state lawmakers that the dissent argued evinced "hostility to pharmacists" with religious objections.[136] In doing so, the dissent sounded in the register of *Boerne*'s malice-based triggering rule, even while disagreeing with the majority's application of it.

The dissent, however, soon signaled that it would depart from this rule in favor of one that provided a more meaningful role for effects. The dissent explained that "[e]ven if [it] disregard[ed]" lawmakers'

130. Stormans, Inc. v. Wiesman (*Stormans I*), 794 F.3d 1064, 1071–73 (9th Cir. 2015).

131. *Id.* at 1072.

132. Brief for Appellees at 61–108, *Stormans I*, 794 F.3d 1064 (Nos. 12-35221, 12-35223), 2012 WL 5915339, at *61–108.

133. Specifically, the Ninth Circuit noted that "[n]eutrality is not destroyed by the supposition that pharmacies whose owners have religious objections to emergency contraception will be burdened disproportionately." *Stormans I*, 794 F.3d at 1077–78. Moreover, that the regulations contained certain exemptions for nonreligious entities and that Washington had enforced the rules only against religious entities did not demonstrate a lack of general applicability. *Id.* at 1079–84.

134. *Id.* at 1088.

135. *Stormans*, 579 U.S. 942, 942 (2016) (denying certiorari).

136. *Id.* at 943 (Alito, J., dissenting). The dissent primarily pointed to statements by lawmakers that they intended the regulations to prevent a pharmacist's "moral beliefs" from interfering with individuals' ability to access duly-prescribed medication. *Id.* at 945.

statements, heightened scrutiny would be warranted because "the burden [the regulations] impose 'falls "almost exclusively" on those with religious objections.'"[137] The regulations' effects alone, in other words, should trigger heightened free exercise scrutiny.

Although the dissent's reasoning on this point was somewhat vague,[138] it appeared to conclude that effects could trigger free exercise scrutiny in precisely the two ways that the Court had previously concluded they could not. First, the dissent indicated that evidence of effects could serve as important evidence of a lack of neutrality. While the dissent did not explicitly invoke the neutrality standard, it appeared to be applying it when, quoting *Lukumi*'s neutrality discussion, it explained that the regulations should trigger heightened scrutiny because they "'singl[ed] out' religious practice 'for discriminatory treatment.'"[139] If the dissent was applying the neutrality rule, however, it did so in a manner that afforded effects a substantial role in satisfying this triggering rule. Specifically, the dissent concluded that the regulations had singled out religious conduct because they "allow[ed] secular but not religious refusals,"[140] thus ensuring that the regulations almost exclusively affected those with religious objections.[141] The regulations lacked neutrality, in other words, because of their effects on religious interests—particularly when compared to the effects on secular interests.

In order to integrate effects into their reasoning, the dissenters subtly departed from prior free exercise neutrality precedent. Remember that in *Lukumi*, two Justices—adopting the *Feeney* discriminatory purpose rule—concluded that laws would lack neutrality only where they "were enacted 'because of,' not merely 'in spite of' their [effects]."[142] A full Court in *Boerne* endorsed this rule,

137. *Id.* at 945, 949 (citation omitted) (quoting Stormans Inc. v. Selecky, 844 F. Supp. 2d 1172 (W.D. Wash. 2012)).

138. The dissent did not clarify whether its analysis turned on a lack of neutrality or a lack of general applicability, instead simply urging that "it seems to me likely that the Board's regulations are not neutral and generally applicable." *Id.* at 952.

139. *Id.* at 950 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993)).

140. *Id.* at 949.

141. *Id.* (citation omitted).

142. *See supra* note 118; *Lukumi*, 508 U.S. at 540–42 (opinion of Kennedy, J.) (quoting *Feeney*, 442 U.S. 256, 279 (1979)) (determining that a law exhibiting hostility toward Santeria religion and its practice of animal sacrifice was unconstitutional based on *Feeney*'s discriminatory purpose rule).

confirming that a law would lack neutrality only where lawmakers acted out of a conscious desire to harm religious interests.[143] Under this rule, effects alone were insufficient to trigger heightened scrutiny.[144] In order for the *Stormans* dissent to rely on effects to demonstrate a lack of neutrality, it therefore needed a conceptual bridge to link disparate effects with constitutional infirmity.

The *Stormans* dissent found its conceptual bridge in the idea of "devaluation." The dissent explained that the regulations' effects evidenced a lack of neutrality not because they demonstrated malice but because they indicated that the government had "'devalue[d] religious reasons' for" objecting "by judging them to be of lesser import than nonreligious reasons."[145] This "devaluation" definition of a lack of neutrality broadened the malice-based definition set out in *Lukumi* in two ways. First, it appeared to eliminate the requirement that lawmakers affirmatively "desire" any negative effects on religious interests in order for their laws to lack neutrality. A lawmaker can inadequately value religious interests in the legislative process without specifically aiming to harm those interests. Second, this "devaluing" definition appeared to eliminate the requirement that lawmakers be conscious of the effects of a law on religious interests for that law to lack neutrality. For example, a law could devalue religious interests by failing to consider them at all in the legislative process, a failure that can be attributable to unconscious bias or even ignorance. The *Stormans* dissent, in other words, permitted effects to play a dispositive role in triggering free exercise scrutiny by redefining a lack of neutrality to include any failure by lawmakers, conscious or not, to value religious interests adequately.

In addition to modifying the neutrality standard to permit a law's effects alone to satisfy this purpose-based triggering rule, the *Stormans* dissent reworked the general applicability rule to permit effects to satisfy it in a significant number of cases. Recall that *Lukumi* defined a lack of general applicability as "in a selective manner impos[ing] burdens *only* on conduct motivated by religious belief,"[146] a rule that

143. City of Boerne v. Flores, 521 U.S. 507, 534–35 (1997) (explaining that laws lacked neutrality where "they had the object of stifling or punishing free exercise" or were "motivated by religious bigotry").

144. *See Feeney*, 442 U.S. at 278–79 (explaining that adverse effects were not probative of malice).

145. *Stormans*, 579 U.S. at 949–50 (quoting *Lukumi*, 508 U.S. at 538).

146. *Lukumi*, 508 U.S. at 543 (emphasis added).

Boerne emphasized was narrow.[147] The *Stormans* dissent heralded a triggering rule with a much broader application. According to the dissenters, the Washington regulations should be subject to heightened scrutiny in part because "[t]hey 'fail[ed] to prohibit nonreligious conduct that endangers' the State's professed interest . . . 'in a similar or greater degree than' religiously motivated" conduct.[148] The laws, in other words, should have triggered scrutiny simply because they were underinclusive, not because they exclusively burdened religious interests. If this language was, as it seems, addressed to the general applicability requirement, it marked a dramatic expansion of that rule: while few laws fail to regulate *only* secular conduct implicating the state's interests, most laws fail to regulate *some* secular conduct implicating the state's interest.[149] Because few laws are perfectly tailored in this way, the dissent's definition of general applicability would allow plaintiffs to trigger free exercise scrutiny of almost any law that affects religious interests.

If the *Stormans* dissent indicated that a minority of the Court was prepared to embrace a meaningful role for effects in triggering free exercise scrutiny in 2015, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[150] signaled that a majority of the Court was prepared to do so by 2018. The *Masterpiece* litigation began when a baker refused, on religious grounds, to bake a wedding cake for a same-sex couple in Colorado.[151] The couple filed a civil rights complaint, arguing that the baker had violated a Colorado public accommodations law prohibiting discrimination on the basis of sexual orientation.[152] After a state administrative law judge determined that the baker had violated the law, the baker appealed, partly on the ground that Colorado's antidiscrimination law violated his free exercise rights.[153] Both the Colorado Civil Rights Commission and the Colorado Court

147. *See supra* note 143 and accompanying text.

148. *Stormans*, 579 U.S. at 952 (quoting *Lukumi*, 508 U.S. at 543).

149. *See* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 176 [hereinafter, Laycock, *Broader Implications*] (noting that if a law is not generally applicable "[a]ny time the government prohibits a religious practice but exempts some analogous secular practice that undermines the alleged government interest," "many laws will fail the test of general applicability").

150. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

151. *Id.* at 1724.

152. *Id.* at 1725–26.

153. *Id.* at 1726–27.

of Appeals rejected this argument, the latter concluding that the law was both neutral and generally applicable and valid under rational basis review.[154]

The Supreme Court reversed in an opinion that, like the *Stormans* dissent, initially appeared consistent with its prior free exercise triggering jurisprudence. As one would expect under a purpose-only triggering regime, the Court began by examining three statements by Colorado civil rights commissioners that it characterized as signaling "hostility toward the sincere religious beliefs that motivated [the baker's] objection" to conclude that the state's adjudication of the baker's claims was not neutral.[155] While some commentators have objected that the statements constituted only weak evidence of hostility,[156] the Court's reliance on these statements was nevertheless at least nominally in line with the Court's malice-based free exercise triggering rule.

As in the *Stormans* dissent, however, the Court soon departed from this rule, relying on effects as further evidence that free exercise scrutiny was warranted. In particular, the Court explained that "the difference in treatment between [Plaintiff's] case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission" reflected a lack of neutrality.[157] Although the Court's reasoning was obscure, the difference in "treatment" that the Court perceived was that the Commission had not credited certain legal arguments raised by the religious baker that it had credited when complaints were filed against secular bakers.[158] This differential consideration led to "inconsistent" enforcement of the civil

154. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 277, 291–94 (Colo. App. 2015).

155. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

156. *See, e.g.*, Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 274–80 (noting that the sum of the opinion's direct evidence of hostility was a single statement by a single government official in a multi-person body at an intermediate level of review).

157. *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

158. The full reasoning was as follows:

> The Commission ruled against [Plaintiff] in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases . . . . Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies" to gay and lesbian customers as irrelevant.

Id. (second alteration in original).

rights law, such that it constrained the behavior of religious bakers like the plaintiff without similarly constraining any secular objectors.[159] The law, at least as applied, thus exclusively burdened religious bakers.

The *Masterpiece* Court reasoned that this effect evidenced a lack of neutrality in a manner similar to the *Stormans* dissent. According to the Court, the inconsistent application of the civil rights law demonstrated a lack of neutrality because it suggested that the Commission had "judg[ed]" secular objections "legitimate" and religious objections "illegitimate," thereby reflecting "a negative normative 'evaluation of' . . . the religious grounds for" objection.[160] This closely resembled the *Stormans* dissent's suggestion that the creation of secular, but not religious, exemptions lacked neutrality because it "'devalue[d] religious reasons' for" objecting.[161] As in *Stormans*, that is, the law's effects signaled a lack of neutrality primarily because they indicated that the government action rested on an improper valuation of religious interests. *Masterpiece* thus appeared to adopt, in a majority opinion, the expanded definition of a lack of neutrality proposed in the *Stormans* dissent, a definition that included any law premised on the "devaluation" of religious interests. In doing so, it endorsed the notion that effects could play a dispositive role in satisfying this purpose-based triggering rule.

Despite the potentially significant shifts in the Court's triggering jurisprudence represented by *Stormans* and *Masterpiece*, their practical import was not immediately apparent. In both cases, the Justices' separate reliance on hostile statements by lawmakers as evidence of a lack of neutrality concealed the extent to which their reliance on effects was or was not dicta. Thus, even after these cases, there appeared to be a good argument that the Court's prior limitations on effects' ability to trigger free exercise scrutiny were undisturbed. A series of free exercise decisions prompted by the COVID-19 pandemic, however, soon revealed the extent of the Court's revisionism.

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159. Professor Douglas Laycock has argued that this inconsistent treatment amounted to an "*implicit* secular exemption" that was similar to the explicit secular exemption in *Stormans*. Laycock, *Broader Implications*, *supra* note 149, at 182–86.

160. *Masterpiece Cakeshop*, 138 S. Ct. at 1730–31 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993)).

161. *Stormans*, 579 U.S. 942, 949 (2016) (Alito, J., dissenting) (quoting *Lukumi*, 508 U.S. at 538).

B. The COVID-19 Cases

If *Stormans* and *Masterpiece* marked the beginning of the Court's revival of effects as a meaningful trigger for free exercise scrutiny, the COVID-19 pandemic marked its consummation. When COVID-19 broke out in early 2020, states instituted public health measures that included stay-at-home orders, building capacity limitations, and other restrictions on in-person gatherings.[162] Plaintiffs whose religious practices were affected by these restrictions soon challenged them on free exercise grounds. Initially, the Supreme Court was not receptive to these challenges. In *South Bay United Pentecostal Church v. Newsom* (*South Bay I*),[163] for example, the Court denied emergency relief where religious plaintiffs challenged California's subjection of certain venues, including houses of worship, to occupancy caps.[164] And, in *Calvary Chapel Dayton Valley v. Sisolak*,[165] the Court denied emergency relief where religious plaintiffs challenged a Nevada executive directive imposing capacity limits on houses of worship.[166] While the Court did not issue a majority opinion explaining its reasoning in either case, a concurrence in *South Bay I* hinted that the Court concluded that the statutes did not trigger free exercise scrutiny.[167]

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162. *CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/museum/timeline/covid19.html [https://perma.cc/4QLH-W6KG] (providing a timeline of the COVID-19 pandemic); Hannah Miller, *Reopening America: A State-by-State Breakdown of the Status of Coronavirus Restrictions*, CNBC (Apr. 30, 2020, 7:01 AM), https://www.cnbc.com/2020/04/30/coronavirus-states-lifting-stay-at-home-orders-reopening-businesses.html [https://perma.cc/5MVM-Z88D] (summarizing early COVID restrictions in each state).

163. S. Bay United Pentecostal Church v. Newsom (*South Bay I*), 140 S. Ct. 1613 (2020) (mem.).

164. *See id.* at 1613 (denying relief); Transcript of Motion Hearing at 4–7, S. Bay United Pentecostal Church v. Newsom, No. 3:20-cv-00865 (S.D. Cal. May 15, 2020), ECF No. 38 (describing California's order); *see also* Emergency Application for Writ of Injunction at 2–5, *South Bay I*, 140 S. Ct. 1613 (No. 19A1044) (arguing that placing occupancy caps on houses of religious worship and not on manufacturing, warehousing, office, and dine-in restaurant businesses was "beyond the pale").

165. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.).

166. *Id.* at 2603 (denying relief); Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1231 (9th Cir. 2020) (describing Nevada's directive); *see also* Nevada Declaration of Emergency Directive No. 21 § 11 (May 28, 2020), https://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28_-_COVID19_Declaration_of_Emergency_Directive_021_-_Phase_Two_Reopening_Plan_(Attachments) [https://perma.cc/8XK6-2C4E] (prohibiting houses of worship from hosting gatherings of more than 50 people at a time).

167. *South Bay I*, 140 S. Ct. at 1613–14 (Roberts, J., concurring) (applying substantial deference to California lawmakers when upholding the COVID-19 regulation at issue).

A number of Justices, however, dissented from these decisions, foreshadowing what would soon become the majority approach. According to these Justices, the COVID-19 restrictions' effects should have been sufficient to trigger free exercise scrutiny. In *South Bay I*, for example, three Justices concluded that California's occupancy limits should be subject to strict scrutiny based on their effects. According to the dissent, "[t]he basic constitutional problem" with the occupancy cap was not that it was motivated by malice but that houses of worship were subject to it while "comparable secular businesses are not."[168] Three separate dissents in *Calvary Chapel*, joined by four Justices total, employed a similar logic. Justice Alito concluded that the capacity limits should be subject to heightened scrutiny because they "treat[ed] worship services differently from other activities."[169] Justice Neil Gorsuch protested that the limitations were unconstitutional because "[l]arge numbers and close quarters are fine" in some secular locations but not in "churches, synagogues, and mosques."[170] Finally, Justice Brett Kavanaugh reasoned that the capacity limits should trigger heightened scrutiny because "a State may not impose strict limits on places of worship and looser limits on restaurants, bars, casinos, and gyms" without justification.[171] Each Justice reasoned, in other words, that the restrictions' effects on religious interests—particularly when compared to the effects on secular interests—should trigger free exercise scrutiny.

Roman Catholic Diocese of Brooklyn v. Cuomo[172] revealed that this near majority had, with the appointment of Justice Amy Coney

168. *Id.* at 1614 (Kavanaugh, J., dissenting). A fourth justice, Justice Alito, would have also granted the church's application, but neither joined Justice Kavanaugh's dissent nor offered a dissent of his own. *See id.* at 1613.

169. *Calvary Chapel*, 140 S. Ct. at 2605 (Alito, J., dissenting).

170. *Id.* at 2609 (Gorsuch, J., dissenting).

171. *Id.* at 2610 (Kavanaugh, J., dissenting).

172. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam). There is some debate about the precedential value of *Roman Catholic Diocese*, as well as *Tandon*, 141 S. Ct. 1294 (2021) (per curiam), discussed below, given these decisions were both emergency orders. *See generally* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021) (discussing this debate). *But see* Vladeck, *supra* note 14, at 724 (noting that the Supreme Court has treated these orders as precedential). Little turns, for purposes of this Article, on whether or to what extent these orders are fully precedential. First, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021), discussed below, confirmed that the triggering rule innovations set forth in *Roman Catholic Diocese* and *Tandon* are binding precedent by incorporating them into a full majority opinion. *See infra* Part II.C. Second, the reasoning set forth in *Roman Catholic Diocese* and *Tandon* is

Barrett,[173] transformed into a majority. *Roman Catholic Diocese* addressed a free exercise challenge to a New York executive order that limited capacity in houses of worship to varying degrees, depending on how widespread COVID-19 was in the area.[174] This time, the Court found the capacity restrictions unconstitutional.[175] Echoing the dissents in *South Bay I* and *Calvary Chapel*, the Court trained its analysis on the differential burdens that resulted from the laws, explaining that the restrictions triggered free exercise scrutiny because "attendance at houses of worship is limited," while some other businesses "may decide for themselves how many persons to admit."[176] Heightened scrutiny, that is, was warranted based on the restrictions' "disparate treatment"[177] of religious venues. The Court confirmed that this disparity was the primary evidence in its triggering analysis, emphasizing that the "especially harsh treatment" of religious venues, rather than any hostile statements by New York lawmakers, was the basis of its decision.[178]

Although these early COVID-19 opinions were noteworthy for their mention of effects at all, it was unclear whether the Court had truly abandoned the purpose-only approach embodied in *Smith* and its progeny. This is primarily because all of the early COVID-19 cases involved restrictions that explicitly mentioned religion, and the Court in all three cases arguably relied on this fact, at least in part, to conclude that heightened scrutiny was warranted.[179] This might suggest that

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evidence of the logic underpinning these doctrinal innovations, regardless of whether those decisions are technically binding. *See id.*

173. *See* Vladeck, *supra* note 14, at 716–20 (explaining how the October 26, 2020, appointment of Justice Barrett turned the tide of the Court's religious discrimination jurisprudence by affording a decisive fifth vote to the dissenters in prior COVID-19 cases).

174. Roman Cath. Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 121–22 (E.D.N.Y. 2020).

175. *Roman Cath. Diocese*, 141 S. Ct. at 66–67.

176. *Id.* at 66.

177. *Id.*

178. *Id.* at 66 ("As noted by the dissent in the court below, statements made in connection with the challenged rules can be viewed as targeting the 'ultra-Orthodox [Jewish] community.' But even if we put those comments aside, the regulations cannot be viewed as neutral . . . ." (alteration in original) (citation omitted) (quoting Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 229 (2d Cir. 2020) (Park, J., dissenting)).

179. *See id.* at 66 & n.1 (indicating that the regulations should be subject to heightened scrutiny because they were not "neutral on [their] face"); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting) (noting that the restriction violated the principle that "[t]he minimum requirement of neutrality is that a law not discriminate on its face" and that the "face of the directive" was discriminatory); *South Bay I*, 140 S. Ct. 1613, 1614 (2020)

these cases concerned the triggering rule for facially classificatory laws, not for the kind of facially neutral laws addressed in *Smith* and its progeny. This conclusion is arguably supported by the Court's next COVID-19 case, *South Bay United Pentecostal Church v. Newsom* (*South Bay II*),[180] in which five Justices agreed that strict scrutiny of new California restrictions was warranted because the state "openly imposed more stringent regulations on religious institutions than on many businesses . . . even assign[ing] places of worship their own row" in the text of the law.[181] This language suggests that the mere mention of religion was the dispositive factor in triggering heightened scrutiny in the Court's early COVID-19 cases and that their discussion of effects was dicta, or at least irrelevant beyond the context of facially discriminatory laws.[182]

The Court's subsequent decision in *Tandon v. Newsom*,[183] however, revealed that the Court's reliance on effects was dispositive and did not depend on the existence of a facial classification. In *Tandon*, the Court addressed a free exercise challenge to California restrictions on private indoor and outdoor gatherings, including a total prohibition on private indoor gatherings where COVID-19 was widespread.[184] The challenged restrictions were facially neutral. While

(Kavanaugh, J., dissenting) (arguing that the law was invalid because "[a]s a general matter, the 'government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits'" (quoting McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring))).

180. S. Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716 (2021).

181. *Id.* at 717 (statement of Gorsuch, J.). Specifically, five Justices signed on to the "statement" Justice Gorsuch issued in the case asserting as much. *Id.*

182. Other language in *Roman Catholic Diocese*, *Calvary Chapel*, and *South Bay I*, however, suggests that the restrictions' effects would have merited free exercise scrutiny even if they were facially neutral. *See Roman Cath. Diocese*, 141 S. Ct. at 66 (focusing on "disparate treatment" as evidence of a lack of neutrality); *Calvary Chapel*, 140 S. Ct. at 2609 (Gorsuch, J., dissenting) ("[T]here is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."); *South Bay I*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) ("The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap . . . .").

183. Tandon v. Newsom (*Tandon*), 141 S. Ct. 1294, 1296 (2021) (per curiam).

184. *See id.* at 1297; *Guidance for the Prevention of COVID-19 Transmission for Gatherings*, CAL. DEP'T OF PUB. HEALTH (Apr. 15, 2021), https://cdph.ca.gov/programs/cid/dcdc/pages/covid-19/guidance-for-the-prevention-of-covid-19-transmission-for-gatherings-november-2020.aspx [https://perma.cc/4TZR-YDN9]; *see also* Tandon v. Newsom (*Tandon II*), 992 F.3d 916, 917–19 (9th Cir. 2021) (describing the California restrictions and *Tandon*'s free exercise challenge in greater depth).

a portion of the regulations mentioned "places of worship,"[185] the plaintiffs did not challenge this feature of the regulations.[186] This is because, as the plaintiffs conceded, the regulations treated "places of worship" the same as, or better than, any secular activity.[187] Instead, the plaintiffs exclusively challenged the portion of the regulations that applied to "all gatherings" without mentioning religion,[188] a feature that both the district court and Ninth Circuit held rendered the restrictions facially neutral.[189] This facial neutrality explains why the plaintiffs challenged the regulations based on their effects, not based on any assertion that they facially classified.[190] Specifically, the plaintiffs objected that the regulations barred them from conducting in-home Bible studies and communal worship while permitting comparable secular gatherings to go forward.[191]

By subjecting these regulations to heightened scrutiny despite their facial neutrality, the Court clarified that the consideration of effects in the early COVID-19 cases was not incidental. The Court explained, with apparent exasperation, that the principles set out in its prior COVID-19 decisions squarely "dictated the outcome in this case."[192] Specifically, those "decisions . . . made . . . clear" that

185. *See About COVID-19 Restrictions*, COVID19.CA.GOV, https://covid19.ca.gov/stay-home-except-for-essential-needs [https://perma.cc/J88N-KLS3], (last updated Mar. 22, 2021).

186. Tandon v. Newsom (*Tandon I*), 517 F. Supp. 3d 922, 948 (N.D. Cal. 2021) (noting that plaintiffs conceded on the record that they were not challenging the part of the restrictions that mentioned "houses of worship").

187. Emergency Application for Writ of Injunction or in the Alternative for Certiorari Before Judgment or Summary Reversal at 19, *Tandon*, 141 S. Ct. 1294 (No. 20A151) [hereinafter *Tandon* Emergency Application] (acknowledging that the regulations "allow[ed] indoor religious gatherings at 'houses of worship'").

188. *Id.* at 7 (challenging the "gatherings" restrictions); *id.* at 183–89 (reproducing the challenged "gatherings" restrictions); *see also Guidance for the Prevention of COVID-19 Transmission for Gatherings*, *supra* note 184 (defining gatherings to include "all gatherings," not just religious ones).

189. *Tandon II*, 992 F.3d at 922 & n.6 (noting that "the gatherings restrictions are neutral on their face" because they "never mention religion"); *Tandon I*, 517 F. Supp. 3d at 974–75 (explaining that the restrictions are "facially neutral" because they "make no reference to any religious practice, conduct, belief, or motivation" (quoting *Stormans I*, 794 F.3d 1064, 1076 (9th Cir. 2015))). Even the Ninth Circuit judge who dissented from the denial of relief to the plaintiffs acknowledged that the laws were facially neutral. *Tandon II*, 992 F.3d at 932 (Bumatay, J., dissenting) (urging that strict scrutiny should apply despite "the fact that [the] restriction is *itself* phrased without reference to religion").

190. *See Tandon* Emergency Application, *supra* note 187, at 20–26.

191. *Id.*

192. *Tandon*, 141 S. Ct. at 1297.

"government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[193] This triggering rule was satisfied in *Tandon* because the indoor gathering restrictions "treat[ed] some comparable secular activities more favorably than at-home religious exercise."[194] The regulations triggered strict scrutiny, in other words, based on their effects alone, not based on any facial classification or any traditional indicia of malice.[195] This analysis made clear not only that the Court's reliance on effects in its prior COVID-19 cases extended to facially neutral laws but also that effects, not facial classifications, were dispositive in those cases.

While *Tandon* thus confirmed that effects alone could play a dispositive role in triggering free exercise scrutiny of facially neutral laws, it was vague about precisely how they could do so.[196] An examination of the various COVID-19 opinions that preceded *Tandon*, however, suggests an answer. Although these opinions are at times unclear or even inconsistent, taken together, they offer a familiar account of how effects alone trigger free exercise scrutiny of facially neutral laws. Just as the *Stormans* dissent did, these opinions suggest that evidence of a law's effects can satisfy both purpose-based and standalone effects-based free exercise triggering rules. And, just as the *Stormans* dissent did, these opinions reached this conclusion by altering these triggering rules in a manner that appeared foreclosed by prior free exercise precedent.

First, multiple opinions suggested that effects could demonstrate a lack of neutrality, thus satisfying the Free Exercise Clause's purpose-based triggering rule. In *Roman Catholic Diocese*, for example, the Court explained that the fact that the capacity restrictions "single[d] out houses of worship for especially harsh treatment" meant that they were not "neutral."[197] In his *Calvary Chapel* dissent, Justice Alito

193. *Id.* at 1296.

194. *Id.* at 1297.

195. The Court made no reference to any evidence of hostility in its analysis, focusing exclusively on the regulations' effects. *See id.* at 1296–97.

196. Although *Tandon* explained that the indoor gathering restrictions triggered heightened scrutiny because they "treat[ed] . . . comparable secular activity more favorably than religious exercise," it did not explain whether this was a problem of a lack of neutrality, a lack of general applicability, or both. *See id.* at 1296.

197. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam).

similarly reasoned that, in "specifically treat[ing] worship services differently from other activities," the capacity limits "depart[ed] from neutrality."[198] As in *Stormans* and *Masterpiece*,[199] this suggestion that a law's effects could prove a lack of neutrality required redefining that rule to require something less than malice. Justice Gorsuch, for example, implied that differential capacity limitations triggered scrutiny because they reflected "a judgment that what happens" in "religious places" "just isn't as 'essential' as what happens in secular spaces."[200] Chief Justice Roberts similarly explained that another set of restrictions lacked neutrality because they "reflect[ed] . . . insufficient appreciation or consideration of the" religious "interests at stake."[201] Nothing about the Justices' opinions suggests that devaluation entails a specific desire to discount religious interests; an unconscious failure to consider religious interests is sufficient.

Second, some COVID-19 opinions suggested that effects could demonstrate a lack of general applicability, thus satisfying the Free Exercise Clause's standalone effects-based triggering rule. Justice Kavanaugh's *Calvary Chapel* dissent, for example, explained that the capacity limitations triggered strict scrutiny because they created a "favored or exempt category" without "plac[ing] religious organizations in the favored or exempt category," thereby violating *Smith*'s general applicability requirement.[202] Justice Kavanaugh repeated this sentiment in his *Roman Catholic Diocese* concurrence.[203] Understanding *Tandon* as concerning general applicability, however, requires the same expansion of that requirement as was set out in the *Stormans* dissent. *Tandon*, like the *Stormans* dissent, explained that a law is not generally applicable if it "treat[s] *any* comparable secular

198. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting).

199. *See supra* Part II.A.

200. *Roman Cath. Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring).

201. *South Bay II*, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring).

202. *Calvary Chapel*, 140 S. Ct. at 2612–13 (Kavanaugh, J., dissenting). While Justice Kavanaugh did not say he was applying the general applicability rule, he relied almost exclusively on *Smith*'s general applicability discussion, *id.* (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)), and a law review article about the general applicability rule, *id.* at 2613 (quoting Laycock & Collis, *supra* note 126, at 22).

203. *Roman Cath. Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (citing his *Calvary Chapel* dissent, as well as *Smith*'s general applicability discussion, for the proposition that the restriction should be subject to heightened scrutiny because it "create[d] a favored class of businesses" without including "houses of worship" in "that favored class").

activity more favorably than religious exercise."[204] Mere underinclusivity is sufficient to trigger heightened scrutiny, even if the protected class is not the only group burdened by a regulation. Indeed, *Tandon* specifically emphasized that, noting that the fact that a law "treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue" does not render it generally applicable.[205] This represents a significant expansion of the *Lukumi* rule that a law lacks general applicability if it "in a selective manner impose[s] burdens *only* on conduct motivated by religious belief."[206]

This expansion was so significant, in fact, that it appeared to conflict with prior free exercise precedent. This is especially true in light of the newly expanded neutrality rule. Taken together, the expanded role for effects that these new rules permitted appeared to contradict *Lukumi* and *Boerne*, both of which suggested that effects alone could not satisfy the neutrality rule and could rarely satisfy the general applicability rule.[207] At a theoretical level, the meaningful role for effects that these triggering rules permitted appeared to run afoul of *Smith*'s theory of triggering. As noted earlier,[208] the Court's redefinition of its neutrality and general applicability rules would appear to render any law resulting from even an unconscious devaluation of religious interests or any law that is not perfectly tailored to its ends subject to strict scrutiny.[209] *Tandon*'s new effects-based triggering rules thus raised the specter of the kinds of "constitutionally required religious exemptions from civic obligations

204. *Tandon*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *see also Stormans*, 579 U.S. 942, 949–50 (2016) (Alito, J., dissenting) (explaining that laws are not generally applicable if they are simply underinclusive).

205. *Tandon*, 141 S. Ct. at 1296.

206. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993) (emphasis added).

207. *See supra* notes 139–147 and accompanying text.

208. *See supra* notes 197–206 and accompanying text.

209. *See* Laycock, *Broader Implications*, *supra* note 149, at 173 ("If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are."); *id.* at 176 (noting that if heightened scrutiny were triggered every time "[g]overnment devalues the religious practice as compared to the secular practice," "many laws that burden religion will require compelling justification").

of almost every conceivable kind" that *Smith* concluded were inconsistent with structural and prudential limits on the judicial role.[210]

In its COVID-19 cases, then, the Court adopted a dispositive role for effects in triggering free exercise scrutiny in precisely the way the *Stormans* dissent and *Masterpiece* majority had. It permitted effects alone to satisfy a purpose-based triggering rule by redefining that rule to include any state action premised on the "devaluation" of religious conduct. It permitted effects alone to satisfy a standalone effects-based rule by reinterpreting that rule to cover any law that affects religious interests and is underinclusive. This marked a significant expansion of the Court's free exercise triggering rules to allow effects alone to frequently trigger heightened review. This expansion was so significant, in fact, that it seemed to conflict with prior free exercise precedent and the limited role for effects set out therein.

C. Fulton v. City of Philadelphia

Despite this tension, the Court's next free exercise case both reaffirmed the new triggering rules set out in *Tandon* and insisted that they were compatible with *Smith* and its progeny. *Fulton v. City of Philadelphia*[211] addressed a challenge to the City of Philadelphia's decision to stop contracting with or referring children to a Catholic foster care agency after it learned that the agency refused to certify same-sex couples as foster parents on religious grounds.[212] The city cited its authority to terminate its relationship with the agency under both a contractual nondiscrimination provision and local antidiscrimination ordinance.[213] The religious foster care agency, along with three foster parents, challenged the decision under the Free Exercise Clause, arguing that the city's actions should trigger strict scrutiny.[214] Both the district court and the Third Circuit rejected this argument, concluding that the contractual and local antidiscrimination

210. *See* Emp. Div. v. Smith, 494 U.S. 872, 888–89 (1990); Oleske, *supra* note 60, at 730 ("[B]ecause so many laws contain secular exceptions, requiring religious exemptions whenever a law contains even 'a single secular exception that undermines the state's asserted interest' would largely eviscerate *Smith*'s no-exemptions-required rule.").

211. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

212. *Id.* at 1875–76.

213. *Id.*

214. Brief for Petitioners at 22–30, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 2836494, at *23–30.

requirements were neutral and generally applicable, and therefore subject to only rational basis review.[215]

The Supreme Court reversed, establishing for the first time in a full opinion that the triggering rules set out in *Tandon* were controlling law. Addressing its purpose-based triggering rule, the Court explained that a law lacks neutrality wherever lawmakers "proceed[] in a manner intolerant of religious beliefs or restrict[] practices because of their religious nature."[216] The Court made explicit what its recent free exercise cases had implied: a lack of neutrality included not only malice—that is, "restrict[ing] practices because of their religious nature"—but also something less than that—"proceed[ing] in a manner intolerant of religious beliefs."[217] Importantly, the Court cited *Masterpiece*'s definition of "intoleran[ce]" as a lack of neutrality, indicating that the Court was importing *Masterpiece*'s rule that a law is not neutral where it was premised on the devaluation of religious interests.[218] This condition might be met simply by failing to consider or appropriately weigh religious interests, even if the decisionmaker did so with a mental state short of malice.

Addressing its standalone effects-based triggering rule, the Court similarly cited the broad rule set out in the COVID-19 cases. The Court explained that a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[219] Although the Court cited *Lukumi* for this proposition, its suggestion that mere underinclusiveness, rather than exclusive regulation of religious interests, would defeat general applicability affirmed that it was applying the substantially broadened version of that standard set out in its COVID-19 cases.[220] In applying this rule to the case at hand, in

215. Fulton v. City of Philadelphia, 922 F.3d 140, 159 (3d Cir. 2019); Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 683–84 (E.D. Pa. 2018). Both courts rendered decisions prior to the Court's COVID-19 cases, so lacked the benefit of those cases' analysis.

216. *Fulton*, 141 S. Ct. at 1877.

217. *Id.*

218. *See id.* (citing Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1730–32 (2018)).

219. *Id.* (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–46 (1993)).

220. *See supra* Part II.B. A subsequent free exercise decision, *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), confirmed this reading. That case cited *Fulton* for the proposition that laws that simply do not apply across-the-board are not generally applicable. *Id.* at 2422 (*citing Fulton*, 141 S. Ct. at 1877).

fact, the Court appeared to expand it even further to include laws that simply pose a risk of underinclusivity.[221]

In addition to incorporating these newly expanded triggering rules in a full opinion, the Court insisted that the rules were consistent with *Smith*. Perhaps sensing the growing tension between the Court's free exercise triggering rules and past precedent, the plaintiffs argued in their petition for certiorari that the Court should overturn *Smith* and the triggering rules it set out.[222] Although the Court appeared ready to do so when it granted certiorari on this question,[223] it ultimately did not. While, as discussed below, some Justices would have overruled *Smith*,[224] a majority of the Court concluded that it "need not revisit [*Smith*]" because Philadelphia's actions were not neutral and generally applicable under it.[225] By reaching this conclusion in the same opinion that it set out its newly expanded free exercise triggering rules, the Court clarified that it understood these expanded rules to be consistent with *Smith*. This revealed that, while it may be very difficult to reconcile the Court's novel triggering rules with existing free exercise doctrine and theory, the Court saw no apparent inconsistency.

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221. Specifically, the Court held that the contractual non-discrimination provision that the City relied on to terminate its relationship with the Catholic agency was not generally applicable because, although it was facially neutral, it "incorporate[d] a system of individual exemptions" that the City "ha[d] no intention of granting" to the agency. *Fulton*, 141 S. Ct. at 1878. Although this might appear an application of the rule that laws lack general applicability where they are underinclusive, this notion is contradicted by the fact that the City had never actually granted any exemption under the contract, either secular or religious. *See id.* at 1879. Because the City had never given effect to the contractual provision, it could not have been the provision's effect that made it not generally applicable.

Instead, it was the mere "creation of a formal mechanism for granting exceptions [that] render[ed] [the] policy not generally applicable." *Id.* Such discretion rendered the policy not generally applicable "because it 'invit[ed]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)). The policy was not generally applicable, in other words, because—by providing discretion to devalue religious interests—it risked an underinclusive effect. This explanation is consistent with Douglas Laycock's defense of the rule that laws permitting individualized assessment are not generally applicable: "individualized decisionmaking provides ample opportunity for discrimination against religion in general or unpopular faiths in particular." Laycock, *Remnants*, *supra* note 10, at 48.

222. Petition for a Writ of Certiorari at 29–34, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2019 WL 3380520, at *29–34.

223. *See, e.g.*, Michelle Boorstein, *Religious Conservatives Hopeful New Supreme Court Majority Will Redefine Religious Liberty Precedents*, WASH. POST (Nov. 3, 2020, 1:31 PM), https://www.washingtonpost.com/religion/2020/11/03/supreme-court-religious-liberty-fulton-catholic-philadelphia-amy-coney-barrettt [https://perma.cc/S98Q-DBLN].

224. *See infra* notes 312–313 and accompanying text.

225. *Fulton*, 141 S. Ct. at 1876–77.

While the Court's recent liberalization of its free exercise triggering rules may, in the Court's view, be consistent with past case law, it has undoubtedly generated a novel discrepancy between free exercise and equal protection jurisprudence. After three decades of close alignment, the Court's approaches to the relevance of effects to triggering free exercise and equal protection scrutiny have diverged significantly. While effects alone may satisfy both purpose- and effects-based triggering rules with some frequency in the free exercise context, equal protection triggering rules appear stuck in the bygone era of purpose exclusivism. As shown in the next Part, this discrepancy is untenable.

III. THE CASE FOR REVIVING EFFECTS IN THE EQUAL PROTECTION CONTEXT

Recent free exercise law has made a strong case that a law's effects both can and should play a meaningful role in triggering equal protection scrutiny too. This Part sets out that case. As an initial matter, this Part demonstrates that recent free exercise law has made a theoretical case for considering effects in the equal protection context. This body of law has done so by undermining the theory of triggering that justified *Davis*'s purpose exclusivism and offering a positive justification for considering effects that is equally persuasive in the equal protection context. This Part then shows how recent free exercise law has made a doctrinal case for considering effects in the equal protection context. This doctrinal case is largely attributable to the historical overlaps in free exercise and equal protection triggering doctrine. Finally, this Part demonstrates why the theoretical and doctrinal cases for considering effects in the equal protection context are likely to survive any impending changes to free exercise law, particularly the overruling of *Smith*. In doing so, this Part sets out—on the Supreme Court's own terms—an enduring case for effecting equal protection.

A. The Theoretical Case

The Court's recognition of a meaningful role for effects in triggering free exercise scrutiny has generated a strong theoretical case for allowing effects to play a similar role in triggering equal protection scrutiny. It has done so first by undermining the theoretical justification for *Davis*'s turn away from effects. As detailed in Part I, the Court first turned to a purpose-based triggering rule in *Davis* out of concern that

an effects-based triggering rule would require judges to play too great a role in enforcing individual rights.[226] The *Smith* Court explicitly imported this structural and prudential theory of triggering to justify its own turn away from effects in the free exercise context.[227]

This theoretical symmetry means that recent free exercise law has refuted the theory that initially justified equal protection law's turn away from effects. Nor is there good reason to think that the Court has suddenly found a way to decouple free exercise jurisprudence from *Davis*'s theoretical foundations. As noted above, the *Fulton* Court, despite being invited to, expressly declined to overrule *Smith*.[228] In doing so, it confirmed that its newly broadened free exercise triggering rules, and the meaningful role for effects they permitted, were compatible with *Smith* and the theory of triggering that it espoused.[229] Because *Davis* espoused precisely the same theory of triggering, *Fulton* reveals that, as a theoretical matter, *Davis* is similarly compatible with a meaningful role for effects in triggering equal protection scrutiny.

The Court's free exercise jurisprudence has, more importantly, set out a positive theoretical justification for permitting effects to play a meaningful role in triggering that applies in the equal protection context. Although the Court has not robustly theorized its newly broadened free exercise triggering rules, it has refashioned them based on the principle that state action should trigger heightened scrutiny where it is premised on the "devaluation" of religious interests. The *Stormans* dissenters urged, for example, that laws should trigger strict scrutiny where lawmakers have "'devalu[ed] religious reasons' for" objecting.[230] *Masterpiece* insisted that government action reflecting a "negative normative 'evaluation of'" religious conduct should trigger heightened scrutiny.[231] Finally, the COVID-19 cases noted that laws should trigger scrutiny if they reflect "a judgment that what happens" in "religious places" "just isn't as 'essential' as what happens in secular

226. *See supra* notes 38–49 and accompanying text.

227. *See supra* notes 50–55 and accompanying text.

228. *See supra* notes 222–223 and accompanying text.

229. *See Fulton*, 141 S. Ct. at 1876–77.

230. *See Stormans*, 579 U.S. 942, 949–50, 953 (2016) (Alito, J., dissenting) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993)).

231. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 537).

spaces"[232] or "insufficient appreciation or consideration of [religious] interests at stake."[233] This devaluation theory of triggering both explains and justifies the Court's expansion of its neutrality and general applicability rules.

Religious liberty scholars supportive of the Court's new triggering rules have similarly reasoned that the rules are justified by the theory that state action premised on the devaluation of religious interests should trigger heightened scrutiny. Professor Richard F. Duncan, for example, has argued that the Court's newly expanded triggering rules are justified because "[t]he decision to value secular conduct . . . more than religious conduct . . . is the kind of unequal treatment that should be the minimum standard for constitutional protection of religious liberty."[234] Professors Douglas Laycock and Steven Collis, in an article that Justice Kavanaugh cited in his *Calvary Chapel* dissent, similarly assert that a broad general applicability rule is justified because free exercise rights are burdened whenever lawmakers act on an "explicit or implicit" judgment that "secular conduct [is] more worthy" than religious conduct.[235] Echoing the Court's recently expanded articulation of its neutrality rule, they argue that lawmakers violate this principle even through unconscious bias.[236]

By grounding its new free exercise triggering rules in the devaluation principle, the Court has adopted a theory of triggering with a long pedigree in equal protection scholarship. Theories of a liberalized Fourteenth Amendment jurisprudence have often been framed as calls for judicial concern with majoritarian failure to account for the interests of disfavored groups. Indeed, the devaluation theory of free exercise triggering closely resembles a version of the political process theory of judicial review pioneered by Professor John Hart Ely and endorsed by many equal protection scholars. Broadly, political process theory posits that courts should apply heightened scrutiny

232. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69–70 (2020) (Gorsuch, J., concurring); *see also* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614–15 (2020) (Kavanaugh, J., dissenting) (concluding that a law lacked general applicability because it "devalue[ed] religious" interests (quoting *Lukumi*, 508 U.S. at 537)).

233. *South Bay II*, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring).

234. Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi*, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 869, 875 (2001).

235. *See* Laycock & Collis, *supra* note 126, at 30.

236. *Id.* at 29–30 (explaining that a free exercise violation "does not require that the state make an explicit value judgment, or that state officials consciously compare religious and secular conduct and deem the secular conduct more worthy").

primarily to protect against distortions in the democratic process.[237] Ely explained that one such distortion occurs where a majority is "systematically disadvantaging some minority out of simple hostility or . . . prejudice[]," rather than acting based on legitimate differences.[238]

Ely and his successors' explanation of this process error closely resembles the Court's justification for allowing effects to trigger free exercise scrutiny. According to Ely, this process distortion occurs where lawmakers, due to prejudice, overestimate the costs of treating minorities as they are treating themselves and undervalue the benefits to minorities of a more narrowly tailored law.[239] Professor Paul Brest elaborated this theory, explaining that a process defect results when government actions "rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference."[240] Brest defined "selective sympathy and indifference" as an "unconscious failure to extend to a minority . . . the same sympathy and care[] given as a matter of course to one's own group."[241] In both scholars' view, that is, heightened scrutiny is warranted where lawmakers act based on the conscious or unconscious devaluation of protected interests. This closely resembles the theory of triggering that underlies the Court's modified free exercise triggering rules.

As it has in the free exercise context, this devaluation theory of triggering justifies refashioning equal protection triggering rules. The point is best illustrated by Professor Charles R. Lawrence III, who used *Arlington Heights* to demonstrate why existing equal protection triggering rules fail to ensure scrutiny of most laws premised on the devaluation of protected interests.[242] Even if the *Arlington Heights* decisionmakers did not decline to rezone land for affordable housing out of an intentional desire to harm racial minorities, for example, they may have done so because they "associated poverty with blacks and

237. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 73–104 (1980).

238. *Id.* at 103.

239. *Id.* at 157–58; *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933–34 n.85 (1973) (describing the cognitive deficiencies and dangers of making "we-they" generalizations).

240. *See* Paul Brest, *The Supreme Court 1975 Term Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6–7 (1976).

241. *See id.* at 7–8.

242. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 347–49 (1987).

would have weighed the costs and benefits differently if the poor people they envisioned excluding were elderly white people on social security."[243] Alternatively, they may have declined to rezone the land because they "inadvertent[ly] devalu[ed] . . . black interests" and thus did not pay "[]attention to the costs blacks would have to bear" as a result of their decision.[244] In either case, the zoning decision would have been premised on the kind of "selective sympathy and indifference" that Brest and Ely argued implicates the Equal Protection Clause.[245] Yet, existing equal protection triggering rules would not require strict scrutiny in either situation. Under a devaluation theory of triggering, that is, existing equal protection triggering rules are "hopeless[ly] inadequa[te]" to enforce equal protection rights.[246]

The Court's revival of a devaluation theory of triggering, therefore, supports a more meaningful role for effects in triggering equal protection scrutiny. First, it supports redefining "discriminatory purpose" to include the devaluation of race- or sex-based interests. As Brest explained, "selective sympathy and indifference" should be understood as an impermissible form of governmental motivation.[247] Once one accepts that failure to account for the interests of a disfavored group qualifies as a discriminatory purpose—as the Court

243. *Id.* at 348.

244. *Id.* at 349.

245. *See id.* at 348–49.

246. Professor Randall L. Kennedy referred to a malice-based triggering regime as such because it "leaves untouched deeper layers of racially oppressive official action," including (1) "hurtful decisions taken not because decisionmakers have designs against blacks but because decisionmakers leave blacks out of their designs," and (2) "the unconscious failure to extend to [blacks] the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to [whites]." Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1419–20 (1988) (alterations in original) (quoting Brest, *supra* note 240, at 7–8).

247. Brest, *supra* note 240, at 8, 14–15; *see also, e.g.*, J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 966–67 (1978) (arguing that "invidious motivation or invidious purpose consists of devaluing the needs, wants, capabilities, or dignity of members of a group, whether for reasons of hostility or of other prejudice, on the unwarranted assumption that such group members are less capable or less worthy of consideration"); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 963 (1989) [hereinafter Strauss, *Discriminatory Intent*] (arguing that the definition of discriminatory intent must include instances in which the government has "undervalue[d] the interests of a class of citizens, . . . treat[ed] them with indifference, [or] ignore[d] the burdens it imposes on them"). *See generally* Binion, *supra* note 41, at 444 & n.192 (listing additional scholars who have argued that "the concept of illicit intent [should] include any attempt to devalue the needs or ignore the interests of members of minority groups").

has—the relevance of effects in triggering judicial scrutiny follows naturally.[248] Second, a devaluation theory of equal protection supports a more meaningful standalone effects-based equal protection triggering rule. As Brest noted, a standalone effects-based equal protection triggering rule is justified by the need to safeguard against laws premised on devaluation where such devaluation is "strongly suspected but cannot be proved."[249] Other scholars have agreed.[250] A devaluation theory of triggering, as in the free exercise context, thus justifies revising existing equal protection triggering rules to permit a meaningful role for effects in triggering equal protection scrutiny.

One might object that, notwithstanding the apparent fit between a devaluation theory of free exercise and the equal protection context, this fit is not as snug as it seems. Some argue, after all, that the Free Exercise Clause offers liberty-based protections that extend beyond the equality protections offered by the Equal Protection Clause.[251] To

248. This is demonstrated by the example of recent free exercise law. *See supra* Part II.

249. Brest, *supra* note 240, at 28–29. Although Brest urged that such an effects-based triggering rule was necessary to guard against any kind of race-dependent decisionmaking, this justification appears particularly urgent in the context of selective sympathy and indifference. The kind of evidentiary problems Brest describes seem particularly likely to arise in cases of selective sympathy and indifference, where lawmakers themselves may be unaware of the race- or sex-based nature of their decisionmaking. *See* Lawrence, *supra* note 242, at 347–49 (describing some of the evidentiary difficulties of proving unconscious bias).

250. *See, e.g.*, Strauss, *Discriminatory Intent*, *supra* note 247, at 1009–15 (arguing that evidentiary problems associated with proving devaluation-based discriminatory purpose justified adopting a broadened effects-based triggering rule). Others have offered additional reasons why the devaluation theory of triggering supports a broadened standalone effects-based triggering rule. *See, e.g.*, Binion, *supra* note 41, at 422 (arguing for a broadened effects-based rule because "[t]he intentions of government are no more indicative of a human devaluing than are its policies and their impact"); Kennedy, *supra* note 246, at 1419–21, 1424 (arguing that the need to protect against devaluation justified a triggering rule that would be satisfied where, regardless of its purpose, a law had the effect of subordinating racial minorities).

251. *See, e.g.*, Sherif Girgis, *Fragility, Not Superiority? Assessing the Fairness of Special Religious Protections*, 171 U. PA. L. REV. 147, 173–76 (2022) (arguing that the religion clauses both can and should provide unique religious liberty protections due to religious interests' particular "fragility"); Laycock, *Remnants*, *supra* note 10, at 18; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 689–94 (1991) [hereinafter, McConnell, *Accommodation of Religion*] (summarizing arguments supporting special liberty protections under the Free Exercise Clause). *But see* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994) (arguing that the religion clauses should only afford antidiscrimination protections to religious believers); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1377–1403 (2012) (arguing that affording special liberty protections to religious individuals alone is unjustified).

the extent the devaluation theory of free exercise depends on such liberty protections, it might not truly be justified in the equal protection context.

The devaluation theory of triggering, however, does not depend on any such theory of religious liberty—rather, religious equality underpins the Court's increased attention to effects. To understand this point, it is helpful to understand how the neutrality and general applicability rules themselves vindicate equality rather than liberty interests. As *Smith*'s critics have recognized, the triggering rules that *Smith* set out promote religious equality, not religious liberty.[252] A majority of the Court, including five of its most conservative members, agrees.[253] Given *Smith*'s continued force, scholars advocating a devaluation theory of the Free Exercise Clause—and the broadened triggering rules it supports—have characterized that theory as an extension of the Free Exercise Clause's guarantee of religious equality.[254]

This theory of equality, moreover, is one that applies in the equal protection context. *Smith*'s critics were dissatisfied with its triggering rules not just because they promoted equality alone but also because they promoted a narrow version of it. Specifically, *Smith*'s triggering rules advanced formal equality, or "religion-blindness."[255] Under this theory, sometimes also referred to as an "anticlassification" theory of

252. Duncan, *supra* note 234, at 880 ("*Smith* and *Lukumi* have transformed the Free Exercise Clause from a liberty rule . . . to an equality rule . . . ."); Laycock, *Remnants*, *supra* note 10, at 10 (arguing that the post-*Smith* triggering rules principally enforce "a right to equal protection," not "a substantive right to be left alone by government"); McConnell, *Free Exercise Revisionism*, *supra* note 37, at 1152–53 (characterizing the rules as offering "equal protection" rather than liberty protections).

253. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring) (Justice Barrett, joined by Justice Kavanaugh, characterizing the *Smith* triggering rules as "offer[ing] nothing more than protection from discrimination"); *id.* at 1897 (Alito, J., concurring) (Justice Alito, joined by Justices Thomas and Gorsuch, explaining that "[a]s interpreted in *Smith*, the [Free Exercise] Clause is essentially an anti-discrimination provision").

254. This is true whether the theory supports a broadened general applicability or neutrality rule. *See* Duncan, *supra* note 234, at 869, 881 (explaining that the prohibition on "[t]he decision to value secular conduct . . . more than religious conduct" that supports a broad general applicability rule is an "equality rule not a liberty rule"); Laycock & Collis, *supra* note 126, at 34 (suggesting that the devaluing principle "can be understood as . . . a nondiscrimination requirement" that can be implemented through either the general applicability or neutrality rule); Laycock, *Remnants*, *supra* note 10, at 50–51 (noting that the prohibition on laws premised on "valu[ing] . . . secular activities more highly than . . . religious activities" "is part of the requirement of formal neutrality or general applicability").

255. Laycock, *Remnants*, *supra* note 10, at 12.

equality,[256] the state is forbidden only from "utiliz[ing] religion as a standard for action or inaction,"[257] at least to the detriment of religious interests.[258] Given *Smith*'s continued viability, advocates of a devaluation theory of free exercise have characterized that theory—and the triggering rules it supports—as simply guarding against such religion-dependent decisions.[259] In doing so, they have located the devaluation theory of triggering in a formal equality principle that is familiar to the equal protection context. The Court has long held that the Equal Protection Clause, like the Free Exercise Clause, promotes formal equality by barring the state from making decisions based on protected characteristics, at least to the detriment of protected groups.[260] Scholars have thus urged that a devaluation theory of equal

256. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 10 (2003) (defining anticlassification as requiring "that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category").

257. Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990) [hereinafter Laycock, *Neutrality*] (quoting Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961)).

258. Formal equality may permit some kinds of favorable religion-conscious government action. Laycock, *Remnants*, *supra* note 10, at 11–12.

259. Professor Laycock argues that laws premised on devaluation of religious interests violate formal equality. *See id.* at 11, 50–51 (arguing that "a legislative judgment that the free exercise of religion is less important" violates the "formal neutrality," or religion-blindness requirement); *see also* McConnell, *Free Exercise Revisionism*, *supra* note 37, at 1135–36 (arguing that laws based on "selective[] sensitiv[ity] toward religious injuries" should trigger heightened scrutiny because they are "the result of prejudice" against religion rather than "objective differences"). Laycock, among others, also argues that a broad neutrality rule promotes formal equality by ensuring scrutiny of laws premised on devaluation. *See* Laycock, *Remnants*, *supra* note 10, at 11, 50–51 (arguing that the neutrality requirement should forbid laws premised on "valu[ing] . . . secular activities more highly than . . . religious activities" because they violate *Smith*'s religion-blindness requirement); Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 IND. L.J. 295, 299–302 (2000) [hereinafter Perry, *Freedom of Religion*] (arguing that *Smith* prohibits religion-based government action, and that "religiously selective sympathy and indifference" should accordingly count as a governmental state of mind that triggers scrutiny). Laycock, Professor Collis, and others have argued that a broad general applicability rule similarly promotes formal equality by ensuring scrutiny of laws premised on devaluation. *See* Laycock & Collis, *supra* note 126, at 34–35 (arguing that *Smith* prohibits decisions made because of religion, and that the general applicability rule "implement[s]" this rule by helping to identify laws that "result[] from hostile indifference" in the face of complexity); Perry, *Freedom of Religion*, *supra*, at 302–03 (arguing that the general applicability rule offers an indirect way of enforcing the rule against religion-based decisionmaking by ensuring scrutiny of laws covertly premised on devaluation); Duncan, *supra* note 234, at 881 n.194 (same).

260. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1473 (2004) ("Scholars debate what our constitutional understanding of equality ought to be, but most would agree that American

protection—and the triggering rules it supports—promotes formal equality by guarding against such decisions.[261] Recent free exercise law, by insisting that formal equality encompasses such a prohibition on devaluation-based decisions, has essentially endorsed this notion. Both the Court and scholars have, in other words, recognized that protection from devaluation forms part of a baseline requirement of formal equality that governs not just in the free exercise but also in the equal protection context.

While advocates' characterization of the devaluation theory as a formal equality principle may be partly strategic—a means to fit this theory into the doctrinal constraints of *Smith*—this characterization also makes good sense. Although the Court has traditionally concluded that only laws that classify or are motivated by malice violate formal equality,[262] laws premised on devaluation should be understood to

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equal protection law has expressed anticlassification . . . commitments as it has developed over the past half-century."). This formal neutrality principle is perhaps most rigid in the race context, where the Court has endorsed a "colorblindness" approach that forbids consideration of race in most contexts, including in cases of benign intent such as affirmative action. *See* Haney-López, *supra* note 10, at 1861–74. The Court has adopted a more flexible approach in the sex-discrimination context, where it strictly polices governmental consideration of sex that perpetuates sex-based inequality but is more willing to permit sex-based distinctions that had the opposite effect. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2009) (explaining how constitutional sex-discrimination jurisprudence reflects an "anti-stereotyping principle" that "dictate[s] that the state c[an]not act in ways that reflect[] or reinforce[] traditional conceptions of men's and women's roles," but that "permit[s] the state to classify on the basis of sex in instances where doing so serve[s] to dissipate sex-role stereotypes"); *see also* Keith Cunningham-Parmeter, *(Un)equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 19–36 (2015) (arguing that the Court has struck down laws for "relying upon stereotypical assumptions about women's domestic roles" and "left intact laws that treated women differently than men based not on stereotypes").

This is not to say that protection from race- or sex-dependent decisionmaking is the sum total of the protections afforded by the Fourteenth Amendment. Indeed, scholars have long called for broader conceptions of equality in both the constitutional race- and sex-discrimination contexts. *See* Strauss, *Discriminatory Intent*, *supra* note 247, at 941–46 (summarizing some such scholarship). *But see* Katie Eyer, *The But-For Theory of Antidiscrimination Law*, 107 VA. L. REV. 1621, 1685–88 (2021) (defending an anticlassification approach to equal protection). The principle of formal equality is, however, a floor below which a law cannot fall in this context.

261. *See, e.g.*, Brest, *supra* note 240, at 7–15, 28–29 (arguing that "selective sympathy and indifference" constitutes race-dependent decisionmaking and that the Court should accordingly (1) recognize "selective sympathy and indifference" as a governmental state of mind that triggers heightened scrutiny, and (2) develop a standalone effects-based triggering rule to ensure full protection against such devaluation); Strauss, *Discriminatory Intent*, *supra* note 247, at 956–64, 1009–15 (making a similar argument).

262. *See* Tebbe, *Equal Value*, *supra* note 14, at 2424–26 (explaining that the Court's new free exercise triggering rules extend beyond this traditional conception of formal equality).

violate formal equality too. This is because laws premised on the devaluation of the interests of certain racial, sex-based, or religious groups are, fundamentally, dependent on race, sex, or religion. As explained above, devaluation occurs where lawmakers make conscious or unconscious judgments that one racial, sex-based, or religious group is more valuable or worthy of consideration than another. A law premised on such devaluation thus allocates benefits or burdens based on the favored or disfavored status of such groups, rather than on legitimate differences. As Paul Brest has put it, laws premised on devaluation thus "would have been different but for the race," sex, or religion "of those benefited or disadvantaged by them."[263] Protection from such race-, sex-, or religion-dependent laws forms the core of the rule of formal equality.

Protection from devaluation-based decisions, in fact, constitutes one of the most important formal equality protections that both the Free Exercise Clause and Equal Protection Clause can afford today. Drawing on psychology and social science literature, equal protection scholars have demonstrated that, as norms against race and sex discrimination grew stronger, more overt forms of such discrimination became less acceptable.[264] As a result, state actors became more likely to discriminate unconsciously and covertly, rather than consciously and overtly.[265] Stronger norms against express race and sex discrimination thus meant that protection from devaluation should have become one of the central features of the formal equality afforded by the Equal Protection Clause.[266] This same logic suggests, on the Court's own terms, that protection from devaluation is one of the most vital formal equality protections offered by the Free Exercise Clause. If the Court's

263. Brest, *supra* note 240, at 6.

264. *See* Siegel, *Equal Protection*, *supra* note 10, at 1136–37 (noting how "sociological and psychological literature demonstrates that . . . racial bias remains the norm among white Americans; but that . . . they are strongly inhibited in expressing the racial attitudes they consciously hold"); *see also* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 982–85 (1993) (summarizing some of the psychology and social science evidence); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027–29 (1988) (same).

265. *See* Siegel, *Equal Protection*, *supra* note 10, at 1136–37 & n.129 (explaining that most race-dependent governmental decisionmaking in the modern era will result from unconscious, rather than overt bias).

266. *See* Kennedy, *supra* note 246, at 1419–21 (noting that the Court's failure to recognize such protections, as evidenced by the Court's theory of purposeful discrimination, rendered equal protection doctrine "hopeless[ly] inadequa[te]" to enforce equal protection rights).

claims of growing religious persecution are accurate,[267] strengthening norms against such discrimination are likely to shift the discrimination away from overt malice into more covert and unconscious channels.[268] In such a world, protection from devaluation is more essential than ever to enforcing religious equality.

In sum, recent free exercise cases have both refuted the Court's initial justification for minimizing effects' role in triggering equal protection scrutiny and offered a new theory of triggering that justifies attention to effects in the equal protection context. This devaluation theory maps onto the equal protection context because it is justified by a minimum requirement of formal equality that applies in both the free exercise and equal protection contexts. If failure to weigh the interests of a protected class violates constitutional norms of formal equality even in the absence of malign intent, then the relevance of effects in triggering judicial scrutiny in both contexts is apparent.

Ultimately, however, the Court's inattention to effects in the equal protection context might still be justified in some broader sense, even if it contradicts the announced theory of recent free exercise law. While the logic of free exercise law appears to require attention to effects in the race and sex discrimination contexts, reasons external to those cases might warrant a different conclusion. In particular, differential treatment of effects in these contexts might be warranted if there are external reasons to believe that attention to effects is either uniquely appropriate in the free exercise context or uniquely inappropriate in the equal protection context. The remainder of this Section sketches—and rejects—the likeliest versions of these arguments.

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267. Professor Leah Litman has documented how some justices' "belie[f] that social conservatives, especially conservative religious groups, now face widespread societal discrimination and prejudice" animates recent religious discrimination jurisprudence. Litman, *supra* note 14, at 48. She has also shown how this sense of growing religious persecution depends on an unduly narrow focus on such religious groups' "social" power. *Id.* at 60–63. This narrow focus obscures the considerable political power that such religious groups continue to exercise, power that suggests that their interests are in fact unlikely to be devalued in the political process. *Id.*

268. *See* Laycock, *Remnants*, *supra* note 10, at 4 (arguing that "obvious forms of persecution are not the ones a contemporary American majority is likely to use" and that discriminatory laws are more likely to "be enacted through hostility, sheer indifference, or ignorance of minority faiths"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992) (arguing that the most "serious threat to religious pluralism today is a combination of indifference to the plight of religious minorities and a preference for the secular in public affairs").

Perhaps the simplest basis for defending consideration of effects in the free exercise, but not equal protection, context would be to assert that the Free Exercise Clause mandates a broader theory of equality than the Equal Protection Clause does. Specifically, one might adopt the view of some religious liberty scholars that the Free Exercise Clause demands more than formal equality, and instead "prohibits laws that have the effect of disadvantaging a particular religious group (or religion generally) regardless of whether they have a neutral purpose."[269] Under this theory of equality, the Free Exercise Clause does not require the government to be religion blind. To the contrary, it requires the government to be "conscious of the effects of its action on . . . religious practices" in order to "minimize interferences with those practices."[270] While the Court has not advanced this theory of religious equality—likely because *Smith*'s mandate of formal equality forecloses it—this theory offers an alternative justification for the Court's recent attention to effects that one could argue is unique to the free exercise context.

Armed with this new justification for considering effects in the free exercise context, a further reason for disregarding effects in the equal protection context might follow naturally. This reason flows from the "colorblind" or "sex-blind" approach to equal protection endorsed by some precedent and commentators. This theory of equal protection posits that the best way to eliminate racial and sex-based inequality is to bar the government from considering race or sex at all.[271] Under this theory, any consideration of race or sex in government decisionmaking, even for benign purposes, is both counterproductive and discriminatory. If one understands the Court's attention to effects as enforcing a religion-consciousness requirement (rather than a religion-blindness requirement), it becomes clear that any similar attention to race- or sex-based effects would be impermissible under this theory. Indeed, attending to effects in the race or sex discrimination context would violate the Equal Protection Clause's central antidiscrimination

269. Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 700 (2005); *see also* Laycock, *Neutrality*, *supra* note 257, at 1001–06 (elaborating on this theory).

270. McConnell, *Accommodation of Religion*, *supra* note 251, at 689–94.

271. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); Thomas P. Crocker, *Equal Dignity, Colorblindness, and the Future of Affirmative Action Beyond* Grutter v. Bollinger, 64 WM. & MARY L. REV. 1, 34–44 (2022) (summarizing the colorblindness theory set out by case law and scholarship).

principle. This unique undesirability of considering effects in the equal protection context would provide a sound basis for treating effects differently in the free exercise and equal protection contexts.

While these interlocking arguments for disparate consideration of effects in the free exercise and equal protection contexts are colorable, they are unpersuasive. Both arguments depend on the same premise that the Equal Protection Clause demands formal equality—and specifically race and sex blindness—alone.[272] This premise is flawed. To begin with, numerous scholars have illustrated that neither the text nor the history of the Equal Protection Clause demands race or sex blindness. As a textual matter, the Equal Protection Clause is best read as merely mandating some form of equality, without specifying precisely what kind of equality is required.[273] Moreover, the history of the Equal Protection Clause does not demand race or sex blindness. To the contrary, historical evidence suggests that the clause was intended to combat subordination, not simply to enforce formal equality.[274] Accordingly, attention to race- or sex-based effects,

272. These arguments also require accepting the premise that a substantive equality regime is uniquely appropriate in the free exercise context. This Article does not add to the vast literature debating this premise, beyond noting that it is far from clearly established. *See, e.g.*, Eisgruber & Sager, *supra* note 251, at 1270–73 (disputing the textual and historical argument for a substantive, accommodationist approach to the Free Exercise Clause); Schwartzman, *supra* note 251, at 1406 ("There is no consensus among originalists about whether the Free Exercise Clause requires exemptions from general laws that incidentally burden religious practices."); *see also* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998) (disputing numerous arguments in support of an accommodationist Free Exercise Clause).

273. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108 (1976) (noting that the words of the Equal Protection Clause "do not state an intelligible rule of decision" and instead "gives constitutional status to [an] ideal of equality" that "is capable of a wide range of meanings"); *see also* Binion, *supra* note 41, at 409 (noting that the text of the Equal Protection Clause does not support a formal equality approach).

274. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1012 (1986) (noting that a substantive approach to race and sex equality "is consistent with the history of the equal protection clause"); William N. Eskridge, Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1080–91 (2015) (outlining history that supports the conclusion that the Equal Protection Clause's original meaning was to combat legislation that "entrench[ed] social groups as inferior castes" and thus the conclusion that the Clause protects against laws that subordinate LGBT people); Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 13–14 (2017) (arguing that historical evidence supports an antisubordination understanding of the Equal Protection Clause); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIA. L. REV. 191, 204–10 (1997) (summarizing historical evidence contradicting a colorblind approach to racial discrimination and supporting a color-conscious, antisubordination approach).

particularly for the purpose of combating racial or sex-based subordination, is consistent with both the text and history of the Equal Protection Clause.

More importantly, the suggestion that the Equal Protection Clause demands race or sex blindness alone is contrary to any sound theory of discrimination. As many scholars have noted, race- and sex-blind constitutionalism is beset by internal contradiction.[275] This theory insists, for example, that heightened scrutiny of race- and sex-based classifications is warranted.[276] But it also denies that the histories of racial and sex-based subordination that justify such heightened scrutiny are relevant.[277] Further, this theory of formal equality denies the reality of group-based interests warranting race- or sex-conscious decisionmaking.[278] However, it simultaneously urges that real group-based interests—mostly of white people—are undermined by race- and sex-conscious decisionmaking.[279] Further contradictions exist.[280]

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275. *See* Powell, *supra* note 274, at 219 ("[C]olorblindness is held together by a conglomeration of baseless contradictions which are illuminated with increasing intensity the more we try to ignore race.").

276. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

277. *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 49–50 (1991) (noting that the Court perversely relies on the historical subordination of Black people to justify striking down only laws intended to remedy the subordination of Black people).

278. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 920 (1995) (explaining that a race-conscious redistricting plan violated the Equal Protection Clause because it "assume[d] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls'" (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993))).

279. *See* Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 184–85 (1994) (explaining that the Court's acceptance of white plaintiffs' claims that they are injured by race-conscious districting depend on the claim that white voters and Black voters have different interests); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 342–43 (1994) (noting that arguments that race-conscious remedies produce racial stigma assumes that group-based harms such as stigma are possible).

280. This includes the fact that, while colorblindness admonishes that attention to race is inappropriate, it requires attention to race. *See* Morrison, *supra* note 279, at 338 ("[C]olorblindness draws just as much attention to race as does race-consciousness."). It also includes the fact that, while colorblindness insists that race or sex are unrelated to merit, it leaves little explanation for the continued inequality that women or racial minorities face other than a lack of individual merit. *See* Gotanda, *supra* note 277, at 44–46 (noting that colorblind constitutionalism's rejection of the possibility of systemic racism suggests that continuing racial inequality is attributable to "market forces").

If these contradictions suggest that a race- or sex-blind equality regime is at best confused, the theory's inability to remedy racial or sex-based inequality reveals that it is wrong. This theory of equal protection, by insisting that discrimination occurs only where the government classifies or acts with a discriminatory purpose, ignores the systemic racism and sexism that account for so much of present day inequality.[281] More importantly, it destroys the government's ability to address such structural inequality.[282] Rather than encourage lawmakers to study and address structural barriers and policies that disproportionately harm women or racial minorities, race and sex blindness forbid such endeavors. And, instead of allowing lawmakers to frankly employ the most effective proxies for racial and sex-based inequality—race and sex themselves—this version of formal equality forces lawmakers to turn to less effective ones, such as income[283] or

281. *See* Gotanda, *supra* note 277, at 44 (noting that colorblindness ignores institutional and structural racism that is necessary to understand existing inequality); Powell, *supra* note 274, at 199–200 (same); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 42 (1987) (arguing that a sex-blind approach to sex discrimination fails to adequately account for the structural inequality of women).

282. *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1611 (2009) ("[T]he Court's colorblindness principle scrupulously fail[s] to capture the law's long-running complicity with white supremacy and equally failed to undo its effects."); Colker, *supra* note 274, at 1003–16 (urging that meaningful progress in fighting gender inequality requires consciousness of a law's effects on historically subordinated racial or gender groups, as well as race- and sex-specific remedies); Culp, *supra* note 279, at 167 (noting that "only race-conscious policies can alter the racial status quo in this country"); Gotanda, *supra* note 277, at 62–63 (arguing that express consideration of race is necessary to combat racial subordination); Powell, *supra* note 274, at 195, 212 (arguing that "the principle of colorblindness perpetuates racial subordination" by "destroy[ing] a governmental entity's ability to address systemic racism"); MACKINNON, *supra* note 281, at 42 ("If differentiation into classifications, in itself, is discrimination, . . . the use of law to change group-based social inequalities becomes problematic, even contradictory.").

283. Samuel R. Bagenstos, *On Class-Not-Race*, *in* A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY 110 (2015) (arguing that class inequality is a poor proxy for race inequality because racial disadvantage in the United States involves not only "economic deprivation" but also "stigma and stereotypes with a variety of consequences for the day-today lives of even economically advantaged members of racial minority groups"); Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1226 (2011) (explaining that gender-neutral measures aimed to remedy gender inequality may be counterproductive because, "without attention to gender, universal proposals are likely to result in increased inequality"); Cheryl I. Harris, *Fisher's Foibles: From Race and Class to Class Not Race*, 64 UCLA L. REV. DISCOURSE 648, 681 (2017) (arguing that attention to *both* race and class is necessary to remediate inequality, both because race and class inequality are distinct phenomena and because "[d]iscrimination operates not as exclusive or separable processes or phenomena but is intersectional and interactive").

"diversity."[284] By barring attention to laws' effects on disadvantaged groups, race- and sex-blind constitutionalism does not advance equality but instead preserves the very racial and sex-based status quo that it purports to undermine.[285]

In short, the most likely objections to equally considering effects in the free exercise and equal protection contexts are unpersuasive because they rely on the flawed premise that attention to effects is not appropriate in the equal protection context. These external objections thus do not undermine the theoretical case for considering effects in the equal protection context that is so apparent from recent free exercise law. Of course, some further external objections might undermine this case; anticipating all possible reasons to distinguish effects' role in equal protection jurisprudence from their role in free exercise jurisprudence is beyond this scope of this Article. If such reasons exist, however, it is incumbent on a Supreme Court willing to contemplate a broad theory of equality in the religion context but not the sex or race context to offer such reasons. Until then, the logic of free exercise law will continue to make a powerful theoretical case that effects should matter in the equal protection context.

B. The Doctrinal Case

The Court's recent free exercise jurisprudence also offers a doctrinal roadmap for allowing effects to play a meaningful role in triggering equal protection scrutiny. Because the Court has relied on the same legal principles, and sometimes the same precedent, to reject a meaningful role for effects in triggering free exercise and equal protection scrutiny, the doctrinal obstacles to considering effects have historically been the same in both contexts. As a result, the Court's increased attention to effects in triggering free exercise scrutiny has required removing doctrinal obstacles that resemble those that stand in the path of increased attention to effects in triggering equal protection scrutiny. The Court's free exercise cases thus not only call for a meaningful role for effects in the equal protection context but also

284. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–15 (1978) (identifying diversity in higher education as one of the limited constitutionally permissible goals of race-based affirmative action policies in schools).

285. Culp, *supra* note 279, at 172 (arguing that "the moral claim of colorblindness is, in reality, an enforcement and defense of a status quo that leaves blacks and many other racial minorities at the bottom of the economic ladder"); Gotanda, *supra* note 277, at 2–3 ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.").

provide avenues for doing so that would not—on the Court's own terms—run afoul of existing equal protection precedent.

The extent to which the Court's recent free exercise cases offer a basis for overcoming doctrinal obstacles to considering effects in triggering equal protection scrutiny is best illustrated by the Court's modification of its purpose-based free exercise triggering rule. As detailed in Part I, the Court has, until recently, defined a lack of neutrality as requiring something akin to malice, or a desire to harm religious interests.[286] The Court did not develop this standard in the free exercise context but instead imported it from the equal protection context, indicating in *Lukumi* and confirming in *Boerne* that a lack of neutrality was equivalent to *Feeney*'s malice-based discriminatory purpose standard.[287] Thus, until recently, the same doctrinal hurdle appeared to preclude effects' ability to satisfy a purpose-based triggering rule in both the free exercise and equal protection contexts.

By avoiding this hurdle without explicitly overruling existing free exercise precedent, the Court's recent free exercise jurisprudence offers a model for avoiding the same hurdle in the equal protection context without requiring any explicit changes to equal protection law. Notwithstanding the apparent tension between a malice-based neutrality standard and a neutrality standard that forbids devaluing protected interests, the Court has insisted that its new rule flows from past precedent, particularly *Lukumi*.[288] Given that *Lukumi* incorporated *Feeney*'s discriminatory purpose standard (as *Boerne* confirmed that it did),[289] the recognized link between *Lukumi* and *Feeney* is tantamount to acknowledging that the Court's new free exercise triggering rule likewise flows from—or is at least consistent with—*Feeney* and other equal protection precedent. This inference is reinforced by *Masterpiece*, which explicitly cited equal protection precedent as a source of its new neutrality rule.[290] If, in other words,

286. *See supra* Part I.D.

287. *Id.*

288. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (citing to *Lukumi* as the source of its expanded neutrality standard); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam) (same); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (same); *Stormans*, 136 S. Ct. 2433, 2437–38 (2016) (Alito, J., dissenting) (same).

289. *See supra* notes 124–128 and accompanying text.

290. *Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative

the Court's new neutrality rule is consistent with case law setting out a malice-based purpose standard in the free exercise context, a similar rule is consistent with case law setting out the same malice-based purpose standard in the equal protection context. Accordingly, the Court's new free exercise cases reveal that the primary obstacle to adopting a "devaluing" definition of discriminatory purpose in the equal protection context is in fact no obstacle at all.

The Court's expansion of its standalone effects-based free exercise triggering rule—the general applicability rule—has similarly cleared the doctrinal path to an expansion of its effects-based equal protection triggering rule—the covert classification rule. As explained in Part I, the Court's development of its effects-based triggering rules in the free exercise and equal protection contexts followed a remarkably similar path. *Davis* and *Smith* turned to a purpose-only triggering rule that suggested that only a very narrow standalone effects-based triggering rule existed, and *Feeney* and *Lukumi* confirmed this limitation obtained in both contexts.[291] Specifically, language from those cases indicated that the "covert classification" and "general applicability" rules could be satisfied only where there was an exclusive or nearly exclusive effect on a protected class, and *Seattle* and *Boerne* confirmed this point.[292] Accordingly, the same doctrinal obstacle appeared to stand in the way of the Court's expansion of both its free exercise and equal protection effects-based triggering rules.

The Court has avoided this obstacle in the free exercise context in a manner that should permit a similar doctrinal move in the equal protection context, despite prior precedent that might appear to the contrary. As previously explained, the Court expanded the general applicability rule by concluding that a law does not comply with it simply because it "treats some comparable secular businesses or other activities as poorly as or even less favorably than" religious interests.[293] A law may lack general applicability, that is, even if it does not exclusively affect religious interests.[294] Despite the tension between this

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or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977)))).

291. *See supra* notes 100–111, 118–122 and accompanying text.

292. *See supra* notes 100–111, 118–122 and accompanying text.

293. *Tandon*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

294. *Id.*

statement and *Lukumi*'s suggestion that a law lacks general applicability where it applies "*only* against conduct motivated by religious belief,"[295] the Court has cited *Lukumi* as support for this broadened triggering rule.[296]

In doing so, the Court appears to be following the lead of religious liberty scholars who have characterized *Lukumi* as setting the floor, rather than the ceiling, of the general applicability rule. According to these scholars, the extreme facts of *Lukumi* led the Court to state the general applicability rule in more stringent terms than it meant.[297] In other words, while the Court held that the exclusive effect in *Lukumi* was sufficient to demonstrate a lack of general applicability, it did not hold that an exclusive effect was necessary in other cases.[298] *Lukumi*'s narrow articulation of the general applicability rule was thus, the argument goes, fact-bound and should not be read to preclude a broader standard going forward.[299]

This precise analytical move would permit a broad effects-based triggering rule to fit comfortably within existing equal protection precedent. Like *Lukumi*, *Feeney* arguably suggested that a near-exclusive effect on a protected group was necessary to satisfy its effects-based triggering rule. As with *Lukumi*, however, it is possible to read this definition as limited to the facts of that case. In *Feeney*, the Court did not hold that an exclusive effect was necessary to demonstrate a covert classification but rather held that "[t]oo many men" were affected by the veterans' preference at issue to do so.[300] Accordingly, it

295. *Lukumi*, 508 U.S. at 545 (emphasis added).

296. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (citing to *Lukumi* as the source of its general applicability rule); *Tandon*, 141 S. Ct. at 1296 (citing to a concurrence in Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring), which itself relied on *Lukumi*, to support its general applicability rule); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting) (citing *Lukumi* as a source of its neutrality standard).

297. *See, e.g.*, Laycock & Collis, *supra* note 126, at 5–6. These scholars primarily rely for this conclusion on the Court's statement in *Lukumi* that it did not need to "define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 543. While this quote supports the proposition that *Lukumi* did not set the ceiling of the general applicability rule, as explained in Part I, this inference is fundamentally undermined by *Boerne*, which indicated that the general applicability rule was as narrow as *Lukumi*'s statement of it suggested. *See supra* notes 124–128 and accompanying text.

298. Laycock & Collis, *supra* note 126, at 5–6.

299. *Id.*

300. *Feeney*, 442 U.S. 256, 275 (1979).

is possible to characterize *Feeney* as merely marking the outer limit of the "covert classification" rule. While the veterans' preference affected too many men to qualify as a covert classification, that is, a more pronounced disparate effect on women (or other protected individuals) could still raise a constitutional concern. When *Feeney* is viewed in this light, an effect on an unprotected class that is less severe than that imposed by the veterans' preference should not preclude a finding of a covert classification. This would allow many laws to qualify as covert classifications given that the veterans' preference affected nearly half of the men working in the Massachusetts civil service, an effect the Court characterized as "substantial[]."[301] Indeed, *Lukumi* similarly held that laws applying to "substantial nonreligious conduct" are generally applicable, suggesting that *Feeney* is just as flexible as *Lukumi* on the question of how much impact on the unprotected class is too much to satisfy its standalone effects-based triggering rule.[302]

The Court's free exercise cases also provide a path for overcoming subsequent equal protection case law that arguably precludes this interpretation of *Feeney*, such as *Seattle*, which suggested that an exclusive impact was needed to satisfy the covert classification rule. As detailed in Part I, *Boerne* similarly seemed to foreclose reading *Lukumi* to allow a broad general applicability rule by clarifying that effects alone should rarely trigger heightened free exercise scrutiny.[303] Yet, the Court's recent free exercise jurisprudence expanding the general applicability rule did not mention *Boerne* at all, let alone overrule it explicitly.[304] This provides reason to believe that the Court's retrenchment of effects-based triggering rules in *Boerne* and *Seattle* was not so profound as to prevent the Court from adopting a broader covert classification rule without explicitly revisiting analogous equal protection case law. Put simply, if *Seattle*- and *Boerne*-era constructions of the effects-based triggering rules articulated in *Feeney* and *Lukumi* do not pose an obstacle to a broader application in the free exercise context, they likewise are no longer a barrier in the equal protection context.

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301. *Id.*; *see also id.* at 270 (noting that only 54 percent of men working in the Massachusetts civil service were veterans).

302. *Lukumi*, 508 U.S. at 539–40.

303. City of Boerne v. Flores, 521 U.S. 507, 529, 534–35 (1997) (explaining that laws that were "not . . . motivated by religious bigotry" are not "likely to be unconstitutional" under the Free Exercise Clause, thereby implying that laws not evincing a discriminatory purpose do not often implicate the Free Exercise Clause).

304. *See supra* Part II.

In sum, the doctrinal case for allowing a law's effects to play a meaningful role in triggering heightened scrutiny is, at least on the Court's own terms, as strong in the equal protection context as in the free exercise context. Although some doctrinal obstacles appear to complicate considering effects under the Equal Protection Clause, the interrelated development of the Court's free exercise and equal protection triggering rules means that similar obstacles appeared to complicate considering effects under the Free Exercise Clause. The mechanisms that the Court has employed to overcome those obstacles in the religion context should thus operate effectively in race and sex discrimination contexts.

This is not to say that effects must play precisely the same role in triggering in the equal protection context as in the free exercise context. There may be reasons that the precise triggering rules the Court has fashioned in the free exercise context are inappropriate for the equal protection context. Such reasons, however, would not undermine the proposition that attention to effects per se is both possible and necessary to adequately enforce equal protection rights. They would instead suggest that an alternative effects-based equal protection triggering rule is appropriate. As this Article's summary of scholarship advocating a devaluation theory of equal protection demonstrates, scholars have proposed modifications to both the Court's purpose- and standalone effects-based equal protection triggering rules that would permit a meaningful role for effects and would better ensure protection against devaluation of the interests of certain race- and sex-based groups.[305] While identifying the best such triggering rule is beyond the scope of this Article, this wealth of scholarship suggests that a viable equal protection triggering rule both exists and could comfortably fit into existing equal protection doctrinal hooks.

*C. The Post-*Smith *Case*

While recent free exercise law has made a strong case for allowing effects to play a meaningful role in triggering equal protection scrutiny, one might object that this case is likely to be fleeting. This is because there is a good chance that the Court will soon overhaul its free exercise jurisprudence by overruling *Smith*. While the Court's most

305. *See supra* notes 232–235 and accompanying text.

recent free exercise cases have at least nominally applied *Smith*, five Justices in *Fulton* either expressly committed to[306] or strongly signaled their inclination to[307] overrule *Smith*. This Section demonstrates that the case for allowing effects to play a meaningful role in triggering equal protection scrutiny would be durable even without *Smith*. This is because, as discussed below, a decision overruling *Smith* is (1) likely to only diminish the prudential concerns that animated its adoption of narrow triggering rules; (2) unlikely to reject formal equality as a value of paramount constitutional import that forbids devaluation-based decisions; and (3) unlikely to withdraw the Court's endorsement of doctrinal innovations that permit liberalized consideration of effects. Those principles are the foundation of the case for expanding triggering rules in the equal protection context and would survive the Court's formal abandonment of *Smith*.

First, a decision overruling *Smith* is likely to only further undermine the existing theoretical justification for inattention to effects in the equal protection context. This point is illustrated by Justice Alito's concurrence in *Fulton*, which would have overturned *Smith* outright. That opinion explained that overruling *Smith* is warranted in large part because triggering rules should be guided by "the ordinary meaning of the constitutional text," not structural and prudential concerns about "cour[ting] anarchy."[308] This same reasoning, if adopted by the full Court, would suggest that *Davis*, too, was wrong to rely on the latter concerns in developing its triggering rules. A decision overruling *Smith*, in other words, is likely to fundamentally reject the theory of triggering that underlay both *Smith* and *Davis*, providing even more reason to revisit equal protection triggering rules.

Second, a decision overruling *Smith* is unlikely to abrogate the Court's endorsement of a theory of equality that supports consideration of effects in the equal protection context. While some Justices have expressed skepticism of the equality approach to free exercise set forth in *Smith*, there is no indication that they are prepared to jettison the Free Exercise Clause's equality protections entirely. Indeed, the rule that the Free Exercise Clause guarantees at least

306. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring).

307. *Id.* at 1882 (Barrett, J., concurring).

308. *Id.* at 1907 (Alito, J., concurring) (alteration omitted) (quoting Emp. Div. v. Smith, 494 U.S. 872, 888 (1990)).

formal equality is more robust than ever before.[309] There is, moreover, good reason to believe that the Court will continue to recognize protection from devaluation as part of such formal equality protections. As explained above in Part III.A, both the Court and religious liberty scholars have argued that protection from devaluation forms part of formal religious equality.[310] They have done so not merely to comply with *Smith* but also because protection from devaluation is a logical extension of the rule against religion-based decisionmaking, and a particularly important one in light of strengthening antidiscrimination norms.[311] This may explain why a supermajority of the Justices in *Fulton*—even those who indicated they would overrule *Smith*—expressed continued support for the Court's new neutrality and general applicability rules, which are designed to defend against devaluation-based decisions.[312] Accordingly, a decision overruling *Smith* is more likely to supplement newly broadened free exercise triggering rules than to reject those rules on the ground that formal equality does not include protection from devaluation.

Third, and finally, a decision overruling *Smith* will not withdraw the Court's endorsement of doctrinal innovations that should permit

309. Indeed, the Court has invalidated numerous laws in recent terms on formal equality grounds. *See, e.g.*, Carson v. Makin, 142 S. Ct. 1987, 1997–98 (2022) (applying strict scrutiny to invalidate a Maine school funding law because it denied funding to certain sectarian schools "solely because they are religious" (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020))); *Espinoza*, 140 S. Ct. at 2254–57 (applying strict scrutiny to invalidate Montana's exclusion of religious schools from receiving state scholarship funds on the ground that the Free Exercise Clause "protects religious observers . . . against laws that impose special disabilities on the basis of religious status" (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017))); *Trinity Lutheran*, 137 S. Ct. at 2019–22 (applying strict scrutiny to invalidate a Missouri law excluding religious entities from receiving playground resurfacing grants on the ground that the Free Exercise Clause "subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status'" (quoting Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993))).

310. *See supra* notes 237–244 and accompanying text.

311. *See supra* notes 264–268 and accompanying text.

312. Chief Justice Roberts, along with Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, applied the broadened neutrality and general applicability rules without any objection. *Fulton*, 141 S. Ct. 1868, 1876–77 (2021). Justice Barrett, joined by Justice Kavanaugh, indicated that she would overrule *Smith*, but in a way that supplemented, rather than eliminated, the neutrality and general applicability rules. *Id.* at 1882 (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. . . . [I]t is difficult to see why the Free Exercise Clause . . . offers nothing *more than* protection from discrimination." (emphasis added)). While the three remaining Justices voiced skepticism of *Smith*'s triggering rules, they did so largely as part of a *stare decisis* workability analysis aimed to show that *Smith*'s triggering rules are not more workable than the pre-*Smith* triggering rules. *Id.* at 1917–23 (Alito, J., concurring).

meaningful consideration of effects in the equal protection context. As described above, the Court has embraced a series of creative doctrinal moves that permit considering effects without explicitly overruling *Smith* or other preexisting free exercise law. These include recognizing that a devaluation-based definition of discriminatory purpose is consistent with a malice-based purpose standard, limiting decisions setting forth a narrow definition of an effects-based triggering rule to their facts, and reading seemingly contrary case law flexibly to permit broad consideration of effects. Although a decision overruling *Smith* could hypothetically disclaim each of these doctrinal innovations, such a decision is unlikely. Issuing such a decision would require the Court to explicitly, and unnecessarily, impugn logic that all of its members—including those who favor revisiting *Smith*—have very recently embraced.[313] And without such a decision, these doctrinal moves remain viable precedent for permitting effects to play an expanded role in the equal protection context.

CONCLUSION: THE REALITY OF EFFECTING EQUAL PROTECTION

After decades of forestalling free exercise and equal protection challenges to facially neutral laws by treating purpose as the near-exclusive trigger for heightened scrutiny, the Court has revitalized such challenges under the Free Exercise Clause by permitting effects to play a dispositive role in triggering heightened scrutiny. The Court has predicated this development not on any substantive feature of free exercise jurisprudence but instead on theoretical and doctrinal justifications that, because of the deeply intertwined history of free exercise and equal protection triggering jurisprudence, apply with equal force to race and sex discrimination claims. Accordingly, the Court has expanded free exercise enforcement in a manner that not only permits modifying existing equal protection triggering rules but also compels the conclusion that those rules are inadequate to enforce equal protection rights. On the Court's own terms, the growing discrepancy between free exercise and equal protection triggering rules is both unjustified and unjustifiable.

313. All Justices but Justices Thomas, Alito, and Gorsuch explicitly endorsed the Court's newly expanded neutrality and general applicability rules, and thus the doctrinal maneuvers they require, in *Fulton*. *See supra* note 312. Justices Thomas, Alito, and Gorsuch separately endorsed these rules, and the doctrinal maneuvers they require, in various of the COVID-19 opinions. *See supra* notes 165–195 and accompanying text.

But if reconciliation of free exercise and equal protection law is warranted, how should the Court accomplish it? There are two options. The Court could, on the one hand, "level down" its free exercise triggering rules by reverting to prior doctrine and theory that forbade a meaningful role for effects in triggering free exercise scrutiny. On the other hand, the Court could "level up" its equal protection jurisprudence, affording effects the meaningful role in triggering that recent free exercise doctrine and theory support. For the reasons set out in Part III.A, the latter approach is better. Sound discrimination theory supports the conclusion that consideration of a law's effects is essential to adequately ensuring that the interests of certain religious, racial, and sex-based groups are not routinely discounted or ignored due to lawmakers' prejudice or indifference.[314]

The conclusion that leveling up equal protection doctrine is warranted, however, comes with two important caveats. First, a growing body of scholarship suggests that the Court's current application of its free exercise triggering rules is overinclusive and ensures scrutiny of many laws that are not the result of devaluation.[315] Some reform of free exercise triggering doctrine may thus be warranted to ensure scrutiny only of those laws likely to be based on devaluation. The Court might for example require plaintiffs to demonstrate that there is some special factor, such as the affected group's historical subordination or political powerlessness, that suggests that a law's effect is actually attributable to the ignorance or

314. *See supra* notes 211–217 and accompanying text.

315. *Tandon* offers an example. *Tandon*, 141 S. Ct. 1294, 1296 (2021) (per curiam). In that case, lawmakers had specifically provided for religious exemptions from the COVID-19 restrictions at issue. *Tandon* Emergency Application, *supra* note 187 (acknowledging that the regulations "allow[ed] indoor religious gatherings at 'houses of worship'"). While not dispositive, the existence of such exemptions would seem to suggest that lawmakers both attended to and valued the interests of religious groups in the course of their lawmaking. *See, e.g.*, Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty* 3 (Nw. Pub. L., Rsch. Paper No. 22-01, 2022), https://ssrn.com/abstract=4049209 [https://perma.cc/74QW-LPZP] (arguing that the new free exercise triggering rules, while possibly rooted in a sensible principle, are being applied to deem virtually any law affecting religious exercise presumptively unconstitutional); Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1113 (2022) (arguing that the Court's new approach to religious equality "not only triggers strict scrutiny in essentially every instance but also virtually guarantees victory for religious objectors").

indifference of lawmakers.[316] Second, if the Court "levels up" its equal protection triggering rules and leaves its free exercise rules unchanged, the Court should lower the level of scrutiny that applies in both the equal protection and free exercise contexts. This would help avoid the kind of uncontrolled invalidation of democratically enacted laws that *Smith* and *Davis* cautioned against.

To be sure, this proposal to couple liberalized triggering rules with greater judicial deference would require a shift in the Court's approach to adjudicating rights. It would move the Court closer to the proportionality style of judicial review employed by many foreign courts. Under this theory, courts, among other things, more readily recognize burdens on individual rights but also more readily recognize that these burdens may be justified.[317] Adopting this feature of proportionality would improve the Court's constitutional rights jurisprudence. As Professor Jamal Greene has shown, the Court's current approach to rights, which both strictly polices the boundaries of constitutional rights and strictly forbids their infringement, distorts our constitutional jurisprudence.[318] It shifts most of the pressure of constitutional adjudication to threshold questions of constitutional interpretation, such as triggering rules.[319] This encourages judges to resolve the normative questions that inevitably underlie constitutional adjudication by manipulating these threshold rules, rather than by forthrightly explaining their reasoning.[320] As noted below, the Court's selective contortion of doctrine to permit a meaningful role for effects in the free exercise but not the equal protection context represents precisely this kind of distortion.[321] Shifting to a style of review that expands triggering rules, but lowers the level of scrutiny, would help ameliorate this problem by requiring courts to both defer to other

316. *Cf.* Litman, *supra* note 14, at 60–63 (noting how present free exercise triggering rules fail to attend to some religious groups' significant political power, power that suggests that their interests are in fact unlikely to be devalued in the political process).

317. Jamal Greene, *Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 56–59 (2018) (explaining how proportionality review both recognizes a broader swath of constitutional interests warranting scrutiny, but also applies a lower level of scrutiny to laws implicating those interests).

318. *Id.* at 65–96.

319. *Id.* at 65.

320. *Id.*

321. *Id.*

government actors in more circumstances and to more transparently resolve these normative questions when they do not.[322]

Answering the question of how the Court should reconcile free exercise and equal protection law, however, misses a more fundamental question: whether the Court is likely to reconcile these doctrines at all. As numerous scholars have demonstrated, the Court has not been consistent in applying innovations in First Amendment law evenhandedly to historically subordinated religious, racial, or gender groups. In *Trump v. Hawaii*,[323] for example, the Court declined to even consider whether Muslims' religious equality rights were implicated by an executive order banning travel from predominantly Muslim countries.[324] And in *National Institute of Family & Life Advocates v. Becerra*,[325] the Court strained against its own logic to avoid concluding that a newly broad conception of free speech rights would protect the reproductive rights of women and gender minorities.[326] This patterned approach suggests that the equality and liberty principles present on the face of the Court's opinions may not offer the best explanation for expanded First Amendment jurisprudence. Instead, this jurisprudence may be better explained by an unarticulated normative preference for market libertarianism and the existing distributions of wealth and power it entrenches.[327] If such

322. *Id.* at 89–93 (explaining why transparency is a feature of proportionality).

323. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

324. *See generally id.* (holding that while "five of the seven nations . . . included in the Proclamation have Muslim-majority populations . . . that fact alone does not support an inference of religious hostility"). Professor Nelson Tebbe has persuasively argued that the travel ban at issue in this case "ought to have raised at least the question of whether [Muslim] adherents (and their religious interests) were devalued relative to others (and their reasons for traveling)," and that the Court's unwillingness consider this possibility may reflect both a libertarian bent and a preference for the claims of traditionally powerful religious groups. Tebbe, *Equal Value*, *supra* note 14, at 2464–69.

325. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

326. In that case, the Court insisted that regulations aimed to protect abortion seekers violated the free speech rights of pro-life pregnancy centers but insisted that its holding did not provide new free speech grounds to challenge abortion restriction. *Id.* at 2373. Professors Erwin Chemerinsky and Michele Goodwin persuasively show that this holding is doctrinally, theoretically, and logically inconsistent, and best explained by five Justices' hostility to abortion. Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 118–24 (2019); *cf.* Laura Portuondo, *Abortion Regulation as Compelled Speech*, 67 UCLA L. REV. 2, 18–38 (2020) (arguing that both the doctrine and theory underlying *NIFLA* suggest that it should also protect abortion rights).

327. *See, e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1457 (2015) (arguing that developments in free exercise law "reflect a tradition of market

a theory indeed explains recent free exercise law, there is little reason to believe that it would lead the Court to reform equal protection jurisprudence. Such reforms would disturb, rather than entrench, racial and sex-based hierarchies.

This may be so. And to the extent the Court is unwilling to reconcile free exercise and equal protection doctrine, this Article reinforces this understanding of First Amendment law. Moreover, it illustrates how one can adopt this view of the law without attributing malice or even intentional bias to the Court. As recent free exercise law has acknowledged, decisionmakers can impose value judgments unintentionally by unconsciously devaluing the interests of disfavored groups. The Court's willingness to embrace an expanded theory of equality in the free exercise context but not the equal protection context thus need not be intentional to be discriminatory. Instead, it may represent the very selective sympathy (to the claims of historically powerful groups) and indifference (to the claims of historically powerless groups) that the Court has condemned.[328]

While acknowledging that the Court may be unwilling to expand its equal protection doctrine in the short term, however, this Article also contributes to the long-term project of securing broader recognition for racial and sex equality rights. By illustrating how the principles and doctrine set out in First Amendment jurisprudence support such rights, it offers a way to capitalize on values that are—at least ostensibly—ascendant in our constitutional system. Even if the current Supreme Court is unwilling or unable to recognize that these values support expanded race and sex equality law, appealing to these values may offer a way to persuade lower court judges, lawmakers, and a public for whom these values are increasingly salient. And in the event the Court is more sympathetic to race and sex equality claims in the future, equal protection plaintiffs will benefit from analogizing their claims to those of religious litigants who have met with, and will

libertarianism, rather than religious liberty"); Tebbe, *Equal Value*, *supra* note 14, at 2405 (arguing that recent free exercise law "is being deployed to support a program of religious preferentialism and laissez-faire constitutionalism"); *see also* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1246–47 (2020) (arguing that contemporary free speech doctrine reflects an "anti-redistributive" understanding of liberty "that guarantees freedom from intentional government interference with an individual's autonomy, but . . . almost no protection whatsoever against private interference and constraint").

328. *See* Litman, *supra* note 14, at 67 (suggesting that the current Court selectively applies broader antidiscrimination protections in the free exercise context because "a Court that is represented mostly by members of one group—Christian conservatives, most of whom are white" is more likely to "perceive discrimination against that group" than other groups).

likely continue to meet with, uncommon success in courts. Understanding the growing discrepancy between free exercise and equal protection law, then, does not simply offer a basis to condemn this discrepancy. It may ultimately provide a mechanism for rectifying it.