

THE PRINCIPLE AND POLITICS OF EQUAL VALUE

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An unfamiliar equality principle is gaining prominence in constitutional discourse. Equal value presumptively prohibits government from regulating protected activities while exempting other activities to which the government's interest applies just as readily. Although the principle is being developed in the context of free exercise, it has implications for other guarantees in constitutional law. This Article offers two arguments. First, a version of equal value holds real attraction, not only within religious freedom law but also in areas such as freedom of expression, reproductive rights, and equal protection. Second, however, the rule is operating in a patterned manner, favoring traditional religions at a moment when their social status is facing contestation and extending to decisions concerning free exercise and free speech but not non-establishment, due process, or equal protection. That implementation promotes a problematic political program. If the account here is correct, then equal value promises not an antidote to excessive judicial deference, as some have hoped, but instead a controversial politics.

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INTRODUCTION

An unfamiliar equality rule has become prominent in constitutional discourse. Promoted by scholars and judges in the context of the free exercise of religion, it has implications for other provisions that guarantee evenhandedness toward conduct.

Here is the essence of *equal value*. Suppose a government regulates protected activities while exempting other activities.¹ If its interest applies evenly to the regulated and unregulated categories, then it presumptively has devalued protected practices—it has treated them as less worthwhile than the exempted activities. The government can only carry its burden by showing that its regulation of the protected conduct is necessary to further a compelling interest.

Cases arising in the context of the coronavirus pandemic have provided the most recent and vivid illustrations. During the crisis, religious organizations were subject to limitations on gatherings. If other entities

1. Although equal value only pertains to “protected” persons, there is an ambiguity about whether they are shielded only because of their activities or also by virtue of their identities. Interestingly, the central examples all seem to involve protection against discrimination with respect to conduct, rather than against discrimination on the basis of a vulnerable status as such. See *infra* text accompanying notes 70–76 (discrimination against Muslim practices), 213–230 (discrimination affecting press publication), 330–341 (discrimination affecting the right to terminate a pregnancy). For the full argument that equal value probably pertains to conduct, and not status independently, see *infra* note 253 and accompanying text.

were exempted from those same limitations, and if those “essential” operations presented equivalent health risks, then government had devalued the religious reasons for gathering, on this theory.

In *Tandon v. Newsom*, the Supreme Court relied on equal value.² California had limited private gatherings to three households and it had required social distancing, limited duration, and mask wearing.³ Those restrictions were challenged by a pastor and a congregant who wished to hold Bible study and worship services at private residences with members of more than three households.⁴ After both lower courts turned away requests for interim relief, the Supreme Court issued an emergency injunction.⁵ It held that regulations are presumptively unconstitutional “whenever they treat *any* comparable secular activity more favorably than religious exercise,” and it explained that comparability “must be judged against the asserted government interest that justifies the regulation at issue.”⁶ Because California had permitted hair salons, retail stores, movie theaters, and restaurants to include more than three households at a time, it faced a presumption of invalidity that it could not rebut.⁷ In reasoning this way, the *Tandon* Court applied what some are calling the “most favored nation” approach to religious discrimination.⁸

Several characteristics distinguish the new equality. First, it does not require any showing of discriminatory purpose, object, or intent. California’s coronavirus regulations, for instance, were neutral in their

2. 141 S. Ct. 1294, 1296 (2021) (per curiam).

3. *Tandon v. Newsom*, 992 F.3d 916, 917–18 (9th Cir. 2021).

4. *Id.* at 919.

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

6. *Id.*

7. *Id.* at 1297.

8. Arguably the Court applied the approach in other coronavirus decisions as well, though less explicitly. See *infra* section I.D (discussing those other decisions); see also *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting from the denial of application for injunctive relief) (embracing what scholars have called “something analogous to most-favored nation status” for religious organizations (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. Ct. Rev. 1, 49–50)).

Moreover, the judiciary is not alone—two states recently adopted versions of the rule through legislation. Act of March 29, 2021, ch. 192, sec. 1, § 12(a)(2), 2021 N.D. Sess. Laws (codified as amended at N.D. Cent. Code § 23-01-05(12)(d)(2) (2021)) (providing in relevant part that disease control orders may not “treat religious conduct more restrictively than any secular conduct of reasonably comparable risk, unless the government demonstrates through clear and convincing scientific evidence that a particular religious activity poses an extraordinary health risk”); An Act to Provide Protections for the Exercise of Religious Freedom, ch. 3, sec. 1, 2021 S.D. Sess. Laws (codified at S.D. Codified Laws § 1-1A-4 (2021)) (“[N]o state agency . . . may . . . [t]reat religious conduct more restrictively than any secular conduct of reasonably comparable risk . . .”).

purpose and still presumptively invalid as to private religious gatherings.⁹ Second, it does not require a facial classification. Mere inclusion of religious actors in a regulation, while comparable nonreligious actors are not regulated, may be sufficient to trigger the presumption of invalidity.¹⁰ California's regulation applied to all private gatherings, regardless of religiosity, and it was enforced evenhandedly, for example.¹¹ Therefore, the approach differs from the constitutional rule for racial equality, which works only against classifications.¹²

Finally, equal value may differ from a guarantee against disparate impact, though the difference is debatable. On the one hand, equal value appears to be less protective insofar as it only applies in situations where at least one category is exempted. So religious actors claiming a violation of equal value cannot prevail against a uniform limitation, even if they are disproportionately burdened in some sense.¹³ On the other hand, equal value seems more protective than disparate impact doctrine in certain

9. *Tandon*, 992 F.3d at 922 (noting that the religious challengers “have not asserted that the object of the gatherings restrictions is to restrict religious practices, and there is no indication that the restrictions were adopted for discriminatory purposes instead of addressing public health concerns”).

10. See, e.g., *Roman Cath. Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (“[O]nce a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class.”).

11. *Tandon*, 992 F.3d at 922 (noting that “the gatherings restrictions apply equally to private religious and private secular gatherings” and that “[t]here is no indication that the State is applying the restrictions to in-home private religious gatherings any differently than to in-home private secular gatherings”); see also *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021) (mem.) (granting injunctive relief without mentioning the absence of a religious classification). Although an earlier decision did involve a facial distinction, that turned out to be inessential. *Roman Cath. Diocese*, 141 S. Ct. at 80 (Sotomayor, J., dissenting) (“New York treats houses of worship far more favorably than their secular comparators.”).

12. Suspect classifications may be facial or purposive—but in the absence of either type, a law is presumptively constitutional. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that equal protection does not protect against policies with no discriminatory object or facial classification); cf. Brief of Respondent Flores at 10, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074), 1997 WL 10293 (explaining, with Douglas Laycock as Counsel of Record, that “[a] law may discriminate against religion without a finding of bad motive even if the law does not mention religion, if, for example, the law provides exemptions for secular hardship and no exemptions for religious exercise”). Of course, a suspect facial classification triggers a presumption of invalidity under equal protection even absent a showing of invidious motive. See, e.g., *Pers. Adm’r v. Feeney*, 442 U.S. 256, 272 (1979) (“A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.”). So the mere fact that a showing of impermissible purpose is not required does not distinguish equal value from the main equal protection rule. That an equal value claim does not require any classification at all, whether facial or purposive, does distinguish the rule. For more on equal value’s distinctiveness as compared to equal protection, see *infra* sections II.A, II.C.

13. Notice, however, that proponents may apply equal value wherever a regulation does not extend to comparable activities, even if the failure to regulate is a limitation in scope rather than an “exemption” as such. The articulated rule in *Tandon* allows this interpretation. See *Tandon*, 992 F.3d at 922–23.

ways. Chiefly, religious actors may succeed regardless of whether they are disproportionately affected. In the coronavirus context, for instance, congregations might be closed in precise proportion to nonreligious organizations, yet they would still win a presumption of invalidity if some of the latter were allowed to open in the face of similar safety risks. For example, some lower courts ruled in favor of religious schools that were shuttered during the pandemic, even though secular schools likewise were closed, on the ground that other organizations remained open.¹⁴ That is not straightforward disparate impact analysis.¹⁵ It is worth noting, however, that the two approaches might overlap significantly and that little turns on whether equal value is completely distinct from disparate impact protection.

Regardless of its distinctiveness, should equal value be embraced? It does capture an intuition that the government can wrongly burden protected actors through disregard or devaluing. An ideal constitutional system might well guarantee against that kind of disdain of protected conduct, at least presumptively. And unelected judges plausibly have the capacity and competence to administer such a rule. Elected representatives may not be structurally incentivized to safeguard powerless groups, and they may fall into carelessness when operating under the pressure of exigency. Courts therefore might be necessary.¹⁶

Consequently, some prominent liberal theorists are attracted to something like the principle of equal value.¹⁷ For them, equality has been too weakly protected in too many constitutional contexts. The new approach also could help to correct the Supreme Court's moments of excessive deference to elected officials during emergencies.¹⁸ *Korematsu* stands as the

14. See *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 482 (6th Cir. 2020) (ruling for religious schools); *Danville Christian Acad., Inc. v. Beshear*, 503 F. Supp. 3d 516, 531 (E.D. Ky. 2020) (ruling for religious schools), stayed pending appeal sub nom. *Kentucky v. Beshear*, 981 F.3d 505, 511 (6th Cir. 2020), stay denied sub nom. *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 528 (2020).

15. It is possible to measure disparate impact in more than one way. If schools were disproportionately religious compared to retailers, or compared to organizations even more generally, then closing all schools could have an outsized impact on religious actors. But the key point here is that even if schools were proportionately religious, so that there was no disparate impact, equal value could still apply.

16. That is not to say that legislatures cannot be attentive to religious minorities, or that courts are necessarily more protective. See *infra* note 268 and accompanying text.

17. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 126 (2007) [hereinafter *Eisgruber & Sager, Religious Freedom*] (defending a theory of "equal regard" with important similarities to equal value); Cass R. Sunstein, *Our Anti-Korematsu* (Harvard Pub. L. Working Paper No. 21-21, 2020), <https://ssrn.com/abstract=3756853> [<https://perma.cc/VH3X-S62W>] [hereinafter *Sunstein, Our Anti-Korematsu*].

18. Sunstein, *Our Anti-Korematsu*, *supra* note 17, at 11 ("The claim here is that insofar as the *Roman Catholic Diocese* Court was willing to vindicate antidiscrimination principles under exceedingly unusual circumstances posing severe risks, and to do so with genuinely strict scrutiny, it reflected an approach that is directly antithetical to that in *Korematsu*.").

classic example of a failure to check the government in the face of racial discrimination, and—in a disturbing juxtaposition—the travel ban decision provides the most consequential recent illustration of deference to the government despite undoubted religious hostility.¹⁹

Equal value holds another attraction: It helps to safeguard liberty of conscience, which is underprotected by current constitutional law. In *Employment Division v. Smith*, the Court announced that the Free Exercise Clause would no longer protect against laws that were “neutral” and “generally applicable,” however much they might burden religious observance incidentally.²⁰ Today, that is the main rule for free exercise. Like many on the right and some on the left, I believe that this *Smith* rule is regrettable because it fails to shield those with minority beliefs on matters of conscience who are vulnerable to being overlooked by powerful political actors.²¹ A companion piece evaluates a replacement.²² Here, I only note that a requirement of equal value would provide ersatz liberty protection, if only in situations where a comparable actor happened to fall outside the regulation at issue.²³

So if there is a problem with equal value, it is not simply that free exercise doctrine is being overruled implicitly.²⁴ Weakening *Smith* is not necessarily unwelcome, and it can be done in the service of a principle that is defensible. Nor is the difficulty just that the new rule itself gives too little

19. See *infra* section V.A (citing the cases). The juxtaposition is disturbing because the Court chose the travel ban case to formally repudiate *Korematsu*.

20. 494 U.S. 872, 878–79 (1990).

21. Nelson Tebbe, Free Exercise and the Problem of Symmetry, 56 *Hastings L.J.* 699, 709–10 (2005) [hereinafter Tebbe, Free Exercise] (endorsing the argument that *Smith* underprotects religious minorities).

22. Nelson Tebbe, The Principle and Politics of Liberty of Conscience, 135 *Harv. L. Rev.* 267 (2021) [hereinafter Tebbe, Liberty of Conscience].

23. Cf. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring in the judgment) (suggesting that equal value addresses the “symptoms” but not the “underlying ailment”). For a contention that equal value insufficiently protects religious freedom because it only engages laws that happen to exempt some unprotected actor, see the first argument presented *infra* section III.C.

24. Insincerity is a legitimate concern. See James M. Oleske, Jr., Free Exercise (Dis)Honesty, 2019 *Wis. L. Rev.* 689, 693–94 [hereinafter Oleske, Free Exercise (Dis)Honesty] (arguing that manipulating the general applicability requirement to effectively overrule *Smith* is insincere); cf. Michael C. Dorf, Under-Reacting to SCOTUS Theocracy, Dorf on L. (Dec. 2, 2020), <http://www.dorfonlaw.org/2020/12/under-reacting-to-scotus-theocracy.html> [<https://perma.cc/9EXD-RNAL>] (“What’s really going on is that the *Roman Catholic Diocese* majority are disregarding the *Smith* rule while pretending to follow it If a court can use the narrow tailoring inquiry itself to ascertain whether a law discriminates against religion, then the court has effectively overruled *Smith*.”).

deference to elected officials who may be acting to save lives under emergency conditions such as a pandemic or a threat to national security. Judges can also err by deferring too much.²⁵

What does deserve close examination is the possibility that equal value is being administered in the service of a problematic political program. Administrators of the rule must make two key choices: whether to apply the new equality and how to apply it. Both require the exercise of judgment, but the latter entails a particularly contestable baseline determination. Are the actors who are exempt from the regulation comparable to the religious actors who are bringing the claim, with respect to the government's interest? During the pandemic, for instance, state officials have maintained that businesses like grocery stores and gymnasiums are less dangerous to public health than congregations or schools because they are not designed as gathering places.²⁶ How are judges evaluating those determinations?

To gain perspective on that question, it is helpful to step back and consider whether equal value is being deployed in a patterned way across cases and contexts. When that is done, a troubling hypothesis emerges, namely that the new equality is being applied, and comparators are being found, in cases concerning religious groups disproportionately—and not all religious groups in any consistent way. In the travel ban decision,²⁷ for example, the Court failed to consider equal value. And that was telling because that situation was strikingly similar to the coronavirus context. The Court confronted a religious freedom challenge to an executive action concerning a threat to public safety in the travel ban case. It could have asked why the regulation did not apply evenly—why, for instance, the government exempted certain individuals in banned countries.²⁸ Yet the Court did not raise the question of whether religious travelers were being devalued.²⁹ That omission cannot be explained by deference to executive expertise in a situation of exigency, for judicial humility might reasonably be thought to pertain to executive efforts to manage a global health crisis.

25. See Sunstein, *Our Anti-Korematsu*, supra note 17, at 11 (embracing *Roman Catholic Diocese* as a corrective to the Court's excessive deference in *Korematsu*); see also infra section V.A.

26. See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting) (noting “the conditions medical experts tell us facilitate the spread of COVID-19” and arguing that, “[u]nlike religious services . . . , bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time” (citations omitted)).

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

28. For a detailed analysis, see infra section V.A.

29. The argument was put before the Court by a prominent religious freedom organization, if only in the abstract and not applied to the facts. Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Neither Party at 22–23, *Trump v. Hawaii*, 138 S. Ct. 377 (2018) (No. 16-1540), 2017 WL 3588206 [hereinafter *Becket Fund*].

Nor has the requirement of equal value been applied in the Court's decisions concerning racial equality under the Equal Protection Clause.³⁰ And that is unlikely to change. Given its past decisions, the Supreme Court cannot be expected to temper, for example, its rejection of disparate impact liability under the Constitution by asking whether the important activities of racial groups have been evenly regulated.

Even within religious freedom law, the approach is asymmetric.³¹ Equal value may have no exact conceptual analogue in the Establishment Clause, as explained below,³² but to the degree that it does suggest a non-establishment approach, none is forthcoming—no Justice is proposing a constitutional presumption against laws that place religious groups in exempted categories while restricting comparable actors.³³ On the other hand, equal value will be welcomed into freedom of expression law. Something like it has historically been applied in press cases and it can be expected to further influence speech rules on content discrimination.³⁴ Lopsidedness like that does little to dispel the impression of partiality. Moreover, the disparity is a social and political circumstance, not a legal or moral inevitability.³⁵

This Article concludes that although equal value holds real attraction as a matter of ideal theory, its implementation under nonideal conditions

30. See *infra* section V.C.

31. See *infra* section IV.A.

32. See *infra* section IV.A; see also *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting from the denial of application for injunctive relief) (“[T]he Court’s precedents make clear that the legislature *may* place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category without causing an Establishment Clause problem.”).

33. Justice Kavanaugh made the asymmetry explicit. First, he discussed laws “that supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category,” and he concluded that governments may place religious organizations in the favored category without raising Establishment Clause concerns. *Calvary Chapel*, 140 S. Ct. at 2611–12. In the next paragraph, he acknowledged that the free exercise rule is stronger:

The converse free-exercise or equal-treatment question is whether the legislature is *required* to place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category. The Court’s free-exercise and equal-treatment precedents also supply an answer to that question: Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category.

Id. at 2612.

34. See *infra* section IV.B.

35. Moreover, the Court’s use of the “shadow docket” to foreground equal value contributes to the impression that its members are motivated to reach particular results. See Stephen I. Vladeck, Opinion, The Supreme Court Is Making New Law in the Shadows, N.Y. Times (Apr. 15, 2021), <https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html> (on file with the *Columbia Law Review*) (noting that *Tandon* “came on the court’s ‘shadow docket,’ and in a context in which the Supreme Court’s own rules supposedly limit relief to cases in which the law is ‘indisputably clear’”).

is another matter. Now is the time to consider the concept carefully. Equal value must be understood and evaluated, not only within religious freedom but across equality doctrines, and not only in principle but also in its practical implementation. Doing that suggests a disquieting possibility—that it is being deployed to support a program of religious preferentialism and laissez-faire constitutionalism that extends beyond free exercise and nonestablishment to free speech and equal protection. Religious groups, including the largest denominations, are winning cases, and private speakers are being protected against public regulation, while sexual and racial communities are left undefended by constitutional law against a naturalized stratification of social power.³⁶ In fact, the existing distribution itself is constitutionalized and thus insulated from democratization efforts. Equality law is being strained across doctrines to rationalize these results.

Part I accounts for the origins of the new equality. Its judicial visibility can be traced to an opinion by Justice Samuel Alito, written while he was sitting on the Third Circuit.³⁷ Among scholars, versions of equal value were proposed earlier in the 1990s, both by egalitarians³⁸ and by others.³⁹ Their arguments were taken up in the coronavirus cases and in dicta in *Fulton v. City of Philadelphia*.⁴⁰

Part II defends the view that the new equality differs from other forms of antidiscrimination found in existing constitutional law. Not only is it not reducible to the main free exercise rule, but it also diverges from the leading alternative. Part II also distinguishes disparate impact protection for nonwhite people, albeit with caveats. It ends by identifying two sorts of cases that could be seen as precursors, namely certain decisions in the fundamental interest branch of equal protection law and a line of speech opinions concerning press freedoms.⁴¹

Part III explores two justifications for the rule of equal value. First, the model polices a form of unfairness. Not every situation where government regulates protected actors while exempting comparable others is unfair, but the heuristic does capture many laws that subordinate members of the political community or frustrate the exercise of basic liberties. Second,

36. See *infra* section IV.D (on reproductive freedom for women), sections IV.C, V.C (on racial justice).

37. See *infra* section I.B (discussing Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999)).

38. See, e.g., Eisgruber & Sager, Religious Freedom, *supra* note 17, at 90–91 (embracing the *Fraternal Order* ruling as invalidating a failure of “equal regard”).

39. Compare Douglas Laycock & Steven T. Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 21–22 (2016) (embracing *Fraternal Order*), with Douglas Laycock, The Broader Implications of *Masterpiece Cakeshop*, 2019 BYU L. Rev. 167, 182–83 (arguing that the Colorado baker was devalued because the state had crafted “an *implicit* secular exception” from its public accommodations law).

40. 141 S. Ct. 1868, 1877 (2021) (“A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.”).

41. See *infra* sections II.D, II.E.

equal value provides vicarious political protection for powerless groups. You could think of this second point as an argument from positive political theory or constitutional political economy. Part III concludes by considering critiques of the principle, some of which are persuasive.

Part IV suggests ways in which the approach could improve antidiscrimination doctrines in other areas of constitutional law. These include the rule against favoring religious activities under the Establishment Clause, the prohibition of content discrimination under the Speech Clause, the protection for conduct closely associated with racial identity, and the due process right to reproductive freedom.⁴²

Part V turns to equal value's actual administration, which has a perceptible shape. First, it has been deployed in some constitutional domains and not others. Cases concerning free exercise and freedom of speech are growth areas for the new equality, whereas those concerning nonestablishment and racial justice are not. Second, where equal value is applied, it requires comparators to be identified. The way that has been done in the *Tandon* line of cases contributes to the impression that the rule has been administered selectively. Inferring from such outcomes, the Part hypothesizes that the Roberts Court is pursuing a combination of preferentialism in religion cases and constitutionalization of existing power distributions in free speech and equal protection. And it is doing so at a moment in history when traditional religious actors are facing status contestation.

Part V closes by drawing out implications for judicial review.⁴³ Although the Court's willingness to enforce constitutional rights during the coronavirus crisis has been received as a welcome corrective to its past deference to executive action,⁴⁴ we might learn something additional by comparing the coronavirus cases to the Court's decisions during the early decades of the twentieth century. On one understanding of that period, the Court engaged in baseline manipulation in order to naturalize the existing distribution of wealth and entitlements and to impose a particular economic program on democratic politics. Today, too, the determinative factor may not be substantive law, nor the institutional design of courts, but rather the development and deployment of a politics that should then be evaluated on its own terms.

A brief conclusion acknowledges that similar pressures could affect any ideal approach to free exercise, if not in the same way.⁴⁵ Still, it is

42. For reasons of readability and manageability, this Article otherwise puts to one side discrimination on the basis of sex, gender, and sexual orientation. It also brackets the question of whether equal value applies to funding programs.

43. See *infra* section V.E.

44. See *supra* note 18.

45. See Tebbe, *Liberty of Conscience*, *supra* note 22, at 296–319; cf. Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party at 1, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 3078491 [hereinafter Volokh, Brief Amicus Curiae] (“[O]verruling *Smith* would revive all the flaws of a broad substantive due process regime.”).

imperative to identify the particular interaction of political power and legal discourse here and now, so that we can understand what equal value is likely to entail under existing historical conditions.

I. ORIGINS

Equal value has a history that is longer and more diverse, politically and intellectually, than most people realize. Especially those who have become aware of the concept through the coronavirus cases may not appreciate its complex background. This Part accounts for its origins, both in case law and in scholarly work, showing how it has appealed in various versions to people with varied concerns and commitments.

A. Prehistory

Equal value first appeared in free exercise discourse after *Smith* came down in 1990.⁴⁶ Previously, the Court had applied strict scrutiny to laws that imposed substantial burdens on observance.⁴⁷ It had applied that rule in numerous cases over three decades,⁴⁸ until it reversed course in *Smith* and held that free exercise claims do not trigger a presumption of unconstitutionality where they challenge a law that is “neutral” and “generally applicable” as to religion.⁴⁹ With few exceptions, such laws now would be pro tanto constitutional.⁵⁰

46. *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

47. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

48. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983); *United States v. Lee*, 455 U.S. 252, 257–58 (1982); *McDaniel v. Paty*, 435 U.S. 618, 627–28, 628 n.8 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

49. *Smith*, 494 U.S. at 878–79.

50. Justice Antonin Scalia carved out exceptions from the main rule, such as that strict scrutiny would continue to apply to government programs of individualized assessments that afforded relief to secular actors but not religious ones. *Id.* at 884. No such system of case-by-case review need be in place for the new equality rule to be pertinent. Thus, it is appropriate to set this exception aside.

Justice Scalia also created a “hybrid rights” exception for laws that burden another right in addition to free exercise. *Id.* at 881–82. That doctrine has been strenuously criticized and has been rendered all but moribund. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment); Oleske, *Free Exercise (Dis)Honesty*, supra note 24, at 725 (noting that the hybrid rights doctrine has drawn “widespread scorn” and citing sources). That said, the hybrid rights exception is still sometimes applied. See, e.g., *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019) (finding that a religious wedding videographer can invoke the hybridity exception because the claim implicates both freedom of expression and free exercise). Justice Neil Gorsuch also mentioned it in one of the coronavirus cases. See *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting) (invoking the hybrid rights doctrine in a challenge to a coronavirus closing order brought by parents of children in religious schools, and suggesting that both free exercise and the right of parents to direct their children’s education were involved, but ultimately resting his dissent on other grounds).

Three years later, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court confirmed that, where government *does* act with the object or purpose of targeting religion, it must show that its action is necessary to pursue a compelling interest.⁵¹ In that case, municipal ordinances prohibited animal sacrifice of the sort that was practiced by a Santeria church located in the city.⁵² Though the ordinances did not explicitly target ritual sacrifice, they contained so many exemptions for nonritual animal killing that they were held to be antireligious “gerrymander[s].”⁵³ That the laws exempted animal slaughters that were “necessary” only revealed that the city considered religious reasons for killing animals to be unnecessary.⁵⁴ Notably for our story, the Court seemed to explain the latter point in terms of equal value: “[T]he ordinance’s test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons.”⁵⁵

Neutrality and general applicability were addressed separately in *Lukumi*.⁵⁶ Regarding neutrality, the Court said simply that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”⁵⁷ Writing for the Court on this point, Justice Kennedy acknowledged the “many ways of demonstrating that the object or purpose of the law is the suppression of religion.”⁵⁸ He examined the text of the ordinances and their effect.⁵⁹

51. 508 U.S. at 533.

52. *Id.* at 526–28 (describing the ordinances).

53. *Id.* at 535.

54. *Id.* at 537.

55. *Id.* at 537–38. Legislative history also revealed that the purpose of the regulations was to suppress ritual sacrifice by Santerians, but only two Justices, Anthony Kennedy and John Paul Stevens, thought that consideration was relevant. *Id.* at 540–41 (plurality opinion). Note, however, that seven Justices later held that the statements of members of a quasijudicial civil rights board were relevant to adjudication of antireligious animus in *Masterpiece Cakeshop*, with Justice Kennedy writing the majority opinion and citing the legislative history section of *Lukumi*. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018). Because Justices Ginsburg and Sotomayor undoubtedly agreed, this view arguably was unanimous in *Masterpiece Cakeshop*. See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 Harv. L. Rev. 133, 149 & n.100 (2018) (noticing this agreement).

56. “Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied.” *Lukumi*, 508 U.S. at 531. Justice Scalia went further. He signed onto these sections but also wrote separately to clarify that for him, the author of *Smith*, neutrality and general applicability typically ran together. Neutrality pertained to a statute’s terms, while general applicability went to its “design, construction, or enforcement.” *Id.* at 557 (Scalia, J., concurring in part and concurring in the judgment). With regard to Hialeah’s ordinances, it was “a matter of no consequence” whether they were held to be nonneutral or not generally applicable. *Id.* at 558.

57. *Id.* at 533.

58. *Id.*

59. *Id.* at 534–35.

However, the section on general applicability is the one generally invoked by proponents of equal value.⁶⁰ “Inequality results,” the Court explained, “when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.”⁶¹ In other words, “government, in pursuit of its legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief.”⁶² With respect to the City of Hialeah’s claimed purposes, namely protecting public health and preventing cruelty to animals, the ordinances were underinclusive because they failed to prohibit nonreligious behavior that implicated them in a similar way and to a similar degree. Moreover, “[t]he underinclusion [was] substantial, not inconsequential,” and it showed that the ordinances were “drafted with care” to forbid only religious sacrifices of animals.⁶³ Note, however, that the section on general applicability was arguably dicta: The Court first held that the ordinances were not neutral because they had a discriminatory object or purpose.⁶⁴

Whether equal value can be located in Supreme Court precedent is contested. Proponents usually maintain that it was established in *Smith* and *Lukumi* and therefore has the status of binding law.⁶⁵ Critics, by contrast,

60. See, e.g., Laycock & Collis, *supra* note 39, at 9–10 (specifying that even if the neutrality requirement turns on a law’s motive or object, the general applicability requirement provides independent support for the most favored nation approach); Oleske, *Free Exercise (Dis)Honesty*, *supra* note 24, at 728–29 (documenting that supporters commonly root the approach in the general applicability requirement).

61. *Lukumi*, 508 U.S. at 542–43.

62. *Id.* at 543.

63. *Id.*

64. Maintaining that *Lukumi* stands against some laws that have a neutral object or purpose becomes more difficult in light of later authority. In *City of Boerne v. Flores*, the Court held that the Religious Freedom and Restoration Act of 1993 (RFRA) was outside Congress’s enforcement power precisely because it would require exemptions from laws that did not discriminate on the basis of religion in their purpose. 521 U.S. 507, 531 (1997). What doomed RFRA as an enforcement provision was that “Congress’ concern was with the incidental burdens imposed [by state legislation], not the object or purpose of the legislation.” *Id.*; see also *id.* at 534 (“Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise.”); Oleske, *Free Exercise (Dis)Honesty*, *supra* note 24, at 730 (making a similar point about *Boerne*). It is possible, however, that the *Boerne* Court overwrote because it was simply not considering equal value. After all, RFRA was imposing a different rule, strict scrutiny of laws that substantially burden religious activity. And if the Court was thinking that narrowly, then equal value may well be compatible with free exercise precedent, or even supported by it, despite the broad language of *Boerne*. That said, Laycock’s brief in *Boerne* did put the Court on notice of the equal value reading of precedent, making it harder to maintain that its language was inadvertent. Brief of Respondent Flores, *supra* note 12, at 9–10 (“A law may discriminate against religion without a finding of bad motive even if the law does not mention religion, if, for example, the law provides exemptions for secular hardship and no exemptions for religious exercise.”).

65. See, e.g., Laycock & Collis, *supra* note 39, at 6–11 (grounding the rule in *Smith* and *Lukumi*).

argue that those cases stand for the proposition that government actions with the object or purpose of targeting religion are presumptively unconstitutional, while all other laws are not.⁶⁶ While I am drawn to an intermediate position, namely that *Smith* and *Lukumi* are compatible with a rule of equal value without requiring or foreclosing it, this Article neither supports nor relies on that interpretation.⁶⁷ The purpose of this Part is simply to trace the origins of the approach.

B. Fraternal Order

Regardless of whether *Smith* and *Lukumi* articulated a theory of equal value, the judicial decision that did the most to promote it, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, was written by Justice Alito and filed in 1999, when he was serving on the Third Circuit.⁶⁸ The Newark Police Department had prohibited officers from wearing beards as part of its uniform policy.⁶⁹ Two Muslim police officers sued for a free exercise exemption that would allow them to grow facial hair for religious reasons.⁷⁰ The court ruled for the Muslim officers, even though the beard policy was not aimed at religious observers. Alito relied on the fact that the department had exempted officers who could not shave for medical reasons.⁷¹ He reasoned that the existence of the medical exemption

66. See Oleske, Free Exercise (Dis)Honesty, *supra* note 24, at 728–30 (criticizing architects of the most favored nation approach for purporting to ground it in the general applicability requirement when the approach requires no showing of discriminatory object or purpose); see also Brief of Church–State Scholars as Amici Curiae in Support of Respondents at 7–12, *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (No. 20A138) (arguing that the “most favored nation” theory is inconsistent with *Smith*).

Before the coronavirus cases, and putting to one side *Lukumi* itself, the new equality had only been explicitly articulated in one free exercise opinion at the Supreme Court level, namely, Justice Alito’s opinion in *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2437 (2016) (Alito, J., dissenting from the denial of certiorari). Making the case for novelty, the Ninth Circuit recently wrote that the *Roman Catholic Diocese* case “arguably represented a seismic shift in Free Exercise law.” *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020).

67. *Smith* holds that a substantial burden alone does not shift the burden to the government. The main holding of the case is phrased negatively. *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’” (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment))). And *Lukumi* holds that a law that does have a discriminatory object or purpose is not neutral and therefore is presumptively invalid. See *Lukumi*, 508 U.S. at 542–46. Neither case mandates what happens when a law has no discriminatory object or purpose and is not generally applicable. See Laycock & Collis, *supra* note 39, at 5 (“There is an impression in some circles that *Smith* states the broad general rule, and *Lukumi* states a narrow exception. But *Smith* and *Lukumi* are both exceptional, with facts at opposite ends of the continuum.”).

68. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

69. *Id.* at 360.

70. *Id.* at 361.

71. *Id.* at 365.

rendered the policy not neutral and generally applicable because it revealed that the department valued some secular reasons for growing a beard more highly than religious reasons.⁷²

Puzzlingly, he also agreed with the officers that “the [d]epartment’s decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.”⁷³ The idea seemed to be that, although the original policy may have been neutral as to religion, the refusal to grant an exemption was not.⁷⁴ While *Fraternal Order* thus acknowledged an interpretation of free exercise law that turned on government intent, it also has been taken to establish a broader principle by proponents of the new equality. That reading is reasonable because Alito also wrote that the defect in the Newark policy was that it devalued religious reasons for wearing a beard when it determined that secular medical reasons warranted an exemption but sectarian reasons did not.⁷⁵

72. *Id.* at 366.

73. Alito initially drew on language from *Smith* and *Lukumi* that was specific to government systems of individualized assessment. *Id.* at 364–65. That language foreshadowed the Court’s holding in *Fulton*, which relied squarely on the *Smith* exception for systems of individualized assessment. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) (holding that the city’s policy “incorporates a system of individual exemptions”). Later in his opinion in *Fraternal Order*, however, Alito clarified that his reasoning was not limited to such systems. *Fraternal Ord.*, 170 F.3d at 365. And that made sense, because the Newark exemption for medical conditions was categorical, not individualized. Alito explained:

While the Supreme Court did speak in terms of “individualized exemptions” in *Smith* and *Lukumi*, it is clear from those decisions that the Court’s concern was the prospect of the government’s deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

Id.

74. An ambiguity surrounds the timing issue. It is sometimes unclear whether the devaluing is thought to happen at the outset, when the policy is crafted along with certain exemptions, or only later when a religious exemption is sought and denied. See *infra* note 252.

75. *Fraternal Ord.*, 170 F.3d at 366 (“[T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular . . . motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not . . . [, a position that] must survive heightened scrutiny.”).

In a subsequent decision, Alito applied the approach without referencing discriminatory intent or purpose. *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004). A Native American practitioner sought an exemption from a permit fee requirement for keeping wildlife in captivity; he wished to keep black bears on his property for religious reasons without complying with the rule. The panel held that the government’s exemptions for certain circuses and zoos undermined its interests in the same way and therefore rendered the permit fee requirement not generally applicable. *Id.* at 211; see also James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 *Animal L.* 295, 311 (2013) [hereinafter Oleske, *Lukumi at Twenty*] (explaining that

What troubled Alito was not simply the existence of a secular exemption, moreover, but that the medical accommodation implicated the government's interest in the same manner and to the same degree as the denied Muslim exemption. Significantly, the department afforded one other exemption from its uniform policy, viz. for undercover officers. But that one did not raise the same concern because it did not undermine the department's interest in uniformity.⁷⁶ A key feature of equal value is that secular exemptions are comparable if and only if they implicate the government's interest in the same way as the claimed religious exemptions.

Years later, Justice Alito drew on the theory again in his dissent from the denial of certiorari in *Stormans, Inc. v. Wiesman*.⁷⁷ A pharmacy with religious owners sued for an exemption from Washington state rules that required it to stock and deliver emergency contraception.⁷⁸ Alito thought that Washington's rules were not generally applicable.⁷⁹ Among other things, the state exempted pharmacies that could not fill particular prescriptions for business reasons.⁸⁰ Alito concluded that the rules were religiously "gerrymandered."⁸¹ Without citing *Fraternal Order*, Alito nevertheless explicitly invoked the concept of equal value:

Allowing secular but not religious refusals is flatly inconsistent with [*Lukumi*]. It "devalues religious reasons" for declining to dispense medications "by judging them to be of lesser import than nonreligious reasons," thereby "singl[ing] out" religious practice "for discriminatory treatment."⁸²

Regardless of whether this reasoning is convincing, Alito's development of equal value has been important. Yet his effort was not the first. Law professors had begun to explore the concept in the early 1990s, soon after *Smith* was handed down.

under *Blackhawk*, the selective exemption rule broadly applies "to situations involving categorical exemptions, even if there was no reason to suspect discriminatory intent in the . . . adoption of those exemptions," and that where categorical exemptions render laws substantially underinclusive, "strict scrutiny will apply to . . . subsequent denial[s] of . . . religious exemption[s]"). For another lower court decision applying equal value and relying on *Fraternal Order* and *Blackhawk*, see *Mitchell County v. Zimmerman*, 810 N.W.2d 1, 15–16 (Iowa 2012) (ruling for a tractor driver whose Mennonite religion required him to equip his wheels with steel cleats, despite an ordinance that prohibited such wheels on roads with hard surfaces, because the ordinance permitted school buses to use tire studs that also could damage roads without providing safety benefits during warm-weather months).

76. *Fraternal Ord.*, 170 F.3d at 366.

77. 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting from the denial of certiorari).

78. *Id.* at 2435–36.

79. *Id.* at 2437.

80. *Id.* at 2436 ("A pharmacy is not required to deliver a drug without payment of its usual and customary or contracted charge." (quoting Wash. Admin. Code § 246-869-010(2) (2009)) (cleaned up)).

81. *Id.* at 2437.

82. *Id.* at 2438 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–38 (1993)).

C. Early Scholarship

Early on, the Newark case drew the support of egalitarian theorists. Christopher Eisgruber and Lawrence Sager cited the decision as an attractive example of their approach, which they called “equal regard” or “equal liberty.”⁸³ Although Eisgruber and Sager opposed special religious exemptions from general laws, they embraced *Fraternal Order* as an illustration of an equality approach they had been constructing for several years, under which free exercise could protect religious minorities even beyond cases of explicit targeting.⁸⁴ For Eisgruber and Sager, regulation can be problematic not only when it is driven by a discriminatory purpose⁸⁵ but whenever it disregards those vulnerable to discrimination.⁸⁶ In other words, government action is unconstitutional when it disadvantages people “because of the spiritual foundations of their deeply held beliefs and commitments.”⁸⁷ This formulation is meant to include situations in which the government hypothetically would have exempted other actors but it refused to lift regulations on those acting from profound convictions. So although Eisgruber and Sager differ from Justice Alito in important respects, they embrace a version of equal value and hold out *Fraternal Order* as a key example.⁸⁸ And they are not alone.

83. Christopher L. Eisgruber & Lawrence G. Sager, Equal Regard, *in* Law & Religion: A Critical Anthology 200, 220 (Stephen M. Feldman ed., 2000) [hereinafter Eisgruber & Sager, Equal Regard]; Eisgruber & Sager, Religious Freedom, *supra* note 17, at 52–53 (defining equal liberty). The authors’ first articulation of equal regard appears to have been in Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1282–84 (1994) [hereinafter Eisgruber & Sager, Vulnerability of Conscience].

84. They explained,

Legislatures can make otherwise valid general laws more or less absolute as their democratic judgment dictates; but to the extent that variance from these laws is or would be permitted to accommodate the discrete and opposing interests of some members of the political community, equal regard insists that the same accommodation be made for the deep interests of minority religious believers.

Eisgruber & Sager, Equal Regard, *supra* note 83, at 210; see also Eisgruber & Sager, Religious Freedom, *supra* note 17, at 90–91 (embracing *Fraternal Order* as an example of equal regard in action).

85. Eisgruber & Sager, Equal Regard, *supra* note 83, at 220.

86. See Eisgruber & Sager, Religious Freedom, *supra* note 17, at 104–08 (defending against the objection that their theory makes protection for religious freedom turn on the happenstance of whether a comparable secular exemption has been granted and discussing *Fraternal Order*); *id.* at 91–92 (arguing that the “requirements of Equal Liberty apply even in the absence of ready-made comparisons” and offering a hypothetical example); see also Cécile Laborde, Equal Liberty, Nonestablishment, and Religious Freedom, 20 Legal Theory 52, 60–61 (2014) [hereinafter Laborde, Equal Liberty] (discussing this aspect of Eisgruber and Sager’s argument).

87. Eisgruber & Sager, Religious Freedom, *supra* note 17, at 70.

88. Interestingly, Roderick Hills perceptively uses the term “most favored nation status” in connection with Eisgruber and Sager’s argument that “the extension of any exemptions for secular reasons automatically entitles ‘analogous’ religious grounds to a similar

In a classic 1990 article, Douglas Laycock used the term “most-favored nation” to refer to the free exercise requirement that religious activity be treated as well as the least regulated comparable secular activity.⁸⁹ More recently, in an important 2016 article written with Steven Collis, Laycock argued that laws cannot be generally applicable if they regulate religious actors while exempting secular actors that implicate the government’s interests in the same way and to the same degree.⁹⁰ Even a single secular exemption can be enough to defeat general applicability and trigger the compelling interest test.⁹¹ Laycock and Collis drew on the earlier language, saying that “[t]he constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct.”⁹² They grounded the argument in *Smith*, *Lukumi*, and *Fraternal Order*,⁹³ and they used it to criticize other decisions.⁹⁴

As an aside, an intriguing question is whether the most favored nation approach creates tension with Laycock’s preferred theory of religious liberty, which he calls substantive neutrality.⁹⁵ On that view, which has been

exemption.” Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 *Ala. L. Rev.* 913, 973 (2018).

89. Laycock explained,

[T]he Court’s explanation of its unemployment compensation cases would seem to require that religion get something analogous to most-favored nation status. Religious speech should be treated as well as political speech, religious land uses should be treated as well as any other land use of comparable intensity, and so forth. Alleged distinctions—explanations that a proposed religious use will cause more problems than some other use already approved—should be subject to strict scrutiny.

Douglas Laycock, *The Remnants of Free Exercise*, 1990 *S. Ct. Rev.* 1, 49–50 [hereinafter Laycock, *Remnants of Free Exercise*]. He reiterated the argument in 1998 without using the phrase “most-favored nation.” Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 *Wm. & Mary L. Rev.* 743, 772 (1998) (“Where a law has secular exceptions or an individualized exemption process, any burden on religion requires compelling justification . . .”).

90. See Laycock & Collis, *supra* note 39, at 19.

91. *Id.* at 21–22.

92. *Id.* at 22–23.

93. *Id.* at 22 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004)).

94. See *id.* at 12–17 (primarily targeting *Stormans, Inc. v. Weisman*, 794 F.3d 1064 (9th Cir. 2015)). Richard Duncan also has embraced a version of equal value in work that has been widely cited. See 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, 868 (2001).

95. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DePaul L. Rev.* 993, 1001–02 (1990) [hereinafter Laycock, *Neutrality*].

Interestingly, Laycock included a category, disaggregated neutrality, that described uneven or selective invocations of neutrality. *Id.* at 1007 (defining “disaggregated neutrality” as an approach that “looks only at one side of the balance of advancing or inhibiting”); see also *id.* at 1008 (examining a pattern of case outcomes and positing “[t]he most obvious explanation is simply hostility to religion”). Though Laycock was worried about court deci-

influential, officials must govern in ways that leave religion as unaffected as possible.⁹⁶ When government disincentivizes religious practice, it implicates free exercise, just as when it incentivizes religious practice, it implicates nonestablishment. A possible difficulty for Laycock is that his most favored nation approach will sometimes incentivize religious observance.⁹⁷ People who wish to gather with others during the coronavirus pandemic, for instance, may do so in houses of worship but not in many nonreligious settings. Some who wish to assemble for secular reasons may have strong purposes that can approximate claims of conscience—think of addiction support groups, artistic assemblies, or even family celebrations of life events. Laycock has confronted this possibility in discussing exemptions generally, and he has said that sometimes the most neutral solution will be to deny the religious exemption.⁹⁸ That may impose a limitation here as well.

Equal value's genealogy is complex—that is one lesson of the account given so far. While Eisgruber and Sager embraced their version because of egalitarian commitments, Justice Alito and Laycock developed theirs in reaction to new doctrinal constraints on free exercise. Another difference is that, while the egalitarians generally support the rule of *Smith*, others would like to see it overruled and replaced with a presumption of invalidity for all laws that substantially burden religious practice. Laycock has indicated that if *Smith* were to be scrapped, that would render the principle of equal value unnecessary—and relatively costly because it is more cumbersome and complicated.⁹⁹ And Justice Alito now seems to agree.¹⁰⁰ Below, this Article suggests a position that is different from either of these,

sions that disfavored rather than favored religion, his claim otherwise resembled the concern developed in Part V that equal value is being applied in a manner that reflects a politics of partiality.

96. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561–62 (1993) (Souter, J., concurring in part and concurring in the judgment) (citing Laycock, *Neutrality*, supra note 95) (explicitly endorsing Laycock's theory of "substantive neutrality").

97. Cf. Tebbe, *Free Exercise*, supra note 21, at 702 (arguing that advocates of substantive neutrality have trouble accounting for their support for the many discretionary religious accommodations that incentivize observance).

98. Laycock, *Neutrality*, supra note 95, at 1016–18 ("If we suspect that the original number of [religious observers] is small, and that the number of [non-observers] seriously tempted by the exemption is large, then denying the exemption appears to be more nearly neutral than granting it.")

99. See Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 5, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 3078340 (Douglas Laycock, counsel of record).

100. *Fulton*, 141 S. Ct. at 1921–22 (Alito, J., concurring in the judgment) (reviewing the coronavirus cases, describing the difficulties involved in identifying comparators and assessing whether they are comparable, and suggesting that such problems undercut the argument that the rule of *Smith* should be preferred because of its simplicity). Alito does not discuss *Tandon*, almost alone among the coronavirus orders, but that may be because his opinion was written before *Tandon* came down.

namely that equal value is supportable and potentially useful independent of the main free exercise rule.¹⁰¹ Following that, section III.C. addresses scholarly critiques of equal value. Here, the aim is only to give an account of its development. And for that, the recent coronavirus rulings are critical.

D. *Coronavirus Cases and Fulton*

Calvary Chapel challenged a Nevada regulation that limited houses of worship to fifty people.¹⁰² Calvary wished to operate at fifty percent capacity, or about ninety people, while taking precautions such as social distancing and requiring masks. It pointed out that Nevada permitted various secular activities to operate at fifty percent capacity, including bowling alleys, gyms, breweries—and casinos. Because Las Vegas casinos are large, that allowance meant that they could welcome thousands of patrons.¹⁰³ Lower courts¹⁰⁴ and then the Supreme Court¹⁰⁵ denied temporary injunctive relief anyway, with Chief Justice John Roberts joining Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor.

Justice Kavanaugh filed a dissent in which he explicitly embraced the principle of equal value. He described Nevada's law as sorting organizations either into a "favored or exempt category" or into a "disfavored or non-exempt category."¹⁰⁶ Kavanaugh wrote that, in such a situation, "[u]nless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category."¹⁰⁷ Tellingly, he quoted Laycock's argument that religious organizations enjoy "something analogous to most-favored nation status."¹⁰⁸

Kavanaugh arguably departed from earlier versions of the approach, however, insofar as he did not require the church to show that the exempted and regulated categories were comparable in order to shift the burden of justification to the government.¹⁰⁹ Alito did require that showing, as can be seen from the fact that he did not apply strict scrutiny on

101. See *infra* section II.B; text accompanying notes 169–174.

102. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting from the denial of application for injunctive relief).

103. *Id.* at 2604–05.

104. *Calvary Chapel Dayton Valley v. Sisolak*, No. 32:0-CV-00303-RFB-VCF, 2020 WL 4260438, at *4 (D. Nev. June 11, 2020), *rev'd and remanded*, 982 F.3d 1228 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1285 (2021) (mem.).

105. *Calvary Chapel*, 140 S. Ct. at 2603.

106. *Id.* at 2611–12 (Kavanaugh, J., dissenting from the denial of application for injunctive relief).

107. *Id.* at 2612.

108. *Id.* (internal quotation marks omitted) (quoting Laycock, *Remnants of Free Exercise*, *supra* note 89, at 49–50).

109. See *id.* Justice Kavanaugh argued:

the basis of the existing exemption for undercover officers in Newark. And Laycock requires it as well. To the extent that Kavanaugh therefore jettisoned the threshold test of comparability, he departed from the dominant understanding of equal value.¹¹⁰

Although Kavanaugh explicitly endorsed the principle of equal value, he was writing in dissent. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, a majority took a step toward equal value in issuing an order against the government.¹¹¹ Writing per curiam, the Court provided interim relief from a New York coronavirus regulation for houses of worship. Governor Andrew Cuomo had issued an executive order limiting gatherings in order to combat the virus.¹¹² Under the order, the Department of Health had been directed to designate geographic areas for elevated restrictions based on “cluster-based cases of COVID-19.”¹¹³ It could sort those areas into “red zones,” “orange zones,” or “yellow zones” depending on the severity of the outbreak. In red zones, nonessential businesses were closed, restaurants were limited to takeout and delivery, schools were closed for in-person instruction, and houses of worship were limited to the lesser of twenty-five percent of maximum occupancy or ten people. Businesses

[I]n these kinds of cases, the Court’s religion precedents require a basic two-step inquiry. First, does the law create a favored or exempt class of organizations and, if so, do religious organizations fall outside of that class? That threshold question does not require judges to decide whether a church is more akin to a factory or more like a museum, for example. Rather, the only question at the start is whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group. If the religious organizations are not, the second question is whether the government has provided a sufficient justification for the differential treatment and disfavoring of religion.

Id.

Josh Blackman noticed early on that Kavanaugh did not require comparability to trigger strict scrutiny. Josh Blackman, *Why Exactly Was New York’s COVID-19 Regime Not “Neutral”?*, Volokh Conspiracy (Nov. 26, 2020), <https://reason.com/volokh/2020/11/26/why-exactly-was-new-yorks-covid-19-regime-not-neutral/> [https://perma.cc/QK4Q-JWQE] (arguing that the per curiam opinion in *Roman Catholic Diocese* essentially adopted Kavanaugh’s approach in not requiring houses of worship to be “comparable” to secular businesses in order to trigger heightened review).

110. There is something to Kavanaugh’s approach—it is difficult to understand how a court could assess comparability without applying something like heightened scrutiny. See *infra* text accompanying notes 289–291 (discussing Alan Brownstein’s critique).

111. 141 S. Ct. 63 (2020) (per curiam).

112. Cuomo had made comments suggesting that the Hasidic community was a problematic source of coronavirus spread, but those words were bracketed by the Court. *Id.* at 66 (“[S]tatements 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 because they single out houses of worship for especially harsh treatment.”). Moreover, one of the challenges was brought by the Roman Catholic Diocese, and the outcome benefitted all houses of worship, not just synagogues.

113. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 495 F. Supp. 3d 118, 121 (E.D.N.Y. 2020), *rev’d and remanded sub. nom. Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020).

considered “essential” were exempt from these restrictions.¹¹⁴ Announcing the program, Governor Cuomo made several comments concerning the impact on houses of worship and on Orthodox Jews in particular.¹¹⁵

In its per curiam opinion, the Court ruled that the restrictions “cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.”¹¹⁶ In a red zone, the Court reasoned, congregations were limited to ten people in person, while essential businesses were unrestricted. And essential businesses included not only grocery stores and pharmacies, but a variety of other organizations as well.¹¹⁷ So although a large retail store could have admitted hundreds of people, a church would have been limited to ten people even if it could have held thousands. Although the government’s interest in protecting the public health was compelling, the Court held that its restrictions were not necessary.¹¹⁸ For instance, attendance limits could be keyed to the size of a church. While it acknowledged that “[m]embers of this Court are not public health experts,” it also insisted that “even in a pandemic, the Constitution cannot be put away and forgotten.”¹¹⁹

Roman Catholic Diocese’s reasoning had much in common with equal value, as others have noticed.¹²⁰ The per curiam opinion did point out that New York had explicitly classified houses of worship—and it contrasted the travel ban, which did not facially discriminate against Muslims¹²¹—but it

114. *Id.* at 121–22.

115. The Court described his comments this way:

At the press conference to announce the Initiative, Governor Cuomo said . . . that the Initiative “is about mass gatherings” and “one of the prime places of mass gatherings are houses of worship.” . . . [H]e said[,] “the cluster is a predominantly ultra-Orthodox cluster. The Catholic schools are closed because they happen to be in that cluster. But the issue is with that ultra-Orthodox community”

Id. at 122 (citations omitted).

116. *Roman Cath. Diocese*, 141 S. Ct. at 66 (per curiam).

117. *Id.* (noting the exemption of “things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities”).

118. “Not only is there no evidence that the applicants have contributed to the spread of COVID-19,” the Court reasoned, “but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services.” *Id.* at 67.

119. *Id.* at 68.

120. See Blackman, *supra* note 109 (“[T]he majority—to be frank—adopted Justice Kavanaugh’s ‘most favored’ right approach. . . . I see very little daylight between actual operation of the per curiam opinion and the Kavanaugh concurrence.”); Dorf, *supra* note 24 (arguing that the *Roman Catholic Diocese* Court is effectively overruling *Smith* by applying the Laycock approach).

121. *Roman Cath. Diocese*, 141 S. Ct. at 66 n.1 (per curiam) (describing the travel ban as “neutral on its face” (internal quotation marks omitted) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018))).

also found no discriminatory purpose or object.¹²² So New York's policy did not violate neutrality in that sense. Actually, New York treated houses of worship *better* than secular gathering places, as Justice Sotomayor pointed out in dissent.¹²³ What is more, the *Roman Catholic Diocese* majority did not emphasize the facial classification. Instead, it simply observed that "while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish."¹²⁴ That difference yielded "troubling results," such as the prospect of a capacious retail store admitting hundreds of people while an equally capacious church was limited to ten.¹²⁵ What troubled the Court, then, was not the classification, but instead what the Court called "disparate treatment."¹²⁶ Without a finding of nonneutrality understood as a discriminatory object or purpose, this must have been a violation of general applicability, and if that was problematic, it must have been because it presented a problem of unequal value.¹²⁷

Concurring opinions forthrightly applied equal value in *Roman Catholic Diocese*. Following the logic of his dissent in *Calvary Chapel*, Kavanaugh simply observed that a church in a red zone is capped at ten people while a nearby grocery or pet store is more loosely restricted.¹²⁸ No showing that churches were comparable to retail stores was required to trigger a presumption of invalidity.¹²⁹ Nor did it matter that some secular businesses were even more strictly constrained than religious congregations. "Rather, once a State creates a favored class of businesses . . . [it]

122. And the Court has upheld a classification that excluded religious actors from a benefit without applying strict scrutiny. See *Locke v. Davey*, 540 U.S. 712, 720–21 (2004) (declining to apply strict scrutiny to a state scholarship program that excluded students majoring in theology from a faith perspective).

123. *Roman Cath. Diocese*, 141 S. Ct. at 80 (Sotomayor, J., dissenting) ("It is true that New York's policy refers to religion on its face. But as I have just explained, that is because the policy singles out religious institutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them.").

124. *Id.* at 66 (per curiam).

125. *Id.* at 66–67.

126. *Id.* at 66.

127. Confirming the reading that the religious classification was not central, the Supreme Court subsequently granted interim injunctive relief to Gateway Church even though the challenged ban did not distinguish between religious and secular gatherings and even though the Ninth Circuit had distinguished *Roman Catholic Diocese* on precisely the ground that New York had deployed a religious classification. See *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021) (mem.); *Gateway City Church v. Newsom*, No. 21-15189, 2021 WL 781981, at *1 (9th Cir. Feb. 12, 2021).

128. *Roman Cath. Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).

129. *Id.*; see also Blackman, *supra* note 109 (observing that Justice Sotomayor noticed that Kavanaugh did not require comparability and criticized him for it, writing "that *Smith* and *Lukumi* do not stand 'for the proposition that states must justify treating even noncomparable secular institutions more favorably than houses of worship'" (quoting *Roman Cath. Diocese*, 141 S. Ct. at 80 n.2 (Sotomayor, J., dissenting))).

must justify why houses of worship are excluded from that favored class.”¹³⁰ Nothing more is required to impose strict scrutiny, which the government failed to satisfy.

Justice Gorsuch also concurred in *Roman Catholic Diocese*. His opinion contained little legal analysis, but its key passage seemed to argue that New York’s restrictions were unconstitutional because they demeaned religious congregations. After pointing out that “people may gather inside for extended periods” in essential businesses including airports, laundromats, and hardware stores, he said it was unclear why they could not also gather in churches and synagogues, while taking similar precautions.¹³¹ Gorsuch concluded that “[t]he only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as ‘essential’ as what happens in secular spaces.”¹³² That logic was consistent with the new equality.

Any ambiguity over whether the Court had adopted equal value was resolved in *Tandon*.¹³³ Recall that the Court there ruled in favor of a minister and a congregant who wished to gather at private homes.¹³⁴ California had limited private gatherings to no more than three families, and it had imposed other requirements as well.¹³⁵ In its per curiam granting temporary injunctive relief, the Supreme Court made four points, the first two of which articulated the equal value approach.¹³⁶ First, “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.”¹³⁷ Here, the Court made it explicit for the first time that a religious classification is not required to trigger a presumption of invalidity and that a showing of comparability is required. Second, “whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.”¹³⁸ This suggested that the Court would accept, at this threshold stage of the analysis, the

130. *Roman Cath. Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring). Kavanaugh says only that “the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses [and here] [t]he State has not done so.” *Id.*

131. *Id.* at 69 (Gorsuch, J., concurring).

132. *Id.*

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

134. See *supra* text accompanying notes 3–6.

135. Gatherings had to allow physical distancing of six feet, last for less than two hours, and require attendees to wear face masks. *Tandon v. Newsom*, 992 F.3d 916, 917–18 (9th Cir. 2021). The permissibility of indoor gatherings varied by the “tier” in which a particular locality had been placed—Tier 1, 2, 3, or 4—depending on the risk level there. *Id.*

136. The Court said that its “decisions have made the following points clear,” *Tandon*, 141 S. Ct. at 1296, but in fact, it had not been explicit about whether classifications were required to trigger a presumption of invalidity, whether comparability was required, or even whether it was applying an equal value approach at all.

137. *Id.*

138. *Id.*

government's "asserted" reasons without asking whether they represented its actual reasons¹³⁹—in other words, that it was applying something like deferential review—but that may change as the Court thinks through this new doctrine. What is unlikely to change, and what *Tandon* establishes, is that five Justices have committed themselves to the rule.

In a kind of coda, Chief Justice Roberts's majority opinion in *Fulton* mentioned equal value in passing. A child welfare agency sought a religious exemption from a government rule that prohibited exclusion of potential foster parents on the ground that they were married to someone of the same sex. The Court ruled in favor of the agency based on the exception to *Smith* that applies strict scrutiny whenever the government makes exemptions available on an individualized basis.¹⁴⁰ Along the way, it gestured to the rule of equal value, saying that "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."¹⁴¹ But it did not apply the approach, presumably because there was no evidence that the city had ever actually granted an exception to the nondiscrimination rule.

Although the aim of this Part has been to account for the origins of equal value, it should be noted before closing that there were serious problems with the Court's application of the approach in the coronavirus decisions. Governments reasonably believed that grocery stores and hair salons, which were designed for temporary use, were not comparable in their health risks to worship services or bible study groups, which were constituted as extended gatherings for the purpose of social interaction. Even Laycock, a principal architect of the new equality, believes that *Roman Catholic Diocese* was wrongly decided.¹⁴² Limitations in California and New York may not have been narrowly tailored, but it is hard to see how that stage of the analysis should have been reached.¹⁴³

139. The *Tandon* Court's final two points—that to satisfy narrow tailoring the government must show that it cannot pursue its safety interests by applying the less restrictive measures that it requires of exempted businesses, *id.* at 1296–97, and that government modification of a coronavirus regulation does not moot the case, *id.* at 1297—were not specific to equal value.

140. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

141. *Id.* at 1877. The Court did not cite *Tandon*. Only Justice Gorsuch discussed the decision, and he only said that "*Tandon* treated the symptoms, not the underlying ailment." *Id.* at 1931 (Gorsuch, J., concurring in the judgment).

142. Civil Rights and Wrongs for December 8, 2020, Civil Rights and Wrongs, at 13:05–13:42 (Dec. 8, 2020), <https://bobdailey.podbean.com/e/civil-rights-and-wrongs-for-december-8-2020/> [<https://perma.cc/PW5R-BDYR>]. In yellow zones, congregations were regulated more strictly than restaurants and schools, both of which *are* designed for long-term gathering. That difference could have grounded a finding of unequal value, but it was not relied on by the per curiam.

143. See Dorf, *supra* note 24 ("[O]ne could say that the [New York] order—insofar as it undercounted the risks to [retail] workers . . . —was not narrowly tailored to the state's compelling interest in health Yet under *Smith*, one only gets to the narrow tailoring

Notice too that exempting only religious actors from regulations that apply evenhandedly, as the Court did in *Tandon* and other orders,¹⁴⁴ creates troubling problems of religious favoritism of the sort that is ostensibly prohibited by the Establishment Clause and the Speech Clause. Favoring religious gatherings over nonreligious gatherings that may be motivated by sincere commitments of conscience introduces obvious unfairness of constitutional magnitude. In response, officials will face pressure to “level up”—to permit all gatherings—in order to cure the equality problem. And that then starts to look like widespread deregulation through the First Amendment. These concerns are deferred to section IV.A.

* * *

Assuming the story told here about the origins of the equal value doctrine is accurate, it raises the question of whether the principle is distinctive. A possible reading—the dominant one among early commentators—is that by imposing a rule of equal value, the Court has overruled *Smith*, effectively or at least partially.¹⁴⁵ That interpretation is plausible because most of those who support the new approach also favor replacing *Smith* with a liberty rule that imposes a presumption of invalidity on any law that substantially burdens observance. All five of those in the *Tandon* majority have criticized *Smith*.¹⁴⁶ Much the same is true of scholars, among whom perhaps only Eisgruber and Sager support both something like the *Smith*

inquiry of heightened scrutiny *after* determining that a law discriminates against religion.”). Dorf was responding to an opinion piece arguing that whatever the risks to customers, the risks to employees of retail stores and churches were comparable. See Michael W. McConnell & Max Raskin, Opinion, The Supreme Court Was Right to Block Cuomo’s Religious Restrictions, N.Y. Times (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/opinion/supreme-court-covid-19-religion.html> (on file with the *Columbia Law Review*).

144. E.g., *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021); see also *supra* note 14 (citing cases).

145. See Dorf, *supra* note 24; Ian Millhiser, Religious Conservatives Have Won a Revolutionary Victory in the Supreme Court, Vox (Dec. 2, 2020), <https://www.vox.com/2020/12/2/21726876/supreme-court-religious-liberty-revolutionary-roman-catholic-diocese-cuomo-amy-coney-barrett> (on file with the *Columbia Law Review*). Millhiser explains that *Smith* allowed states to apply “‘neutral law[s] of general applicability’ to . . . religious objector[s],” and treated as suspect “only [those] laws that single out people of faith for lesser treatment than secular individuals.” *Id.* However, Millhiser also asserts that *Roman Catholic Diocese* upends *Smith* by defining “‘neutral law of general applicability’ so narrowly that it is virtually meaningless.” *Id.*

146. See *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring, joined by Kavanaugh, J.); *id.* at 1883 (Alito, J., concurring in the judgment, joined by Gorsuch & Thomas, JJ.). Justice Breyer joined all of Justice Barrett’s opinion except the first paragraph, which criticized *Smith* on originalist grounds. But Justice Breyer has long voiced concerns about *Smith*. *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) (“I agree with Justice O’Connor that the Court should direct the parties to brief the question whether [*Smith*] was correctly decided, and set this case for reargument.”).

approach and a principle like equal value.¹⁴⁷ And admittedly, a liberty rule would have been available to religious entities in the coronavirus cases. So perhaps the moral of the story that has been told in this Part is just that equal value functions as an ersatz liberty rule.

Yet equal value works differently from the compelling interest test for substantial burdens. Therefore, there is no reason why it could not persist even if *Smith* is overruled.¹⁴⁸ The next Part makes the case for equal value's distinctiveness, compared not only to free exercise alternatives but also to other equality conceptions.

II. DISTINCTIVENESS

It may seem unlikely that a distinctive equality concept could have emerged at this late date. After multiple rounds of equal protection debate,¹⁴⁹ and after implementation of various equality notions in other areas of law such as free speech and free exercise itself, U.S. constitutional thought might appear to have exhaustively explored every aspect of equality. Skepticism is especially understandable with respect to equal value, which is a second choice for many of its supporters, whose first choice would be to overrule *Smith* and to presumptively invalidate all policies that substantially burden religion. For them, equal value satisfies while a liberty rule optimizes.

Yet equal value should be differentiated, both morally and doctrinally, from more familiar conceptions.¹⁵⁰ Five sections lay out the argument of this Part. Section II.A distinguishes equal value from anticlassification, a theory that presumptively prohibits both facial differentiation and discrimination of purpose or object. Section II.B separates equal value from *Smith*'s main competitor, the approach to free exercise that would presumptively invalidate substantial burdens. Section II.C argues that

147. More precisely, they argue that *Smith* was “half right and half wrong,” specifically because it did not consider the possibility that Native Americans were devalued under the facts of *Smith* itself. Eisgruber & Sager, *Religious Freedom*, supra note 17, at 96.

148. Note that South Dakota, which recently adopted equal value by statute, also adopted strict scrutiny of substantial burdens in the same statute. S.D. Codified Laws § 1-1A-4 (2021).

149. See, e.g., Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 494, 494–95 (2003) (describing three phases of interaction between equal protection and disparate impact doctrines).

150. See Brief of Constitutional Law Professors as Amici Curiae in Support of Appellees at 1–2, *Stormans, Inc. v. Selecky*, 794 F.3d 1064 (9th Cir. 2015) (Nos. 12-35221, 12-35223), 2012 WL 5915342 (presenting an argument from academic proponents of equal value, describing it as “a special kind of equality rule that goes well beyond the traditional bounds of equal protection and nondiscrimination law”); cf. Dorf, supra note 24 (arguing that Kavanaugh’s most favored nation theory, “which builds on an argument advanced by Professor Laycock, relies on a conception of discrimination that one finds nowhere else in constitutional law”).

equal value differs from the rule against disparate impact that is contained in some civil rights statutes.

The remainder of the Part indicates that the new equality is not entirely anomalous in constitutional law. Sections II.D and II.E bring to the surface similarities between equal value and, respectively, the fundamental interest branch of equal protection and a line of First Amendment decisions concerning press freedoms.

A. *Anticlassification*

Probably the most straightforward proposition in this Part is that equal value can be violated even in the absence of facial differentiation. Numerous opinions now have applied the approach to government actions that did not explicitly differentiate on the basis of religion.¹⁵¹ And none of its academic creators require discrimination to be evident in the text of the challenged law or policy.

Neither does equal value prohibit only government actions with a discriminatory intent, purpose, or object. Begin with subjective intent, which is certainly not necessary. Officials can violate free exercise even if they do not have a conscious or articulated aim to discriminate on the basis of religion. Again, Justice Kennedy's finding, drawing on legislative history, that lawmakers in the City of Hialeah had such intent was unnecessary to the outcome.¹⁵² Later cases establish that evidence of impermissible intent can be sufficient to show a violation in certain situations, not that it is necessary.¹⁵³

Nor is the purpose or object of a law central to the concept of equal value as defined in this Article or as it usually features in constitutional discourse. Government can devalue religious practice through inadvertence or insufficient care. For example, no discriminatory purpose was found in *Tandon*.¹⁵⁴ Similarly, Laycock and Collis specify that the "Free Exercise Clause protects religious observers against unequal treatment, regardless of targeting, motive, or an improper object."¹⁵⁵ Even Eisgruber and Sager, who are perhaps most sensitive to law's purpose and its attendant social meaning, are clear that the government also can fail to show equal regard through inadvertence or neglect.¹⁵⁶

It is true that Justice Alito found that the Newark Police Department's failure to exempt Muslim officers from its ban on facial hair, while providing an exemption for officers with medical conditions, was

151. See *supra* notes 9–12 and accompanying text (citing cases).

152. See *supra* note 55 and accompanying text.

153. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

154. *Tandon v. Newsom*, 141 S. Ct. 1296, 1297 (2021) (*per curiam*).

155. Laycock & Collis, *supra* note 39, at 10 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (cleaned up)).

156. See *supra* text accompanying notes 85–86.

“sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.”¹⁵⁷ But, again, he cited no evidence of that purpose other than the refusal of an exemption itself, and he seemed to be motivated to show that his holding was consistent with precedent, which he interpreted to require such a showing.¹⁵⁸ Subsequently, Alito has not seen it necessary to find bad intent, object, or purpose. In *Blackhawk v. Pennsylvania*, for instance, he held simply that Pennsylvania had exempted zoos and circuses from its license fee requirement but not a Native American who wished to keep bears for sacred reasons.¹⁵⁹ And in another coronavirus case, Alito signed an opinion suggesting that Kentucky had violated free exercise when it closed all its K–12 schools, not just the religious ones, while keeping open secular businesses.¹⁶⁰ There was no suggestion of discriminatory purpose—the governor simply closed all primary and secondary schools in response to the pandemic.¹⁶¹ All in all, Alito seems to join others in thinking that intent, object, and purpose are irrelevant to the principle of equal value.

If it is correct to say that equal value differs from equality understood as anticlassification in this way, then it departs not only from the principal free exercise rule, which is centrally concerned with discriminatory object or purpose, but also from equal protection doctrine concerning racial discrimination. Either a facial distinction or a discriminatory purpose is needed to create a presumption of invalidity under the Equal Protection Clause.¹⁶² Yet equal value can be violated in the absence of both facial and purposive discrimination.

That also differentiates it from the prohibition on content discrimination under the Free Speech Clause. Government regulation is presumed unconstitutional if it either targets speech content on its face or is animated by a purpose or object of regulating speech because of its content.¹⁶³

157. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999).

158. See *supra* text accompanying notes 73–75.

159. 381 F.3d 202, 211 (3d Cir. 2004) (“The categorical exemptions . . . for zoos and ‘nationally recognized circuses’ likewise trigger strict scrutiny because at least some of the exemptions available under this provision undermine the interests served by the fee provision to at least the same degree as would an exemption for a person like *Blackhawk*.”); see also *supra* note 75 (elaborating on *Blackhawk*’s facts).

160. *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 528–30 (2020) (Gorsuch, J., dissenting) (arguing that the Sixth Circuit erred in part by failing to ask whether the governor’s school-closing order, considered together with his order allowing essential businesses to remain open, “resulted in unconstitutional discrimination against religion” (citing *Laycock & Collis*, *supra* note 39, at 1–5)).

161. See *id.* at 527.

162. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 271–72 (1979).

163. The Court explained that the rule against content discrimination requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. . . . Our precedents have also recognized a separate and additional category of

Insofar as equal value works even in situations where neither of these circumstances is present, it differs from the law on content discrimination as well. In section V.D below, this Article suggests that equal value could well influence that doctrine in the future.

B. *Liberty of Conscience*

If equal value differs from neutrality of object or purpose, it also differs from its main competitor in free exercise law, an understanding that presumptively protects religious practice against substantial burdens.¹⁶⁴ A version of this rule was constitutional law before *Smith*, and today it is statutory law under the Religious Freedom Restoration Act (RFRA) in a somewhat stronger version.¹⁶⁵ Early commentators have compared equal value to the liberty rule, largely because it is supported by many of the same advocates of religious freedom, both in the judiciary and outside it, and because it achieves some overlapping results.¹⁶⁶ In particular, and interestingly, an equal value problem can be remedied with religious exemptions, whereas the rule against purposive discrimination often requires the wholesale invalidation of a law or policy. So equal value shares certain features with the liberty approach. Yet it is fundamentally distinct.

A religious practitioner who sincerely claims a substantial burden enjoys a presumption of unconstitutionality that the government can only overcome by showing that applying the prohibition to that person is necessary to pursue its compelling interest. A practitioner needs to show neither a facial classification nor a discriminatory purpose but only a substantial burden on observance. Under equal value, by contrast, a practitioner can only trigger strict scrutiny if the government has exempted some secular actors or activities that implicate its interests in the same way.

laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be “justified without reference to the content of the regulated speech,” or that were adopted by the government “because of disagreement with the message the speech conveys.” Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015) (first quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011); and then quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (cleaned up); see also Genevieve Lakier, *Reed v. Town of Gilbert, Arizona and the Rise of the Anticlassificatory First Amendment*, 2016 Sup. Ct. Rev. 233, 235–36 (arguing that this anticlassificatory approach represents a change and that it brings law concerning content discrimination closer to law prohibiting racial classifications).

164. For one version of a liberty rule, termed liberty of conscience, see Tebbe, *Liberty of Conscience*, supra note 22, at 274–81.

165. See *City of Boerne v. Flores*, 521 U.S. 507, 512–16 (1997) (describing the relationship between *Sherbert*, *Smith*, and RFRA).

166. See Dorf, supra note 24 (“What’s really going on is that the *Roman Catholic Diocese* majority are disregarding the *Smith* rule while pretending to follow it.”); Oleske, *Free Exercise (Dis)Honesty*, supra note 24, at 691–92 (criticizing the Court for overruling *Smith* implicitly rather than explicitly).

In that way, it is weaker. But it also is stronger in that it applies even in the absence of a substantial burden.

At least five Justices have signaled an openness to reinstating full liberty protection for free exercise, recall.¹⁶⁷ The possibility that *Smith* could be overruled has led several commentators to say that equal value substitutes partially for liberty protection. But it seems that equal value has a distinct conceptual structure and different practical yield. If that is right, then it is possible that the rule could survive any adoption of full liberty protection for free exercise. And that could be appealing even for those who originally designed it as a mechanism for protecting religious liberty more fully than *Smith* allowed. Equal value may turn out to be durable even for them. While it is true that making out a liberty claim may be simpler than showing that the government has failed to regulate a comparable secular actor or activity,¹⁶⁸ it requires a showing of substantial burden, which has not always been found even by modern courts ruling in consequential cases.¹⁶⁹ In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, for instance, the Court found no substantial burden on Native Americans despite federal government plans to build a logging road through sacred lands.¹⁷⁰ If the government had accommodated secular interests in planning the road, such as environmental imperatives, the Native Americans could have brought an equal value claim.

A claim of government discrimination can make a powerful impression. Moreover, if it is successful at the threshold stage, it usually will suffice

167. See *supra* note 146 and accompanying text.

168. See Brief of Christian Legal Society et al., *supra* note 99, at 5 (arguing, with Douglas Laycock as counsel of record, that *Smith* should be overruled and that it would not “suffice to clarify *Smith*’s requirement that laws burdening religion be neutral and generally applicable,” as “that threshold requirement vastly complicates every litigation and will never protect every claim that it should”). Of course, the argument that equal value is not sufficient to protect religious liberty does not preclude the argument that it should be retained alongside protection for substantive liberty.

169. See Alan E. Brownstein & Vikram David Amar, *Locating MFN in Constitutional Context 5* (unpublished manuscript) (on file with the *Columbia Law Review*) (noting that the substantial burden requirement distinguishes the most favored nation approach from the pre-*Smith* rule). Of course, it is true that the Court has articulated a standard that is extremely deferential to a religious person’s claim of substantial burden. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (“[O]ur narrow function in this context is to determine whether the line drawn reflects an honest conviction . . .” (quoting *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981)) (cleaned up)). Even using that standard, however, courts have found it necessary to set limits. See Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Symposium: Zubik and the Demands of Justice*, SCOTUSblog (May 16, 2016), <https://www.scotusblog.com/2016/05/symposium-zubik-and-the-demands-of-justice/> [<https://perma.cc/3ATT-TS69>] (noting that, in seven of the eight circuit decisions that were consolidated in *Zubik*, courts held for the government, mostly by finding no substantial burden when the contraception mandate accommodated religious nonprofits but required certain notifications).

170. 485 U.S. 439, 448–49 (1988). Congress subsequently prohibited the road from being built. *Smith River National Recreation Area Act*, Pub. L. No. 101-612, 104 Stat. 3209 (1990) (codified at 16 U.S.C. § 460bbb (2018)).

to show that the government policy is not narrowly tailored to a compelling interest as well, because it will already have established that the government failed to regulate secular actors to whom its interest applied in the same way. So it may be in the interests of litigants, and government decisionmakers who side with them, to retain the concept even if *Smith* is overruled.

Moreover, the remedy for a violation of equal value can differ from the remedy for a violation of a liberty rule—and that difference reinforces the impression of a distinct conceptual structure. Enforcement of liberty under free exercise almost always entails a religious exemption from a general law.¹⁷¹ Equal value, by contrast, can also be remedied by invalidation of a regulatory provision. Think of a situation where the government closes all secular gathering places (lectures, concerts, etc.), limits houses of worship to ten people, and allows retail stores to operate at twenty-five percent capacity. Churches successfully challenge the ten-person restriction, so they are now subject to the twenty-five percent cap. Did they win an exemption? Reasonably, that remedy instead could be understood as an invalidation of the ten-person limit, which applied only to them.¹⁷² My conclusion from this, as well as from the other considerations in this section, is that equal value differs markedly if not dramatically from liberty of conscience in both conception and operation.¹⁷³

C. *Disparate Impact*

Equal value may also differ from a third conception of equality, the rule against disparate impact. These two are close to each other and may overlap in certain respects, depending on how each is understood and applied.

Disparate impact doctrine provides presumptive protection against government actions that disproportionately burden members of a pro-

171. It is possible to imagine a liberty claim against a regulation that classifies on the basis of religion. But generally, a regulation like that would be thought to offend an antidiscrimination rule.

172. Below, this Article compares the recent free exercise decisions to *Eisenstadt v. Baird*, 405 U.S. 438 (1972), where the Court ruled that unmarried people could not be denied contraception to prevent pregnancy while married people were permitted to use contraception for that reason. See *infra* text accompanying notes 193–205. It is hard to understand the remedy as an exemption for unmarried people; it is easier to see the ruling as invalidating the prohibition on contraception for unmarried people. To the degree that *Eisenstadt* has a similar conceptual structure to cases like *Tandon*, it supports the sense that equal value is not always enforced with exemptions.

173. It would not be quite right to conclude that equal value is a garden-variety antidiscrimination provision that is remedied by leveling up or down. It also works against situations like the one in *Tandon*, where religious actors are regulated alongside some nonreligious actors but more strictly than some others. And in those situations, it results in religious exemptions.

tected group. Bias can be policed through this rule even where an infringing classification cannot be shown.¹⁷⁴ A guarantee against disparate impact is a kind of equality principle because it guards against relative unfairness rather than against simple burdens. And although disparate impact is no longer prohibited by equal protection law,¹⁷⁵ it is regulated by several civil rights statutes, including Title VII, which regulates employment discrimination, and the Fair Housing Act.¹⁷⁶

Interestingly, application of disparate impact doctrine can implicate the constitutional rights of nonminority citizens, insofar as it requires the defendant to adopt a remedy that consciously takes a protected characteristic into account.¹⁷⁷ Current law has been constructed to avoid that countervailing equality concern. First, the plaintiff must show not only that a statistical disparity affected a protected class but also a causal connection between some policy or practice and that disparity.¹⁷⁸ If that showing is successful, then in the second step, the defendant bears the burden of showing that the policy or practice is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.”¹⁷⁹ Even if the defendant succeeds, the plaintiff then has an opportunity to show that the defendant’s interests could be served by a policy or practice with a less disproportionate effect.¹⁸⁰ This procedure is designed to shield members of structurally denigrated groups from “artificial, arbitrary, and unnecessary barriers” to key socioeconomic institutions such as housing.¹⁸¹ It also guards defendants against abusive disparate impact claims.¹⁸²

In the classic example, a test for employment or promotion that is adopted for neutral reasons ends up disproportionately excluding racial minorities.¹⁸³ Imagining use of the rule in the context of religion can feel

174. See Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 *Stan. L. Rev.* 317, 327–28 (1987) (arguing that disparate impact liability can work to counteract “unconscious racism”).

175. See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

176. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 530–40 (2015) (finding that the Fair Housing Act protects against disparate impact, in large part because its text is similar to that of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, which prohibit employment discrimination).

177. See *Primus*, *supra* note 149, at 495 (raising this concern).

178. *Inclusive Cmty.*, 576 U.S. at 542 (“[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.”).

179. *Id.* at 527 (describing the disparate impact framework of 24 C.F.R. § 100.500(c)(2) (2014)).

180. *Id.* (describing 24 C.F.R. § 100.500(c)(3)).

181. *Id.* at 543.

182. *Id.* at 544.

183. See, e.g., *Washington v. Davis*, 426 U.S. 229, 232 (1976) (“This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department.”).

contrived but is not impossible. For example, the federal criminal prohibition on marijuana may disproportionately affect Rastafarians.¹⁸⁴ A disparate impact rule applied to religion could conceivably apply a presumption of invalidity to that rule. In the employment context, a drug testing policy could have a similarly disproportionate effect on Rastafarians. And Title VII, the federal employment discrimination law, both protects against disparate impact and includes religion as a protected class.¹⁸⁵ So such a legal theory is not completely inconceivable, even under current law.

Disparate impact is similar to equal value insofar as it provides equality protection even absent discriminatory classification, whether facial or purposive. Yet it also may differ. First, disparate impact works regardless of exemptions. An employment requirement may impermissibly affect racial or religious minorities even if no workers are exempt from the test. Now, someone could say that workers who pass the test are in some sense “exempted.” And across a range of regulations, limitations of scope may be characterized as exemptions. But even then, disparate impact doctrine may not pursue exactly the same moral objective as equal value.

Can an employer who administers a discriminatory test be said to have “devalued” minority workers? To the employer, workers who have failed the test are not situated similarly to those that passed with respect to the employer’s interests in productivity or skill. Someone could object to this claim by arguing that the legal procedure is designed precisely to reveal situations where the employer’s interests do not require disproportionately excluding members of protected classes. If that is right, then disparate impact does look a lot like equal value in this respect. Disparate impact then does not guard against implicit bias as such, but only against implicit bias that is unnecessary to the defendant’s pursuit of legitimate interests.

But there is another difference, namely that equal value bars effects that are *not* disproportionate. It provides relief even against regulations that do not fall particularly heavily on religious actors. Imagine a policy that creates two categories, regulated and unregulated. Fifty percent of secular actors fall into each category, and fifty percent of religious actors do as well. Under that scenario, there is no disparate impact—religious actors are regulated proportionately, not disproportionately. Even so, they could prevail on an equal value theory. All they would have to show is that the government’s interests apply in the same way to some of the unregulated actors as they do to the regulated religious actors. That would be enough to create a presumption of invalidity because the government

184. See, e.g., *Guam v. Guerrero*, 290 F.3d 1210, 1212–13 (9th Cir. 2002) (describing one Rastafarian’s belief in the sacred use of marijuana).

185. 42 U.S.C. § 2000e–2(a) (2018) (protecting against employment discrimination on the basis of “race, color, religion, sex, or national origin”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (interpreting Title VII to protect against disparate impact).

would be taken to have implicitly concluded that religious reasons for escaping regulation are less worthwhile than those of others.

In the Rastafarian example, a practitioner cannot prevail on a disparate impact theory if Rastafarians are affected by the criminal prohibition at the same rate as everyone else. Imagine, for instance, that Rastafarians violate federal drug laws in proportion to people in general. A disparate impact claim will fail. By contrast, a Rastafarian can make out a *prima facie* case if federal statutes exempted members of the Native American Church who wish to use peyote, another Schedule I drug,¹⁸⁶ so long as the Rastafarian can show that the two drugs similarly implicate the government's interests. Regulating Rastafarians while exempting Native Americans devalues religious use of marijuana—it deems one sacred ritual to be less valuable than the other. And yet the existence of a peyote exemption is irrelevant to a disparate impact theory.

So equal value is distinct from familiar conceptions in constitutional law and theory: anticlassification, free exercise exemption, and disparate impact. Yet there are some less familiar conceptions that are structurally similar.

D. Fundamental Interest Equal Protection

Although the fundamental interest branch of equal protection is largely defunct as a practical matter, having been displaced by substantive due process in many applications, its structure resembles that of equal value. A difference is that the fundamental interest branch of equal protection law can apply even where neither the liberty nor the equality claim is independently protected, whereas equal value seems to require that one or the other be constitutionally established. Otherwise, the structures of the two are similar.

Under this equal protection doctrine, if the government regulates unevenly with respect to a fundamental individual interest, it must justify its regulation as necessary to a compelling state interest.¹⁸⁷ That is true even if its classification is not suspect and even if the private interest does not constitute a fundamental right protected by due process. Government underinclusiveness, normally allowed by equal protection, becomes problematic when it concerns an individual interest of fundamental importance. In such situations, the government must justify its decision to

186. Drug Scheduling, U.S. Drug Enforcement Administration, <https://www.dea.gov/drug-information/drug-scheduling/> [<https://perma.cc/X9VZ-5KDF>] (last visited Aug. 8, 2021) (defining marijuana (cannabis) and peyote as Schedule I drugs).

187. See Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. Pa. L. Rev. 1375, 1377 (2010) (applying this rule to marriage equality before *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

regulate only certain actors, even though its reasons for regulation apply equally to others.¹⁸⁸

In *Skinner v. Oklahoma*, the Court confronted a state statute that provided for sterilization of those who committed three “felonies involving moral turpitude.”¹⁸⁹ The Court invalidated the law not simply because it burdened reproductive freedom but instead because it did so unevenly in violation of equal protection. Oklahoma’s statute exempted from the law “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses.”¹⁹⁰ That rendered the law unjust precisely because none of the state’s conceivable interests applied any differently to embezzlement, which was exempted, than they did to grand larceny, which was regulated. Skinner himself was convicted of stealing chickens, but if he had been a bailee and had fraudulently appropriated the chickens, he would have been guilty of embezzlement and not subject to sterilization.¹⁹¹

The *Skinner* Court held that Oklahoma had arbitrarily restricted the reproductive interests of its citizens by differently regulating crimes to which its interests could only apply in exactly the same way:

When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. . . . We have not the slightest basis for inferring that that [the line between larceny and embezzlement] has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has

188. Other scholars have made the connection between equal value and the fundamental interest branch of equal protection law. See Duncan, *supra* note 94, at 882 (“*Lukumi* and its underinclusion test can also be understood as harmonizing free exercise doctrine with the Court’s equal protection analysis concerning legislative classifications that unequally burden fundamental rights.”); Frederick Mark Gedicks, An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions, 20 U. Ark. Little Rock L. Rev. 555, 573–74 (1998) (presenting the argument “that a law that contains one or more secular exemptions but no religious exemptions should trigger this ‘fundamental rights/equal protection analysis,’ because the effect of the secular exemptions is to classify individuals” such that “some . . . are deprived of the fundamental right to the free exercise of religion”). I first saw these arguments in Alan Brownstein, Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality, 18 J.L. & Pol. 119, 198 (2002).

189. 316 U.S. 535, 536 (1942).

190. *Id.* at 547.

191. *Id.* at 539 (“A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler.” (citation omitted)).

marked between those two offenses. In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.¹⁹²

The structure of this idea resembles that of equal value. When the government regulates fundamentally important acts, even though its interests apply equally to others it chooses not to regulate, it discriminates against the former.

Another powerful example is the decision that extended the right to contraception from married to unmarried people, *Eisenstadt v. Baird*.¹⁹³ Justice William J. Brennan Jr. wrote that Massachusetts could not prohibit unmarried people from obtaining contraception for the prevention of pregnancy while allowing married people to obtain it for the same reason.¹⁹⁴ Applying rational basis review under equal protection,¹⁹⁵ Brennan reasoned that the only plausible state purpose was to limit contraception as much as legally permitted out of a judgment that its use was immoral.¹⁹⁶ Even if *Griswold v. Connecticut* had not been decided, Massachusetts would have violated equal protection by barring distribution to unmarried but not married people.¹⁹⁷ That was because the government's interest applied in the same way to the two categories.¹⁹⁸ Reinforcing the similarity of this reasoning to that driving equal value was Brennan's invocation of Jackson's political argument for evenhanded regulation, which is prominent in the equal value literature as well:

Mr. Justice Jackson, concurring in *Railway Express Agency v. New York*, 336 U.S. 106, 112–113 (1949), made the point: “The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and

192. Id. at 541–42 (citations omitted).

193. 405 U.S. 438 (1972).

194. Id. at 454–55. Married and unmarried people alike could obtain contraception for the prevention of disease. Id. at 442.

195. Id. at 447 n.7 (clarifying that the Court is not applying the compelling interest test, as would be required if it were to find that the law abridged a fundamental right under the Due Process Clause, because the statute fails even under the lower standard of review applied under the Equal Protection Clause).

196. Id. at 452 (“The Court of Appeals analysis ‘led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral—to the extent that *Griswold* will permit such a declaration.’” (quoting *Eisenstadt v. Baird*, 429 F.2d 1398, 1401–02 (1st Cir. 1970))). The *Griswold* Court had protected a right to contraception within a marriage. Id. at 453 (“[U]nder *Griswold*[,] the distribution of contraceptives to married persons cannot be prohibited . . .”).

197. 381 U.S. 479 (1965).

198. Id. at 454 (“[I]f *Griswold* is no bar to prohibition on [contraception distribution], the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.”).

unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. . . .” [T]he principle he affirmed has equal application to the legislation here.¹⁹⁹

The parallel to recent free exercise cases is unmistakable.

While Brennan did not associate the decision with the fundamental interest branch of equal protection doctrine in express terms, and while he did not apply the compelling interest test, he did cite *Skinner* and seemed to appreciate the conceptual similarity.²⁰⁰ Without relying on due process and without identifying a suspect classification, Brennan nevertheless reproached the government for regulating differently two classes of citizens to which its interest applied equally.

Yet it mattered to the analysis that some special sort of private interest was at issue. Brennan cited Chief Justice Burger, who had written that the state could not “legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”²⁰¹ But of course the state can do exactly that. Bedrock equal protection doctrine allows mismatches between state interests and regulatory coverage in ordinary legislation.²⁰² Only when there is some special reason for concern does the judiciary require more perfect parity.

In these cases—as with equal value—there was ambiguity about whether the individual challenger was “protected” because they were exercising a basic liberty or because of a status that was especially vulnerable to subordination.²⁰³ But regardless, there was a special reason for requiring a tight connection between means and ends.

Finally, the justifications for equal value are operating here as well, roughly speaking.²⁰⁴ The argument from positive political theory was made obvious by Brennan’s reliance on Jackson’s argument in *Railway Express Agency, Inc. v. New York*. But the moral reason for requiring equal value was

199. *Id.* (quoting *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–113 (1949) (Jackson, J., concurring)). For instances of the Jackson argument in equal value discussions, see *infra* section III.B.

200. *Baird*, 405 U.S. at 453–54.

201. *Id.* at 447 (internal quotation marks omitted) (quoting *Reed v. Reed*, 404 U.S. 71, 75–76 (1971)).

202. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (under traditional rational basis review, the government is permitted to tackle problems “one step at a time”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (holding that the Fourteenth Amendment does not require state legislatures to prohibit all “like evils” or none).

203. Other cases in the fundamental interest branch of equal protection law also resemble equal value. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (holding that, in the context of voting, a state’s interest is limited to qualifications and “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor”).

204. For the justifications for equal value, see *infra* Part III.

in play, too. Massachusetts devalued unmarried people's reasons for using contraception when it allowed its distribution only to married people. Unstated but obvious was that it demeaned women's reasons for using contraception and thereby contributed to their subordination. This was not a matter of intent or purpose—Brennan found that the state was motivated by an opposition to all contraception use and that it only exempted married people in order to comply with *Griswold*.²⁰⁵ Yet an official judgment that married people's reproductive freedom was more worthwhile than single people's was implicit in the regulatory structure. While it is true that Massachusetts classified on the basis of marital status, it is also evident that the reasons it was found to violate equal protection resonated with the justifications for equal value.

Possibly, the resemblance here indicates that equal value is unstable and will prove ephemeral, just as the fundamental interest branch of equal protection is conventionally thought to have been significant only temporarily, while substantive due process was redeveloped. Yet it is also possible that equal value will turn out to be enduringly useful.²⁰⁶ Its persistence (if not prominence) in speech law suggests the latter.

E. *Freedom of the Press*

It may not be surprising that there are cognates of equal value in free speech jurisprudence. After all, *Railway Express* itself, though not decided under the First Amendment, illustrates how the logic of equal value could apply to cases concerning freedom of expression. New York City passed an ordinance that prohibited advertising vehicles, but it exempted delivery vehicles that advertised their own businesses.²⁰⁷ The city's purpose was to improve traffic safety by reducing distractions to drivers and pedestrians.²⁰⁸ The difficulty, of course, was that the exempted advertisements appeared to impair traffic safety just as much as the regulated ones. A business that sold advertisements on its delivery vehicles brought an equal protection challenge.²⁰⁹

The Court upheld the regulation, deferring to the city's judgment that purchased advertisements present a greater danger than advertisements on a business's own vehicles.²¹⁰ That was a standard application of equal protection analysis under the rational basis standard of review. Justice Jackson wrote separately to express the less orthodox view that all

205. See *supra* notes 196–198 and accompanying text.

206. Cf. *M.L.B. v. S.L.J.*, 519 U.S. 102, 106–07 (1996) (extending the fundamental interest equal protection doctrine on equal access to justice in civil cases concerning the termination of parental rights). Voting rights is another area where the doctrine arguably has persisted.

207. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 107–08 (1949).

208. *Id.* at 109.

209. *Id.* at 108.

210. *Id.* at 110.

regulatory categories must be “fairly related to the object of regulation.”²¹¹ What has been more influential is his argument that requiring the government to legislate generally, with respect to its purposes, works to safeguard politically disempowered actors in the legislative process. The next Part speaks more to that justification and the support it provides for the principle of equal value.²¹² For now, it suffices to point out that where a protected person or practice is involved—as in *Railway Express* itself, which today would be litigated as a free speech case, at least in part—the intuition that the government presumptively should not discriminate among those to which its regulatory purposes apply will have real power.

A similar intuition grounded a short line of cases concerning freedom of the press. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, a newspaper sued for relief from a use tax that the state had imposed on the ink and paper consumed during publication.²¹³ The newspaper argued that the use tax violated the First Amendment, and the Court agreed.²¹⁴ Although the state objected that the use tax was part of its general scheme for raising revenue, and that it was only substituting for the sales tax, from which newspapers were exempt, the Court found an equality violation under the Speech Clause.²¹⁵ In effect, the use tax applied only to publications because no other retail goods were subject to taxes on their components.²¹⁶

No special characteristic of the press justified that differential treatment.²¹⁷ After all, Minnesota’s interest in raising revenue applied in exactly the same way to entities and activities not subject to the use tax, and therefore it was difficult to explain why the state did not simply subject newspapers to the sales tax as well.²¹⁸ The majority explicitly embraced Jackson’s theory in protecting the press:

When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. See *Railway Express Agency v. New York*, 336 U.S. 106, 112–113 (1949) (Jackson, J., concurring). When the State singles out the press, though, the political constraints that prevent a legislature

211. *Id.* at 112 (Jackson, J., concurring). Because he thought that the distinction between advertisements for hire and advertisements on a business’s own vehicles was plausibly related to the government’s interest in traffic safety, he concurred. *Id.* at 115–16.

212. See *infra* section III.B.

213. 460 U.S. 575, 577–78 (1983).

214. *Id.*

215. *Id.* at 581.

216. *Id.* at 583 n.5 (“[E]verything is exempt from the use tax on ink and paper, except the press.”).

217. See *id.* at 585.

218. *Id.* at 586. The Court also speculated that the government was motivated not by its articulated interest in administering a general tax code but by a purpose related to the suppression of expression. *Id.* at 585.

from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute.²¹⁹

Based on this finding of differential treatment, the Court required the government to show that it needed the use tax to pursue a compelling interest.²²⁰ Like New York in *Roman Catholic Diocese*, the state argued that the use tax actually favored newspapers over businesses subject to the sales tax, since it applied only to some components rather than to the entire product.²²¹ But the Court rejected the rationale out of fear that, by approving differential taxation of any sort, it would expose the press to the constant threat of special taxation.²²² And that threat could chill speech.

Likewise, in *The Florida Star v. B.J.F.*, the Court ruled for a newspaper that had published the name of a rape victim that it had found in a public government record.²²³ A state law criminalized publishing the name of a victim of any sexual offense “in any instrument of mass communication.”²²⁴ Writing for the Court, Justice Marshall reasoned in part that the statute was fatally underinclusive because it did not prohibit the dissemination of victims’ identities by other means. “When a state attempts the extraordinary measure of punishing truthful publication in the name of privacy,” he wrote, “it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant.”²²⁵ Otherwise, the government’s pursuit of its interest against only some speakers, when all implicate that interest, implicates the First Amendment. A presumption of unconstitutionality applied.²²⁶

Though the majority invoked something like the moral justification for equal value, Justice Scalia came closer to the political rationale in his separate opinion.²²⁷ “[A] law cannot be regarded as protecting an interest of the highest order, and thus justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.”²²⁸ Here, the state law was selective among actors that would implicate its privacy interests, regulating only mass media but not small disseminators of information. Consequently, for Scalia, “[t]his law has every appearance of a prohibition that society is prepared to impose upon

219. *Id.* at 585.

220. *Id.*

221. See *id.* at 588; cf. *supra* note 123 and accompanying text (houses of worship in *Roman Catholic Diocese*).

222. *Minneapolis Star*, 460 U.S. at 589–90.

223. 491 U.S. 524, 526 (1989).

224. *Id.*

225. *Id.* at 540.

226. See *id.* at 541.

227. For the moral rationale supporting the principle of equal value, see *infra* section III.A, and for the political rationale, see *infra* section III.B.

228. *Florida Star*, 491 U.S. at 541–42.

the press but not upon itself.”²²⁹ Though Scalia’s conclusion was that the state’s interest could not have been compelling, his reasoning also supports the majority’s conclusion that it was not narrowly tailored—and he said as much.²³⁰

Although these cases examined regulations that classified the press and subjected it to special regulation, they otherwise invoked something like the new equality. The government’s regulation of the press, but not unprotected actors to which its interests applied in the same way, constituted impermissible disregard of a constitutionally protected actor. Not only did the government devalue the press, but it also exposed that First Amendment institution to adverse political forces. Those two rationales figure more generally in the principle of equal value, as explained in the next Part.

III. JUSTIFICATION

Two arguments work to justify equal value. One elaborates a moral intuition, and the other considers the design of political institutions in a democracy. Two counterarguments are addressed in the final section of this Part.

A. *The Argument From Fairness*

When the government regulates those engaged in a protected activity while exempting others, even though its interests apply equally to both, it presumptively devalues the protected actors or activities. That is the concept of equal value, and it captures an intuition of unfairness. This section explores whether that intuition is justified.

An early argument that bears some resemblance can be found in *A Letter Concerning Toleration* by John Locke. He argued that government should not regulate activity that is undertaken for religious reasons if it permits that activity to be pursued for secular reasons:

By this we see what difference there is between the church and the commonwealth. Whatsoever is lawful in the commonwealth cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use neither can nor ought to be forbidden by him to any sect of people for their religious uses. If any man may lawfully take bread or wine, either sitting or kneeling in his own house, the law ought not to abridge him of the same liberty in his religious worship; though in the church the use of bread and wine be very different,

229. *Id.* at 542.

230. *Id.* at 541 (“I think it sufficient to decide this case to rely upon the third ground set forth in the Court’s opinion . . .”).

and be there applied to the mysteries of faith and rites of divine worship.²³¹

Locke was articulating something like a public reason requirement, according to which it is unjust for the government to regulate citizens out of bare disapproval of their religious conceptions.²³² Similarly, government should not regulate free exercise because of simple disdain. Equal value extends this argument to situations where disfavor is implicit but operative because all available neutral reasons apply equally to unregulated actors.²³³

Inspired by the Lockean argument but moving further, this section articulates versions of equality and liberty that work together to support equal value. These two conceptions also help to show why a violation of the principle should raise constitutional concerns that should be enforced through countermajoritarian measures, absent good reasons to the contrary. Such a showing is needed, of course, because not every kind of government error is unconstitutional, and not every unconstitutional error should be corrected through the exercise of judicial review. Limitations on the power of democratic majorities need to be defended. Here, we want to understand how the available defenses relate to equal value.

First, members of a political community cannot meaningfully participate in the project of democratic government if they are relegated to a subordinate caste or class.²³⁴ Democracy entails political egalitarianism, in other words.²³⁵ Collective self-government becomes unworkable and loses its meaning if some members are systematically denigrated under conditions of structural injustice.²³⁶ What justifies the exercise of judicial review

231. John Locke, *A Letter Concerning Toleration* 40 (Patrick Romanell ed., 2d ed. 1955).

232. Of course, the Lockean argument has other implications as well. And understood substantively, it supports a certain kind of freedom and equality.

233. Cf. Cécile Laborde, *Liberalism's Religion* 62 (2017) [hereinafter Laborde, *Liberalism's Religion*] (“[I]n public reason it would be unreasonable for us to ask conscientious objectors to bear burdens that we would not ourselves be willing to bear.”); *id.* at 72 (exploring a similar idea in Ronald Dworkin’s thought). Compare these positions with Justice Kennedy’s statement that “[i]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542–43 (1993).

234. Cf. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 *U. Miami L. Rev.* 9, 9 (2003) (“Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification . . .”).

235. Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* 17–18, 23 (2019) (“Political equality is democracy’s foundation.”).

236. See Lawrence G. Sager & Nelson Tebbe, *Discriminatory Permissions and Structural Injustice*, 106 *Minn. L. Rev.* (forthcoming 2021) (manuscript at 16–18) (describing the concept of structural injustice); see also Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 83, at 1252 (“The bitter divisions of humanity along religious lines, and the global persecution of religious minorities throughout most of recorded history, make the

is not simply the use of a suspect classification, though that may have forensic value, but government action that differentiates citizens in a manner that causes or reinforces social subordination and thereby undermines a society's democratic character. Differentiation according to religion and conscience has proven to be one historical source of social demotion, of course.

Second, participants in a democracy must enjoy the ability to exercise fundamental freedoms, capacities, or activities. Egalitarians have offered several reasons for this commitment to certain basic liberties.²³⁷ One idea is that members of the political community must be able to exercise their moral powers to form their own wills and worldviews, perhaps together with others but certainly without interference from the state.²³⁸ That is a good in itself, but it also gives people the ethical and political distance from the government that is necessary to give it direction and hold it accountable.²³⁹ Additionally, those writing in the social contract tradition maintain that people will choose to afford themselves and each other latitude to pursue their ultimate ends.²⁴⁰ Still other versions hold that individuals cannot be burdened in acts promoting integrity when they could be exempted with little cost to government interests²⁴¹ or that

victims of religious intolerance the ultimate and tragic exemplars of vulnerability.”); Laborde, *Equal Liberty*, *supra* note 86, at 61–62 (“It is because of the sociological and cultural features of religions . . . that they are especially vulnerable to invidious discrimination or neglect by majorities. Religions are especially vulnerable, but not uniquely so.”).

237. Cf. Laborde, *Liberalism's Religion*, *supra* note 233, at 200–01 (surveying reasons why egalitarians have argued that certain liberties have special “ethical salience”).

238. Cf. Seana Valentine Shiffirin, *What Is Really Wrong With Compelled Association?*, 99 *Nw. U. L. Rev.* 839, 854 (2005) (articulating a thinker-based approach to compelled speech law).

239. See *id.* at 873–74 (connecting a thinker-based approach to the health of a democratic culture or society).

240. This is true even if those ends are not chosen but instead are inherited or imparted. See Alan Patten, *The Normative Logic of Religious Liberty*, 25 *J. Pol. Phil.* 129, 144 (2017) (noting that self-determination does not depend on autonomy or choice but instead on the ability to pursue the ends a person in fact has); see also Laborde, *Liberalism's Religion*, *supra* note 233, at 205 (noting that her view is not subject to the criticism that it privileges Protestant modes of belief because “it does not put any premium on individualistic, chosen, or antecedently existing beliefs”).

241. Laborde, *Liberalism's Religion*, *supra* note 233, at 204–05 (arguing for the ethical salience of “integrity-protecting commitments”); see also *id.* at 72, 201 (noting that John Rawls thought people in the original position would avoid “strains of commitment,” such as impositions on conscience). At times, Cécile Laborde argues for violations of liberty only when accompanied by a form of inequality, making her ultimate position on basic freedoms somewhat ambiguous. Cf. *id.* at 220 (arguing that basic commitments are presumptively protected against disproportionate burdens and majority bias).

people must be free to enjoy fair opportunities for self-determination.²⁴² Under any or all of these, a democratic society protects basic liberties.²⁴³

Equal value can draw on either or both of these two commitments to equal membership and to protecting basic rights. To the degree that a government subordinates practitioners by regulating them while exempting others to whom its interests apply in just the same way, it undermines the social and political conditions necessary for democracy, as described above. So when the Newark police department carved out an exemption from its beard ban for officers with medical conditions but not for Muslim officers, it contributed to structural injustice, on the (seemingly safe) assumption that Muslims in New Jersey faced that sort of unequal membership status.²⁴⁴

When government differentially regulates a fundamental freedom, moreover, it risks a failure of equal concern and respect.²⁴⁵ By regulating a basic freedom while exempting other activities, the government implicitly judges the former to be less valuable than the latter.²⁴⁶ That sort of judgment is perfectly acceptable and indeed inevitable when the government is regulating ordinary actions, but it raises a presumption of unfairness when it is directed at protected ones. One way to think of this is as a denial of equal liberty, a concept with deep roots in American political thought.²⁴⁷ Government risks treating actors with unequal concern by

242. See Patten, *supra* note 240, at 145 (“Each individual has a legitimate claim on the most extensive opportunity to pursue his or her ends that is justifiable given the reasonable claims of others.”).

243. Protected activities may include not just the ones most obviously connected to democratic politics, such as freedom of speech and assembly, but also personal liberties connected to the formulation and fulfillment of a person’s deepest values. See Laborde, *Liberalism’s Religion*, *supra* note 233, at 147 (noting that the paradigmatically protected activities “concern core areas of intimate, expressive activity, such as religion, sexuality, family, and friendship”).

244. See *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999).

245. Dworkin’s view was comparable, though he was thinking of religious exemptions from general laws, not just from laws that differentially regulate religion. He wrote,

[E]qual concern [requires] a legislature to notice whether any group regards the activity it proposes to prohibit or burden as a sacred duty. If any group does, then the legislature must consider whether equal concern for that group requires an exemption or other amelioration. If an exception can be managed with no significant damage to the policy in play, then it might be unreasonable not to grant that exemption.

Ronald Dworkin, *Religion Without God* 136 (2013). Applying his view to equal value, it is possible to think that having exempted some other group means that the regulator has not, in fact, treated religious actors with equal concern.

246. Cf. Eisgruber & Sager, *Religious Freedom*, *supra* note 17, at 52 (“[Equal Liberty] insists in the name of equality that no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects.”).

247. See *id.* at 53 (describing equal liberty’s “venerable constitutional pedigree”).

selectively regulating their free exercise.²⁴⁸ To continue with the Newark example, the police department was held to have implicitly determined that medical reasons for growing a beard were more worthwhile or understandable than religious reasons. This could be conceptualized as a presumptively problematic instance of devaluing a fundamental right.

Someone might object that equal value does no independent work with respect to basic freedoms like liberty of conscience. If a practitioner is substantially burdened, that raises a presumption of invalidity simply because of the interference with a fundamental right. On that objection, a comparative analysis adds nothing. This is a serious argument, especially for those of us who also endorse freestanding protection against substantial burdens on conscience.²⁴⁹

However, equal liberty does plausibly add something conceptually distinct, namely a concern with differential regulation of fundamental freedoms. For one thing, those exercising basic liberties may be treated with unequal concern even if they are not substantially burdened. Government devaluing may be just as problematic in those situations, even though liberty is not unduly limited. For another, and more profoundly, government regulation may be unfair under an equal value theory even where a more evenhanded regulation could be justified. The differential regulation of a basic liberty could be just as concerning in that situation. Imagine that the Newark department could have refused all exemptions, acting on a sufficient interest in uniformity in police operations. Even then, it would have been unfair to deny an accommodation for Muslim officers while granting one for medical conditions. In other words, Newark could have eliminated all exemptions—defeating a liberty claim—but it could not have selectively regulated those seeking to exercise a basic capacity of democratic citizenship.

With those fundamental points in mind, consider now a few specific features of the fairness argument for equal value.

Note first that the comparability metric will not always perfectly isolate instances of unfairness. Put differently, asking whether the government

248. Alan Patten reaches a compatible conclusion using his principle “Fair Opportunity for Self-Determination” (FOSD), which provides that “[e]ach individual has a legitimate claim on the most extensive opportunity to pursue his or her ends that is justifiable given the reasonable claims of others.” He writes:

FOSD explains and justifies a concern about the unfairness of selective accommodation: if the law can reasonably make an exemption for conduct motivated by some particular viewpoint, and conduct motivated by another viewpoint is comparable in relevant respects, then there must be no justification grounded in the reasonable claims of others against offering the same exemption to the second viewpoint.

Patten, *supra* note 240, at 145–46. Note that this rationale depends on FOSD, which provides a right to exemptions absent reasonable claims by others. Here, this Article is not relying on a general right to religious exemptions. That issue is explored in Tebbe, *Liberty of Conscience*, *supra* note 22.

249. See Tebbe, *Liberty of Conscience*, *supra* note 22, at 270–71.

has regulated protected actors while exempting comparable others is a heuristic that may not precisely identify situations where people have been unfairly burdened.²⁵⁰ For example, a lottery for military conscription could burden conscientious objectors without denigrating their reasons for not wanting to fight. Using the government's interest to set the baseline for comparability is a device for identifying most situations where protected actors or activities have been devalued. Over time, another rubric may emerge that better captures unfairness. Meanwhile, the comparability threshold and the accompanying compelling interest test should be applied in a way that best approximates equal value.

Second, subordinated persons are most vulnerable to unfair devaluation. In theory, it is possible to imagine situations in which those with heightened social or political status would be able to bring claims under the approach. Had a mainstream Christian in Locke's example been prohibited from consuming bread and wine, while others who were otherwise similarly situated were exempted, that person conceivably could complain of unfairness. The possibility that equal value could be used by powerful actors may be considered a serious drawback insofar as it exacerbates the political dynamics identified in Part V. But in the real world, there will be few situations in which uneven regulation of majoritarian groups devalues their activities. And where it somehow does, protection may be appropriate, at least presumptively. Egalitarian interests of the public will then have power in the back end of the analysis.

Third, the fairness justification applies not only when individuals are explicitly singled out for regulation but also where they are implicitly devalued.²⁵¹ Nor do the terms "devaluing" or "value judgment" necessarily signify that decisionmakers have acted deliberately. Rather, they point to

250. In this way, the fairness justification for equal value is similar to Eisgruber and Sager's argument for "equal regard" or "equal liberty." See Eisgruber & Sager, *Religious Freedom*, supra note 17, at 52 (naming their model "equal liberty"); id. at 75 ("Equal liberty insists that the government must respond to the needs and interests of all its citizens with equal regard; . . . for example, . . . if government regulations make special accommodation for the dietary needs of pluralist faiths, then they must also accommodate the dietary needs of theocrats to the same degree."). For them too, a failure to exempt sacred practices while exempting secular ones is impermissible when it violates equal regard. See id. at 88–89. A difference is that they have developed their account for liberty of conscience, not for other constitutional protections, though they do believe that it brings free exercise in line with freedom of expression and equal protection. See id. at 55–56 ("Equal Liberty has the great virtue of putting the constitutional ideal of religious freedom in harmony with other prominent and prized features of our constitutional tradition, most notably free speech and equal protection.").

251. Cf. Laborde, *Liberalism's Religion*, supra note 233, at 47 (noting that, for Dworkin a "justification is 'covertly' non-neutral if, albeit facially neutral, it 'ignores the special importance of some issue to some citizens' and thereby constitutes a failure of equal concern").

a disparity that might be better described as systemic disregard or indifference. After all, one way to denigrate a person is to overlook their fundamental interests in a way that treats them as less worthwhile.²⁵²

Fourth, it is not simply burdening a protected activity that is problematic. That would suggest a liberty rule, not equal value. Rather, the concern here is with disparity—regulating protected activities while exempting comparable ones.

Finally, a tricky issue is whether the intuition here applies to protected actors as well as to protected activities. Free exercise doctrine includes both components, as do some other liberty rights, most obviously freedom of expression with its presumption against viewpoint and content discrimination. LGBTQ+ rights likewise are understood to blend protection of status and conduct.²⁵³ And, again, the fundamental interest branch of equal protection law requires evenhandedness as to important activities. Extrapolating from the core examples reviewed here, my sense is that equal value speaks to equality with respect to conduct and not independently. That said, the approach also may shield ordinary conduct that is associated with a subordinated class, as section IV.C suggests.

B. *The Argument From Positive Political Theory*

The positive political case for equal value draws on the familiar precept that requiring lawmakers to regulate in general terms provides effective if incidental protection for powerless persons and groups in democratic institutions. If dominant political actors are affected by regulation alongside less powerful ones, then they will have both the incentive and the ability to guard against government overreaching, and their efforts will benefit vulnerable people as well.

252. Notice again that there may be differences of timing and decisionmaking that separate an original policy from a refusal to exempt religious actors. See *supra* note 74. In *Fraternal Order*, for instance, the uniform policy was enacted before the request for a religious exemption was made. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360–361 (3d Cir. 1999). And in *Blackhawk*, the ban on housing wild animals exempted zoos and circuses years before the religious exemption was denied. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 205 (3d Cir. 2004) (describing the statutory exemptions enacted in 1986 and the agency’s refusal to grant an exemption in 1998). Moreover, the policy in *Blackhawk* was crafted by the legislature while that in *Fraternal Order* was created by an executive official. Compare *id.* at 205 (describing Pennsylvania statutes regulating wildlife), with *Fraternal Ord.*, 170 F.3d at 360 (describing the Special Order from the Chief of Police which created the beard policy at issue). While those differences may complicate an analysis that turns on governmental purpose or object, they pose less difficulty for equal value, which captures another form of unfairness.

253. See William N. Eskridge, Jr., A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 *Yale L.J.* 2411, 2416–21 (1997) (noticing perceptively that religion and sexual orientation are both characterized by both identity and practice, thought and action).

If regulation is not general, however, but affects only marginal interests, then this natural protection disappears. Lobbyists working for influential players may, by winning legislative exemptions, effectively remove political protection for others. Leaving weaker groups to their own defenses may be inevitable in a competitive democracy, at least when they are not subject to structural injustice. Even if, say, the Green Party is a persistent loser in American politics, it deserves no special protection, on this view. Subordinated groups, by contrast, may need judicial intervention to protect them from political dysfunction. They are systematically precluded from building the kinds of alliances that can protect them from the forces of political indifference. This could be called an argument from public choice theory, positive political theory, or constitutional political economy.²⁵⁴

Of course, religious minorities have historically experienced just this kind of structural vulnerability. And the Court has recognized as much, saying “[f]ree exercise . . . can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.”²⁵⁵ In the next sentence, the Court drew on Justice Jackson’s opinion in *Railway Express* for support.²⁵⁶ Religion is one characteristic of social exclusion to which this argument applies.

Defenders of equal value, Douglas Laycock and Cass Sunstein, have each independently invoked this argument and supported it by referring to Justice Jackson’s concurring opinion in *Railway Express*.²⁵⁷ As noted above,²⁵⁸ Jackson wrote that “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”²⁵⁹ What he meant was that the government should not discriminate in regulation except in ways that are related to its reasons for regulating.²⁶⁰

254. See generally James M. Buchanan, *The Domain of Constitutional Economics*, 1 *Const. Pol. Econ.* 1, 1 (1990) (“Constitutional political economy . . . directs inquiry to the working properties of rules, and institutions within which individuals interact, and the processes through which these rules and institutions are chosen or come into being.”).

255. *Larson v. Valente*, 456 U.S. 228, 245 (1982).

256. *Id.* at 245–46.

257. See Laycock & Collis, *supra* note 39, at 25 (quoting Jackson); Sunstein, *Our Anti-Korematsu*, *supra* note 17, at 13 (same).

258. See *supra* text accompanying notes 199, 205, 207–212, 219.

259. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

260. *Id.* (“I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.”).

Laycock and Collis call this “vicarious political protection for religious minorities,” and they believe it to be “the deepest rationale for the rule.”²⁶¹ They source the argument not only from *Railway Express* but also from *Lukumi*, in which the Court cautioned against regulation that “society is prepared to impose upon [religious groups] but not upon itself” as the “precise evil the requirement of general applicability is designed to prevent.”²⁶² Laycock and Collis believe that even a single exemption can undermine the effective political opposition to a particular policy that burdens a religious sect.²⁶³

Responding to critics, Laycock and Collis recognize that some laws will not affect mainstream interests, even if they are general in form and even if they seriously burden powerless groups.²⁶⁴ One example was the criminal ban on peyote, a drug with numerous unpleasant effects and, therefore, a miniscule recreational market.²⁶⁵ The Native American Church²⁶⁶ had no natural political allies in its struggle against that regulation—or did it? In fact, the church did succeed in securing a religious exemption from the peyote ban after it lost in *Smith*.²⁶⁷ Other religious minorities also succeeded in the legislature after losing in the courts.²⁶⁸ Perhaps Laycock and Collis underestimate the way alliances can be built among believers of different faiths or even of no faith. More likely, they

261. Laycock & Collis, *supra* note 39, at 24–25.

262. *Id.* at 25 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545–46 (1993)).

263. *Id.*

264. *Id.* at 25–26 (responding to Oleske, *Lukumi* at Twenty, *supra* note 75, at 329–30).

265. See U.S. Drug Enf’t Admin., Drug Fact Sheet: Peyote & Mescaline (2020), <https://www.dea.gov/sites/default/files/2020-06/Peyote%20and%20Mescaline-2020.pdf> [<https://perma.cc/6FH7-HE7V>] (describing such effects as “intense nausea, vomiting,” “heavy perspiration,” and “increased heart rate,” among others); U.S. Dep’t of Health & Hum. Servs., Facing Addiction in America: The Surgeon General’s Report on Alcohol, Drugs, and Health app. D at 64, 68, 76 (2016), <https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf> [<https://perma.cc/7Z9A-RWUE>] (noting that, as of 2015, only around eight million people had ever tried peyote, compared to the roughly twenty-three million and twenty-five million people who had used the hallucinogens psilocybin and LSD, respectively).

266. See *Emp. Div. v. Smith*, 494 U.S. 872, 874 (1990) (noting that respondents were members of the Native American Church).

267. See 42 U.S.C. § 1996a (2018). Several states have also exempted the ritual use of peyote from their drug laws. See *Smith*, 494 U.S. at 890 (listing state statutes).

268. See *supra* note 170 (noting that Congress negated the practical outcome in *Lyng*); see also, e.g., 10 U.S.C. § 774 (2018) (effectively reversing *Goldman v. Weinberger*, 475 U.S. 503 (1986), by allowing members of the armed forces to wear religious apparel while in uniform); 26 U.S.C. § 3127 (2018) (largely unwinding the result in *United States v. Lee*, 455 U.S. 252 (1982), by providing a religious exemption from Social Security tax contributions for certain employers). See generally Hillel Y. Levin, Rethinking Religious Minorities’ Political Power, 48 U.C. Davis L. Rev. 1617, 1624 (2015) (“A skeptical reassessment strongly suggests that, contrary to the counter-majoritarian intuition, *majoritarian* institutions at every level of government offer substantial protections and accommodations for religious minority groups—more substantial than courts do or ever have offered.”).

believe that politics only sometimes will fail sects with idiosyncratic beliefs.²⁶⁹ Requiring regulation to be general affords some protection for some practices.

Slightly differently, Sunstein argues that the requirement of generality helps to uncover hostility or prejudice. If a law regulates only a subset of those implicated by a government interest, it might be driven by an interest other than the one articulated. If a law “cannot be passed unless it is partial,” that may be because the law has an improper purpose.²⁷⁰ Aside from pure animus, it could reflect what Sunstein calls “selective sympathy and indifference.”²⁷¹

In order to decide whether partiality is a problem, it is necessary to determine whether there are “relative similarities and relative differences” between those regulated and those not regulated.²⁷² No one believes that regulatory exemptions are necessarily invalid just because they fail to include a protected group.²⁷³ In the Newark beard case, which Sunstein does not discuss, the exemption for medical conditions raised concerns that the exemption for undercover officers did not. To determine which ones violate equal value, it is necessary to know which of them is comparable to the requested religious exemption—in other words, it is necessary to determine the baseline. Making that determination will require a “substantive account,” according to Sunstein.²⁷⁴ Unlike Laycock, Sunstein does not use the government’s interests as the benchmark, perhaps because that move short circuits the analysis, which later asks (again) whether the government has a compelling interest.

Part V returns to the baseline question. Here, the point is that serious arguments of political and constitutional theory support the principle of equal value. Not only is there something morally troubling about this form of indifference, but there are good reasons why a democracy might want

269. See Laycock & Collis, *supra* note 39, at 26 (“Sometimes there are analogous secular interests that will be affected by a rule that burdens religion, and sometimes there are not To eliminate that source of randomness would require overruling *Smith* and returning to *Sherbert* and *Yoder*.”); cf. Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 Nw. U. L. Rev. 1189, 1197–99, 1262–72 (2008) (proposing meaningful rationality review to protect against covert discrimination). Laycock is a prominent critic of *Smith*. See, e.g., Laycock, *Remnants of Free Exercise*, *supra* note 89, at 2–4 (criticizing *Smith* on the basis of text, history, precedent, and normative theory).

270. Sunstein, *Our Anti-Korematsu*, *supra* note 17, at 13.

271. *Id.*

272. *Id.*

273. *Id.* (“No one thinks that ‘generality’ should be required when relevant differences exist.”).

274. *Id.* at 14.

to protect relatively powerless groups from political vulnerability by requiring a regulative generality that aligns their interests with those of powerful groups and thereby naturally benefits them.²⁷⁵

C. *Two Counterarguments*

Two principal arguments have been made against the justifiability of equal value. The first of these is a complaint that the rule will *underprotect*—the contention that equal value cannot adequately safeguard free exercise on its own. This argument is correct. However, it is often offered as support for the conclusion that equal value should be abandoned in favor of some stronger rule. A better alternative is to supplement equal liberty with protection for liberty of conscience. The second argument addressed in this section is that equal value will *overprotect* because so many laws contain exemptions. This critique has real force in its most profound version.

Equality rules by definition only protect against differences—they do not apply to laws or policies that burden everyone evenhandedly. Whether a class receives protection therefore depends on the happenstance of whether the government favors some other class. For example, the Muslim police officers in Newark would not have prevailed if the department had not exempted officers with medical conditions from the ban on growing facial hair.²⁷⁶ Christopher Lund calls this the problem of “constitutional luck,” and he thinks it is fatal to the equal value approach.²⁷⁷ Cécile Laborde criticizes Eisgruber and Sager in a similar way—she argues that it may be wrong to burden a religious practice independent of whether and what other interests are exempted.²⁷⁸ She even draws on the Newark example, saying that “a regulation preventing [Muslim officers] from wearing a beard on religious grounds might be unfair *even in the absence of*

275. Of course, it is possible that a liberty rule would protect religious minorities in the political process as well or even better than equal value. But that is not an argument in itself against adopting both rules. See Tebbe, *Liberty of Conscience*, *supra* note 22, at 292–95 (exploring the compatibility of equal value and liberty of conscience).

276. See *supra* section I.B (discussing Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999)). A caveat is that a disparate impact rule, which is a type of equality guarantee, would work even absent an exemption. But it still requires some disparity to get off the ground.

277. Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol’y 627, 629 (2003); see also 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 229–30 (2006) (arguing that Eisgruber and Sager err in thinking that all religious freedom cases can be sensibly resolved on the basis of discrimination alone); Brownstein, *supra* note 188, at 202 (critiquing the approach because it depends on the “fortuity” of whether a secular exemption exists); Oleske, *Lukumi* at Twenty, *supra* note 75, at 329–30, 330 n.199 (“[A]n argument for protecting religious minorities against neglect and indifference is an argument for providing exemptions to *all* laws, not just laws that happen to contain secular exemptions.” (citing Lund, *supra*, at 644–65)).

278. Laborde, *Liberalism’s Religion*, *supra* note 233, at 56.

comparable medical exemptions."²⁷⁹ Her insufficiency critique has bite against Eisgruber and Sager, who do believe that equality ought to be the only relevant value. Importantly, they also argue that equal regard can be abridged not just when a law happens to provide actual exemptions to other actors but also where lawmakers would have provided them if asked.²⁸⁰ But Laborde answers by pointing out that sometimes there is no obvious comparator group, real or hypothetical, for minority religious interests.²⁸¹ So the underprotection problem persists.

My solution to this problem is similar to Laborde's—it is to supplement equality protection against unfair discrimination with liberty protection against unfair burdens on conscience.²⁸² While the underprotection critique has power against a position that equal value ought to be the only measure of free exercise protection, in other words, it loses force against a more inclusive conception.

The second worry is that equal value is overprotective because so many laws contain exemptions that benefit unprotected actors. And not every law that contains such an exemption is necessarily unfair, according to Eugene Volokh.²⁸³ One of his most prominent examples is federal employment discrimination law, which generally does not apply to small businesses and yet should not for that reason draw religious exemptions.²⁸⁴ Volokh has to be right that Title VII need not allow religious exemptions simply because it does not apply to small businesses. Yet that might not cut against the principle of equal value. The government's interests in antidiscrimination law are typically taken to be threefold: "the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination."²⁸⁵ Exempting small employers but not all religious employers may be explicable in terms of these interests—for instance, because small employers do not impair equal economic opportunity in the same way—and therefore not an instance of unequal value. Admittedly, small businesses possibly are exempted not because of how

279. *Id.* at 57.

280. See Eisgruber & Sager, *Religious Freedom*, *supra* note 17, at 92; see also Laborde, *Liberalism's Religion*, *supra* note 233, at 51–53 (describing their view).

281. See Laborde, *Liberalism's Religion*, *supra* note 233, at 56–57.

282. See Tebbe, *Liberty of Conscience*, *supra* note 22, at 279–81, 292–95 (proposing substantive liberty protection for conscience, in addition to a guarantee of equal value); cf. Laborde, *Liberalism's Religion*, *supra* note 233, at 221–38 (arguing for protections both against "disproportionate burdens" on commitments and against "majority bias" against those commitments).

283. See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 *UCLA L. Rev.* 1465, 1539–42 (1999) [hereinafter Volokh, *Common-Law Model*] (arguing against the most favored nation approach); see also Volokh, *Brief Amicus Curiae*, *supra* note 45, at 23–29 (same).

284. See Volokh, *Brief Amicus Curiae*, *supra* note 45, at 27; Volokh, *Common-Law Model*, *supra* note 283, at 1540–42.

285. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 *S. Cal. L. Rev.* 619, 627–28 (2015).

they implicate the government's primary goal of antidiscrimination but out of concern for their associational interests. That would be different.²⁸⁶ But at least plausibly, the two classes are not comparable.

For similar reasons, we should not be troubled by the related objection that equal value would result in anarchy because so many regulations allow for exceptions. Justice Scalia famously articulated a similar concern in his majority opinion in *Smith*, where he worried that a society that adopted a presumptive exemption for every substantial burden on religion would be "courting anarchy."²⁸⁷ Yet that was not exactly the American experience before *Smith*, and it has not been the experience under RFRA.²⁸⁸ With regard to equal value, claims can be kicked out at the threshold stage if the favored and disfavored regulatory classes are not comparable—as just suggested with respect to Title VII—and they can be defeated at the back end of the analysis if the government can carry its burden. Only time can tell whether anarchy will result, at least as a matter of practical reality rather than political morality, but the experience has been tolerable so far.

Alan Brownstein sees this response to Volokh, but he responds with a deeper concern about the doctrine's operation. In order to determine whether a law is driven by a purpose that applies in the same way to regulated actors and unregulated actors, a court will have to apply heightened scrutiny or something similar.²⁸⁹ There simply is no alternative—to apply rational basis review to the question of comparability would be to accept the government's assertion that the classes are distinct with respect to its interests. That depiction of the inevitability of heightened scrutiny seems right, and it has the further consequence of short-circuiting the back end of the compelling interest test; by the time anyone asks whether a government policy is narrowly tailored to a compelling interest, they will have already determined that it was underinclusive with respect to any such interest.²⁹⁰ Something like this circularity problem might have been in the mind of Justice Kavanaugh when he suggested that strict scrutiny should

286. Duncan argues that a law is presumptively valid so long as it has at least one legitimate purpose that applies differently to religious and nonreligious (exempted) actors, even if it has other purposes that apply evenhandedly. Duncan, *supra* note 94, at 878.

287. *Emp. Div. v. Smith*, 494 U.S. 872, 888 (1990).

288. See Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 *Harv. L. Rev.* 28, 46 (2018) ("[C]ase law under the Religious Freedom Restoration Act (RFRA) has courted no anarchy to date.").

289. Brownstein, *supra* note 188, at 201; see also Brownstein & Amar, *supra* note 169, at 6–7 (reiterating this argument). To the degree that Volokh sees this problem as well, he considers it yet another reason to support *Smith* in order to keep courts from "substituting their moral and practical judgments about what constitutes 'true' harm to others for those of the legislature, as they determine which secular exemptions are indeed based on good enough reasons." Volokh, *Common-Law Model*, *supra* note 283, at 1542.

290. See Brownstein, *supra* note 188, at 201; see also Volokh, *Brief Amicus Curiae*, *supra* note 45, at 27.

be triggered whenever religious actors are placed in a disfavored regulatory category, regardless of comparability.²⁹¹ A middle path seems more sensible, however: One could first accept the government's articulation of its interests for the purposes of determining comparability at the threshold stage, without necessarily deferring to its argument that its regulatory classes are tailored to that interest, and then assess the government's real purpose at the back end of the analysis, as part of the compelling interest calculation.

Even if that compromise is accepted, the doctrinal dynamics, with their attendant risk of an expansion of judicial review, are worrisome. In this section, however, the aim is mainly to understand the moral case for equal value—and then, in Part V, to fully explore its political problematics, which swamp any careful calibration of a balancing standard.

The next Part asks whether and how equal value could be applied outside the free exercise context; Part V then explores the chances that it actually will migrate.

IV. POTENTIAL APPLICATIONS

Although equal value has been elaborated most fully and recently in the context of free exercise, it has conceptual relevance for other areas of constitutional law. This Part briefly canvasses its potential influence. Section IV.A first shows that equal value has relevance for the Establishment Clause, although it probably cannot be applied with exact symmetry. Section IV.B then explains that it has in fact been applied in cases concerning freedom of the press and that it has potential application to doctrines prohibiting content discrimination. Section IV.C argues that equal value holds appeal as a limited rule of racial justice. Finally, section IV.D explores the potential of equal value to protect reproductive freedom and offers an example from earlier in the coronavirus pandemic. This Part is incomplete for reasons of clarity and brevity—it leaves out applications

291. As Justice Kavanaugh put it in *Calvary Chapel*:

[D]oes the law create a favored or exempt class of organizations and, if so, do religious organizations fall outside of that class? That threshold question does not require judges to decide whether a church is more akin to a factory or more like a museum, for example. Rather, the only question at the start is whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group.

Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting from the denial of application for injunctive relief); cf. Note, *Constitutional Constraints on Free Exercise Analogies*, 134 Harv. L. Rev. 1782, 1783 (2021) (arguing for an approach under which “the burden of proof shifts to the government when a religious plaintiff can point to a secular entity receiving favored treatment—regardless of whether that entity is analogous”).

to gender equality and to LGBTQ+ rights, even though equal value arguably is well suited to those guarantees insofar as they combine protection for status and conduct.

A. Establishment Clause

Equality principles are often assumed to apply symmetrically. Think of the existing rule against racial classifications, which presumptively prohibits laws that benefit as well as burden racial minorities. Not all conceptions work this way—the antisubordination interpretation of equal protection shields those subject to structural injustice differently from those who occupy elevated strata of a status hierarchy—but many do. Religious equality seems especially well suited to a reading that requires symmetry, since it is implemented not only by the Free Exercise Clause but also by the countervailing Establishment Clause. And, on reflection, equal value properly applies in both directions, though not in exactly the same way. As this section explains, equal value does not seem to be implicated in situations where religious actors are advantaged but there is no religious classification and no fundamental right protecting regulated persons.

A simple intuition supports the new equality as a rule of antiestablishment. When the government issues a regulation that burdens profound nonreligious practices but exempts religious actors, even though its interests apply in the same way to both the regulated and unregulated categories, it could be said to have valued religious commitments over nonreligious ones. Rather than devaluing believers, it has overvalued or supervalued them. The government has implemented a value judgment that religious activities are more valuable or worthwhile than other significant activities.

A difficulty is that it does not seem intuitive to apply equal value to nonestablishment cases where no classification is involved. Where the government creates two classes—regulated and exempted—and places some religious actors in the latter category without explicitly or purposively singling them out, it is difficult to conclude that it has acted on an implicit value judgment that religious persons or practices are more worthwhile than secular persons or practices. And this seems true even if the government's interests apply in the same way to both. So, there is a difference from how the concept works in free exercise cases.

One possible response is that equal value still applies in situations where religion is advantaged without a classification if and insofar as secular actors are exercising fundamental rights. For instance, a government that exempts at-home gatherings from certain coronavirus restrictions on general gatherings might be accused of valuing at-home religious gatherings over political assemblies that occur outside the home. But that conviction, if plausible, seems to trade on the circumstance that political

gatherings are independently protected by the Speech Clause.²⁹² My conclusion is that equal value applies to the Establishment Clause only with caveats.

How does equal value work in practice in the nonestablishment context, and can we glean anything about the principle from its real-world application? Some doctrine arguably does support the principle's relevance there. Although the most familiar Establishment Clause rule prohibits only government policy that has the purpose or effect of advancing religion,²⁹³ including by sending a message of religious endorsement,²⁹⁴ occasional cases have prohibited other forms of favoritism. During the period of military conscription for the Vietnam War, most notably, the Court interpreted a conscientious objector statute to cover pacifists whose beliefs appeared to be grounded in nonreligious commitments, even though the law by its terms only exempted those who were opposed to war in all forms because of their "religious training and belief."²⁹⁵ Though the Court purported to reach its holding as a matter of statutory interpretation, its construction so clearly contradicted the statute's text that most have read the decision to be required by the Establishment Clause.²⁹⁶ That now is the orthodox reading of the case—and it resembles an application of equal value to protect nonreligious conscience.²⁹⁷ One caution is that atheism and agnosticism might be considered to be protected beliefs themselves.²⁹⁸

292. See *infra* section IV.B (running a similar hypothetical to test the intuition that equal value could apply under the Speech Clause).

293. See, e.g., *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) ("[A] statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion.").

294. See *id.* ("[W]e have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."). But see *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2079–82 (2019) (plurality opinion) (criticizing the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), test, including its nonendorsement interpretation); *id.* at 2101 (Gorsuch, J., concurring in the judgment) (same).

295. *United States v. Seeger*, 380 U.S. 163, 165 (1965) (quoting 50 U.S.C. § 456(j) (1958) (current version at 50 U.S.C. § 3806(j) (2018))).

296. See *Welsh v. United States*, 398 U.S. 333, 354–58 (1970) (Harlan, J., concurring in the result) (arguing that *Seeger* and *Welsh* can only be understood as constitutionally grounded).

297. See Eisgruber & Sager, *Religious Freedom*, *supra* note 17, at 112–13 (describing how equal regard also works as a nonestablishment value, and drawing on *Seeger* and *Welsh*).

298. See Nelson Tebbe, *Nonbelievers*, 97 Va. L. Rev. 1111, 1115 (2011) (describing the argument that nonbelievers should be protected under the Religion Clauses but arguing for a more particularized approach). Note also that, even if Congress did not mean to favor religion over irreligion, but only to accommodate objectors, it did facially classify on the basis of religion. 50 U.S.C. § 456(j) (1958) (exempting any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form").

In *Texas Monthly, Inc. v. Bullock*, moreover, the Court invalidated a Texas law that exempted religious publications from the sales tax.²⁹⁹ A secular magazine challenged that policy and won under the Establishment Clause.³⁰⁰ Although Justice Brennan tailored the plurality opinion to the existing doctrine, suggesting impermissible purpose or effect, he also indicated that exempting religious magazines but not secular ones was simply unfair.³⁰¹ After all, Brennan recognized that government is constitutionally permitted to accommodate religious actors in ways that “incidentally benefit” them, so he could not have meant that a proreligious effect alone was enough to invalidate the exemption.³⁰²

It is possible to reconstruct the reasoning of *Texas Monthly* in light of equal value. What distinguished Texas’s impermissible establishment, on this view, was precisely that the state’s interest in raising revenue pertained equally to secular actors who also wanted to engage in the relevant activity. Texas’s concern was general in nature, in other words, and the secular magazine was similarly situated with respect to it.³⁰³ Exempting only religious periodicals therefore crossed the line. It is also true that the magazine’s expressive activities were independently protected, as Justice White noted,³⁰⁴ but that circumstance only raises the possibility that the case is a candidate for an equal value approach to freedom of speech, as argued in the next section.

Brennan pointed out that a property tax deduction had been upheld in *Walz v. Tax Commission* because it applied to all nonprofits, religious and nonreligious.³⁰⁵ That category was general with respect to the government’s interest in “contributing to the community’s moral and intellectual diversity and encouraging private groups to undertake projects that

299. 489 U.S. 1 (1989).

300. *Id.* at 5–6.

301. The Court summarized the main rule as it stood at the time:

The core notion animating the requirement that a statute possess “a secular legislative purpose” and that “its principal or primary effect . . . be one that neither advances nor inhibits religion,” is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

Id. at 9 (alterations in original) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

302. *Id.* at 10.

303. *Cf. id.* at 20 (noting that “the exemption seem[s] a blatant endorsement of religion” and that “[t]he risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude” (internal quotation marks omitted) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment))).

304. *Id.* at 27–28 (White, J., concurring in the judgment).

305. *Id.* at 12 (discussing *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970)).

advanced the community's wellbeing."³⁰⁶ What differentiated the two exemptions, then, was not simply that Texas's facially classified on the basis of religion. After all, the *Walz* exemption did, too; both of them specifically exempted religious actors alongside nonreligious ones.³⁰⁷ What mattered instead was that it unfairly regulated nonreligious actors that were otherwise analogous to exempted religious actors.

Again, these cases do not squarely apply the principle of equal value, instead assimilating their holdings to the existing prohibition on laws that have the purpose or effect of favoring religion. Yet they are consistent with the commitment.

For a more current illustration, consider the coronavirus cases—particularly *Tandon*.³⁰⁸ There, recall, the Court exempted prayer groups from coronavirus regulations that applied to all at-home gatherings. Yet if equal value applies symmetrically, then the Court's ruling presents a non-establishment problem. Lifting restrictions on religious meetings in homes while leaving them in place for secular meetings on matters of conscience amounts to a value judgment in favor of religious gatherings. A cascade of equality violations could then be triggered. (Recall, however, the complication mentioned above: The application of equal value here might trade on a background sense that many secular at-home gatherings are also constitutionally protected under freedom of expression or association.)

In any event, the conclusion in this section is simply that equal value has conceptual application to nonestablishment—though its operation is not precisely symmetrical. The next section looks beyond the religion provisions of the First Amendment.

B. *Freedom of Speech*

In a line of cases concerning the press, the Court has held that general regulations, including economic regulations, may be applied against the media.³⁰⁹ But where laws are applied unevenly to the press, even though other actors implicate the government's interests in the same way, a suspicion of unconstitutional censorship is warranted. As explained above, *Minneapolis Star and Tribune* and *The Florida Star* both turned on something like equal value, though the real worry may have been that they were discriminating purposefully.³¹⁰

306. *Id.*

307. See *id.* at 14 n.4 (rejecting the argument that the Texas exemption was constitutional because the state also exempted unrelated nonreligious activities).

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

309. See, e.g., *Associated Press v. Nat'l Lab. Rels. Bd.*, 301 U.S. 103, 131 (1937) (applying labor protections to a press outfit, even though the protected employee was an editor).

310. See *supra* text accompanying notes 213–226.

Outside freedom of the press, it is possible to imagine application of equal value to speech cases, especially as an interpretation of content neutrality. Currently, the Court finds content discrimination when a law targets speech on its face or when it cannot be justified without reference to content.³¹¹ Under an equal value approach, content discrimination can also be found where a law regulates expressive activity but exempts nonexpressive activity that implicates the same government interests. Given the Roberts Court's tendency to assertively interpret and enforce the rule against content discrimination, it would not be surprising to see it move in this direction.³¹²

As an example, imagine that a government allows dining in restaurants, watching movies in theaters, and attending classes at universities (all with appropriate safety restrictions), but it disallows large outdoor gatherings, indoor lectures and concerts, and assemblies of more than three households in private residences. A local political organization brings a challenge, arguing that allowing universities and movie theaters to open constitutes a value judgment that those types of expression are more worthwhile than political organizing and protest.³¹³ The party also wants to assemble in private homes in larger groups. Conceivably, it can make out a prima facie case of content discrimination on an equal value theory, even though the party cannot show that the state is singling out political expression for disfavor either facially or in its purpose. After all, other expressive activities such as lectures and concerts are also regulated, and so are nonexpressive gatherings of many kinds. Regardless of that circumstance, it is possible to imagine a colorable claim that the government is devaluing political speech on the basis of its content.

Something similar happened in *Illinois Republican Party v. Pritzker*, in which a local political party brought a free speech challenge against the state's restrictions on gatherings during the coronavirus pandemic, arguing that the exemption for religious gatherings favored religious speech

311. *Reed v. Town of Gilbert*, 576 U.S. 155, 165–66 (2015); Laycock & Collis, *supra* note 39, at 7 (citing *Reed* for this rule); see also Leslie Kendrick, Content Discrimination Revisited, 98 Va. L. Rev. 231, 233 (2012) (arguing, even before *Reed*, that the Court's rules for content discrimination closely track its anticlassification approach to equal protection, for better or worse); Leslie Kendrick, Nonsense on Sidewalks: Content Discrimination in *McCullen v. Coakley*, 2014 Sup. Ct. Rev. 215, 222 (“Under existing doctrine, a law is content-based if (1) on its face it regulates speech on the basis of its ‘content’ or (2) it is justified by reference to the ‘content’ of the regulated speech. Laws that are not content related either on their face or in their justification are content neutral.”); Lakier, *supra* note 163, at 235 (describing the Court's turn to an anticlassification test for content discrimination in *Reed*).

312. For more on that likelihood, see *infra* section V.D.

313. Comparisons of political and religious speech have been made by courts during the pandemic. Early on, a court found that officials in New York had disfavored houses of worship by allowing political protests following the killing of George Floyd while disallowing worship. *Soos v. Cuomo*, 470 F. Supp. 3d 268, 283 (N.D.N.Y. 2020) (finding that, “by acting as they did, Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of preferential treatment” as compared to religious gatherings).

and rendered the policy content discriminatory.³¹⁴ Judge Diane Wood, writing for a panel that included Justice Barrett shortly before she joined the Supreme Court, turned away the claim on the ground that “the speech that accompanies religious exercise has a privileged position under the First Amendment, and . . . [the state regulation] permissibly accommodates religious activities.”³¹⁵ That conclusion was hard to square with the Court’s holding that disfavoring religious speakers is viewpoint discrimination,³¹⁶ but the point here is different. Under an equal value theory, the Republican Party could have argued that the state was implicitly judging certain speech to be more important than other speech on the basis of its content.³¹⁷

So although equal value has only been applied in a short line of press cases, it seems relevant to a larger range of content discrimination issues governed by the Speech Clause. Moreover, it is likely to be exported in that direction, as Part V argues, even though the new equality is unlikely to improve the anticlassification rule for racial discrimination on which the Court’s current content discrimination rule is modeled.

314. 973 F.3d 760, 764 (7th Cir. 2020).

315. *Id.*

316. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830–31 (1995); see also Nelson Tebbe & Micah Schwartzman, *Barrett Favors Religious Expression Over Other Speech. The Constitution Doesn’t.*, *Wash. Post* (Oct. 13, 2020), <https://www.washingtonpost.com/outlook/2020/10/13/barrett-first-amendment-religion-expression/> (on file with the *Columbia Law Review*).

317. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the most important recent case on content discrimination, is not an equal value decision, but it too helps to show how the doctrine could evolve in that direction. Though the Town of Gilbert generally prohibited the outdoor display of signs without a permit, it exempted twenty-three categories of signage. *Id.* at 159. One of these exemptions was for temporary directional signs, which could be displayed with certain restrictions. *Id.* at 160. Good News Community Church held its worship services in various temporary locations; it challenged the restrictions, which burdened its ability to advertise the meeting place each Sunday. *Id.* at 161. Justice Thomas, writing for the Court, wrote that the regulations were content discriminatory on their face and could not survive strict scrutiny despite the fact that they had no discriminatory object or purpose. *Id.* at 165–68. Although the Court did not question Gilbert’s interests in aesthetics and traffic safety, it found that those interests applied equally to categories of signs that were regulated less strictly than temporary directional signs, such as ideological and political signs, and therefore the regulation was not narrowly tailored. *Id.* at 171–72. Though the Court was addressing a law that it found to be facially content discriminatory, and though it therefore addressed comparability on the back end of the analysis, its reasoning otherwise resonated with equal value. Justice Thomas stated, for instance, that “a ‘law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.’” *Id.* at 172 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)). It would be a short step from this analysis to an application of equal value to content discrimination.

C. Racial Justice

Doctrine implementing the Equal Protection Clause could also incorporate an equal value principle. If the government regulated Black actors to whom its interests apply in just the same way as they did to exempted persons, it conceivably could be said to have devalued their activities. And here too, generality can be an effective shield against indifference. So both rationales for equal value pertain.³¹⁸

Imagine for instance that a state ends “no excuse” voting by mail.³¹⁹ To support the repeal, it cites concerns with the integrity of mail-in balloting, which was used by more than one quarter of the electorate in the last presidential election.³²⁰ At the same time, it continues to allow this type of absentee voting by state residents who are temporarily living elsewhere, by members of the military regardless of where they are currently residing, and by those with disabling medical conditions. Imagine further that the NAACP brings a challenge under the Equal Protection Clause, arguing that the new policy implicitly devalues Black voters relative to the interests of those living outside the state, members of the military, and those with medical impediments. It cites equal protection cases,³²¹ insisting that the state cannot regulate Black voters while exempting others to whom its interest in election integrity applies in just the same way. This argument is colorable, even though there may be no disparate racial impact, because many white voters in rural areas also rely heavily on mail-in voting.³²² And

318. This Article brackets affirmative action, which raises complex questions. Equal value could be mobilized to invalidate affirmative action programs, though a difficulty would be determining what it means to “exempt” an applicant from a regulation in this context. If a university pursues multiple interests in admissions, one of which is diversity, then giving a “plus” to members of racial minorities but not members of majorities plausibly does not violate equal value. But then it would have to justify any failure to include members of other protected groups whose admission would promote diversity. This discussion is deferred.

319. Such a provision was considered as part of Georgia’s recent voting law, but ultimately, it was not included. See Richard Fausset, Nick Corasaniti & Mark Leibovich, *Georgia Takes Center Stage With New Battles Over Voting Rights*, N.Y. Times (Mar. 3, 2021), <https://www.nytimes.com/2021/03/03/us/politics/georgia-voting-laws.html> (on file with the *Columbia Law Review*) (last updated Mar. 30, 2021) (“Among the most pressing concerns for Georgia Democrats is the possibility that . . . H.B. 531[] might be amended in the Senate to include provisions that put an end to automatic voter registration and a vote-by-mail system known as ‘no excuse,’ which allows any voters to cast mail ballots if they choose.”).

320. Cf. Fredreka Schouten, *Here’s Why Voting Rights Activists Say Georgia’s New Election Law Targets Black Voters*, CNN (Mar. 26, 2021), <https://www.cnn.com/2021/03/26/politics/georgia-voting-law-black-voters/index.html> [<https://perma.cc/8PHQ-NNNS>].

321. See *supra* section II.D (citing cases); see also *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (reasoning that “where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized,” citing fundamental interest equal protection cases, and concluding that “[t]hose principles apply here” because “wealth or fee paying has . . . no relation to voting qualifications”).

322. Cf. Fausset et al., *supra* note 319 (reporting a comment by Stacey Abrams that Georgia’s proposed restrictions on voting by mail could be “self-defeating for the G.O.P.” because “large percentages of rural white voters, a traditionally Republican-leaning bloc,

of course it applies regardless of any racial classification. Once a presumption of invalidity is applied, the state might find it difficult to prevail, since it is unevenly pursuing its interest in election integrity.

If that example trades too heavily on citizens' fundamental interest in voting, consider policies that regulate activities that are closely associated with racial identity. Kenji Yoshino has drawn attention to policies that pressure people to abandon activities associated with protected statuses.³²³ In that work, Yoshino has explored the connection between status and conduct, and between equality and liberty protections, in a manner that is relevant to equal value. One of his examples involves an employee who wishes to wear cornrows despite a uniform requirement that disallows "all-braided hairstyle[s]."³²⁴ If we imagine a government employer that allows other hairstyles that similarly compromise its interest in conservative appearance, such as blue hair or mohawks, we can imagine equal value having real purchase in the context of racial justice.

Equal value's proponents have recognized its possible applicability to racial equality. Sunstein, for instance, wonders not whether the principle could be applied to problems of equal protection but only about whether it would be applied that way by the Roberts Court.³²⁵ Laycock and Collis look more closely at the analogy to racial justice. They argue that antidiscrimination law traditionally requires "neutrality" and that the rule of general applicability is separate and in some sense more protective.³²⁶ Yet they also believe that free exercise cases are often more complex than other antidiscrimination conflicts.³²⁷ Given that complexity, the most favored nation approach could be understood as simply requiring equality in a context with many possible comparators.³²⁸ Though Laycock and Collis are concerned here with comparing the level of free exercise protection to

could also be impeded by laws that make it harder for citizens to cast absentee ballots and vote by mail").

323. See generally Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (2006) (arguing that pressures on minority groups to minimize their differences pose a threat to civil rights).

324. See *id.* at 131–33.

325. See Sunstein, *Our Anti-Korematsu*, *supra* note 17, at 15.

326. Laycock & Collis, *supra* note 39, at 26.

327. *Id.* ("Racial comparisons are often simpler . . .").

328. *Id.* Imagining a racial discrimination case with similar complexity—i.e., multiple comparators—suggests that the most favored nation approach is comparable to standard antidiscrimination:

If an African-American plaintiff shows that he was treated worse than similarly situated white employees, we would never let the employer defend on the ground that Asian or Hispanic employees were treated just as badly as the plaintiff. Minority employees are entitled to be treated as well as the best-treated race, not merely as well as some other badly treated race. It is no different to say that the exercise of religion is entitled to be treated like the best-treated secular analog.

Id.

other areas of equality law, they also implicitly recognize that equal value has conceivable application to racial justice.

Just as equal value substitutes (in part) for the lack of full liberty protection for free exercise, it also might partially compensate for the lack of disparate impact protection for members of subordinated groups.³²⁹

D. *Reproductive Freedom*

Unlike free exercise, freedom of expression, and equal protection, the right to terminate a pregnancy is not typically thought to incorporate a doctrinal equality requirement, though of course it should be understood to promote women's equality in an important sense. Under current law, a government may regulate and fund pregnancy terminations less generously than childbirth.³³⁰ So there seems to be no formal relevance of equal value to reproductive freedom as protected by the Due Process Clause.

On the other hand, governments sometimes do regulate in ways that carry an implicit judgment that a particular exercise of reproductive freedom is less valuable or worthwhile than another decision, such as to continue a pregnancy to delivery. Because the fundamental right to terminate a pregnancy is essential for women's equality, moreover, overlooking it may have constitutional relevance in ways that the concept of equal value could help to recognize and implement.

During the early days of the pandemic, many states did prohibit medical procedures, including abortions.³³¹ Alabama, for instance, banned all dental and medical procedures except those necessary to treat emergency conditions and those necessary to treat an underlying disease.³³² According to the state, abortions did not fall into either of the exceptions, except if necessary to protect the life or health of the pregnant woman.³³³ Alabama's order was found to impose an undue burden on the right to terminate a pregnancy.³³⁴ The government argued that its order served

329. See *supra* section II.C (comparing equal value and disparate impact).

330. See, e.g., *Harris v. McRae*, 448 U.S. 297, 315 (1980) (“The Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.”).

331. Laurie Sobel, Amrutha Ramaswamy, Brittni Frederiksen & Alina Salganicoff, *State Action to Limit Abortion Access During the COVID-19 Pandemic*, Kaiser Fam. Found. (Aug. 10, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/> (on file with the *Columbia Law Review*); see also Michelle J. Bayefsky, Deborah Bartz & Katie L. Watson, *Abortion During the COVID-19 Pandemic—Ensuring Access to an Essential Health Service*, 382 *New Eng. J. Med.* e47(1), e47(1) (2020) (“[G]overnors in a number of states have called for a halt to abortion care throughout the Covid-19 epidemic.”).

332. *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1174 (11th Cir. 2020).

333. *Id.* at 1175.

334. *Id.* at 1181.

three interests, namely, freeing up hospital capacity for coronavirus patients, preserving personal protective equipment, and slowing the spread of the pandemic by limiting social contact.³³⁵ Yet it was impossible to understand how those interests would be served by banning abortions while allowing childbirth, which required greater time in the hospital and greater use of protective equipment.³³⁶ The same could be said of other exempted medical interventions. Equal value could help capture the intuition that the government was nonsensically regulating the right to terminate a pregnancy while exempting other procedures that implicated its interests as well.

Perhaps for similar reasons, coronavirus restrictions on reproductive freedom were dropped in every state, either voluntarily or in response to litigation.³³⁷ In Alabama, the state health officer issued an order allowing medical procedures to proceed, unless it was determined that a category of them would unacceptably limit resources necessary to treat coronavirus.³³⁸ That decision ended the irrational differentiation of reproductive freedom.

A federal response to the pandemic, however, appeared to devalue reproductive freedom. After the outbreak of coronavirus, the FDA temporarily waived its requirement that patients pick up certain medications in person at a clinic.³³⁹ But it left that requirement in place for mifepristone, a drug that is used to terminate a pregnancy. Mifepristone could be prescribed after a virtual consultation with a doctor, and it could be taken at home without supervision.³⁴⁰ But it had to be picked up in person.

This selective regulation of reproductive freedom appeared to violate equal value. The FDA had lifted its in-person pickup requirement for several other medications and left it in place for mifepristone, to which its interests in safety and efficacy seemed to apply in the same way. Yet the Supreme Court apparently did not apply equal value when it ruled that

335. *Id.*

336. *Id.* at 1181–82.

337. See, e.g., Shannon Najmabadi, *Texas Clinics Resume Abortion Services as State Acknowledges Ban Is No Longer in Place*, *Texas Trib.* (Apr. 22, 2020), <https://www.texastribune.org/2020/04/22/texas-abortions-coronavirus-ban/> [<https://perma.cc/DA97-SR9L>]; Sobel et. al, *supra* note 331.

338. Ala. Dep't of Pub. Health, *Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19*, at 6–7 (May 8, 2020), <https://www.alabamapublichealth.gov/legal/assets/order-adph-cov-gatherings-050820.pdf> [<https://perma.cc/SGR3-3F6Q>].

339. See *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 579 (2021) (Sotomayor, J., dissenting); see also Elizabeth Reiner Platt, Katherine Franke & Lilia Hadjiivanova, *Columbia L. Sch., We the People (of Faith): The Supremacy of Religious Rights in the Shadow of a Pandemic* 17 (2021), <https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/We%20The%20People%20of%20Faith%29%20Report.pdf> [<https://perma.cc/G5GD-S3BM>].

340. See *American College*, 141 S. Ct. at 579 (Sotomayor, J., dissenting).

the FDA rule must remain in place.³⁴¹ It refused the very same sort of emergency protection that it had repeatedly granted for free exercise during the same period in response to the same pandemic.

* * *

In sum, equal value is applicable to other areas of constitutional equality law and would hold attraction in some of them. Although we can expect to see that kind of borrowing before long, it is likely to be patterned and selective in the judiciary. If the analysis of this Part is correct, then any such selectivity demands an explanation.

V. POLITICS

This Part considers equal value not in principle but in practice, given the politics of the Roberts Court and the wider constitutional discourse it both reflects and shapes. My hypothesis is that the Court's pattern of decisions reveals a particular formation of religious preferentialism and laissez-faire constitutionalism that touches not just free exercise but also freedom of speech and equal protection.

Regarding the first element, preferentialism, it matters that the new equality is favoring traditional religions at a historical moment when their social status is facing contestation.³⁴² In particular, mainstream religious groups are turning to constitutional doctrines that previously protected marginal religious sects.³⁴³ Equal value is deployed to shore up these groups against threatened status erosion.³⁴⁴ That also helps to explain why equal value is unlikely to affect some areas of law while it may readily influence others. None of this is to say that constitutional protection for dominant religious groups is necessarily unwarranted. It is instead to understand its practitioners' implicit interests.

341. Technically, the Court stayed the district court's preliminary injunction against the FDA. *Id.* at 578. Because the majority did not issue an opinion, it is impossible to tell whether it even considered the *Tandon* theory in this case concerning reproductive freedom.

342. Reva Siegel once described the relevant history of equal protection law as "preservation-through-transformation." Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1113 (1997). She coined the term to capture the way that status relationships were defended even as legal doctrines shifted in response to conflict and challenge. Today, the new equality could be understood in a similar way, except insofar as free exercise's transformation is working not only to preserve existing status arrangements but also to confer special privileges.

343. The terms "mainstream" and "marginal" are used here not to describe numerical size but rather to indicate relative status positions that are historically durable and culturally significant. Cf. Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 *Sup. Ct. Rev.* 257, 259 (describing the use of antidiscrimination tools by a member of a mainstream denomination). For current demographics on the size of religious groups in the United States, see *infra* note 394.

344. For more on religious preferentialism as a reaction to increased social diversity, see Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 *Minn. L. Rev.* 1341, 1410–12 (2020).

Regarding the second element, laissez-faire constitutionalism, this Article's observations about equal value dovetail with recent work on freedom of expression in the Roberts Court.³⁴⁵ A similar agenda has been attributed to its free exercise jurisprudence.³⁴⁶ But the arguments offered here also reinforce the impression that the judiciary is content to allow existing social stratification to be considered a private matter, not only permitted by courts but protected against government efforts to redistribute opportunities and guarantee equal citizenship status. In short, a coherent worldview is emerging, one that does not conform to the demands of equal value or any other democratic principle. Instead, the Court is revolutionizing constitutional law in the service of a particularized blend of religiosity and libertarianism.

Sections V.A and V.B examine how equal value has actually been applied, looking not only at the coronavirus cases but also at decisions where it was conspicuously absent, such as the travel ban opinion. It rules out any simple story of judicial deference to executive expertise in the context of a national emergency.

Section V.C then begins to anticipate how the principle is likely to be practiced in the future. If there is any point of relative certainty, it is that equal value is not likely to benefit Black and brown people anytime soon, even though it is applicable to certain problems of racial justice.³⁴⁷ An area where an expanded conception of equality could conceivably make headway is in freedom of speech, as section V.D shows. There, it would further strengthen doctrine on content discrimination, contributing to a laissez-faire conception of economic and social policy.

Finally, section V.E tests the suggestion that the emerging equality is usefully compared to the Court's jurisprudence during the *Lochner* era.

345. See, e.g., Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 *Colum. L. Rev. Online* 179, 181–82 (2018); Leslie Kendrick, *First Amendment Expansionism*, 56 *Wm. & Mary L. Rev.* 1199, 1207 (2015); Genevieve Lakier, *The First Amendment's Real *Lochner* Problem*, 87 *U. Chi. L. Rev.* 1241, 1244–45 (2020); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 *Harv. L. Rev. Forum* 165, 181–82 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *Law & Contemp. Probs.* 195, 198–203 (2014); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 *Tex. L. Rev.* 1329, 1334 (2016); Amanda Shanor, *The New *Lochner**, 2016 *Wis. L. Rev.* 133, 134–35; Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 *Food & Drug L.J.* 25, 26 (2015); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, *New Republic* (June 3, 2013), <https://newrepublic.com/article/111132/how-corporations-hijacked-first-amendment-evade-regulation/> [<https://perma.cc/M9GE-6NF9>].

346. See generally Elizabeth Sepper, *Free Exercise Lochnerism*, 115 *Colum. L. Rev.* 1453, 1455–56 (2015) (comparing Lochnerism and free exercise jurisprudence today). For a diagnosis of the political economy of contemporary free exercise decisions, see Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 *Cornell L. Rev.* 959, 1011–18 (2020) [hereinafter Tebbe, *Political Economy*].

347. See *supra* section IV.C.

According to one account of that period, the Court was engaged in baseline manipulation in order to naturalize the existing distribution of wealth and entitlements. It constitutionalized that standard and invalidated deviations as violations of government neutrality or incursions on economic liberty, thereby imposing a substantive program on democratic politics.

Understanding the story in that way may help to diagnose the politics of equal value. Identifying inequality today, like finding burdens on liberty of contract then, depends centrally on baseline determinations. When the Court selects a standard for comparison—when it recognizes the existence of an equality problem in the first place—in patterned ways, it opens itself to the impression not only that it is determining what is “comparable” on the basis of normative judgments, for that is inevitable, but further that it is doing so on the basis of a particular political program. Here, the pattern suggests that constitutional actors are seeking to protect mainstream denominations against perceived status degradation. At the same time, they are deploying the doctrine in other areas of constitutional law—free speech and equal protection—in ways that protect existing power distributions from government interference. Considering all the evidence, in other words, the impression emerges that constitutional decisionmakers are innovating equality doctrine in response to social and political contestation. What is troubling about that is not that equal value is unsupported as a matter of principle, nor merely that it is serving substantive values, but instead that it seems designed to support a regrettable social program.

A. *The Travel Ban Decision*

President Donald Trump’s travel ban ought to have drawn an equal value analysis. Members of a disfavored religious group, Muslims, were placed in a regulated category, while others were exempted from the travel regulation. That ought to have raised at least the question of whether adherents (and their religious interests) were devalued relative to others (and their reasons for traveling). How that question should have been answered is not completely obvious, as explained below. But it should at least have been raised—and it was not.³⁴⁸ That omission by vocal supporters of equal value is telling.³⁴⁹

Of course, the main defect of the travel ban was that its sole enactor, President Trump, was motivated by animus toward Muslims. Over and over again during his campaign in 2016 and through his inauguration in early 2017, Trump made it clear that he viewed the policy as directed against

348. Becket raised the argument in its amicus brief, albeit obliquely. See Becket Fund, *supra* note 29, at 22–23.

349. Cf. Dorf, *supra* note 24 (arguing that, despite Gorsuch seemingly detecting religious discrimination in *Roman Catholic Diocese* because “worship services weren’t advantaged sufficiently relative to comparable secular indoor gatherings,” he “and his fellow Republican appointees looked the other way” when it came to President Trump’s “animus against Muslims as a ground for restricting entry into the US”).

Muslims, calling it a “total and complete shutdown of Muslims entering the United States.”³⁵⁰ The *Hawaii* Court ultimately upheld the travel ban despite the overwhelming evidence of discriminatory intent.³⁵¹ In a case challenging an immigration policy that impacted national security, the Court reasoned that it could only apply rational basis review.³⁵² And, applying that deferential standard, it found that the final version of the travel ban—the third iteration—was reasonably related to national security concerns “quite apart from any religious hostility.”³⁵³ By the time the ultimate version was enacted, the Trump Administration had surveyed other countries to determine whether their emigration controls and information-sharing practices were adequate. Without such controls and practices, the administration said, it would lack the capacity and information to adequately vet travelers.³⁵⁴ Also, in response to its survey, the administration modified its list of countries that were subject to the order, adding two non-Muslim countries and removing other countries with Muslim governments and populations. Ultimately, five of the seven affected countries had Muslim majorities.³⁵⁵

350. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018). That phrase remained on the campaign’s website until May 17, *id.* at 2435 (Sotomayor, J., dissenting), well after the first two versions of the travel ban order. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (first version); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (second version). For a fuller version of the extensive evidence of antireligious animus from the majority opinion itself, see *Hawaii*, 138 S. Ct. at 2416–17.

351. The Court failed to find sufficient discriminatory intent even though it found that intent in another case the very same term, under facts that provided weaker evidence of antireligious hostility. See Kendrick & Schwartzman, *supra* note 55, at 135 (“[I]t is impossible to ignore the obvious inconsistency between the Court’s demand for tolerance and respect in *Masterpiece [Cakeshop, Ltd. v. Colorado Civil Rights Commission]*, 138 S. Ct. 1719 (2018), and its abdication of that demand in *Trump v. Hawaii* . . .”). Deepening the contradiction, Justice Gorsuch, joined by Alito and supported by Thomas, ran something like an equal value theory in *Masterpiece*. See Oleske, *Free Exercise (Dis)Honesty*, *supra* note 24, at 733–38 (describing that argument). Gorsuch made no such move in the travel ban decision.

352. Chief Justice Roberts’s statement that he was applying rational basis review was ambiguous because that standard comes in several varieties. This is how he put it:

The upshot of our cases in this context is clear: “Any rule of constitutional law that would inhibit the flexibility” of the President “to respond to changing world conditions should be adopted only with the greatest caution,” and our inquiry into matters of entry and national security is highly constrained For our purposes today, we assume that we may look behind the face of the [travel ban] to the extent of applying rational basis review [W]e may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

Hawaii, 138 S. Ct. at 2419–20 (citation omitted).

353. *Id.* at 2420–21. The government’s articulated interests were “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.” *Id.* at 2421.

354. *Id.* at 2404–05.

355. *Id.* at 2421.

But, of course, a showing of discriminatory purpose is unnecessary under the new approach. Nor does it matter that the travel ban did not facially classify on the basis of religion—an absence that the majority emphasized.³⁵⁶ What would have been relevant was whether Muslim travelers were treated worse than others who were similarly situated with respect to the government's (legitimate) interests. Answering that question is difficult with respect to the administration's selection of countries affected by the final version of the ban, which was supported by administrative fact-finding.

Obviously, the failure of equal value had been clearer in earlier versions. Before the administration had done its homework fully, the list of countries subject to the ban was different.³⁵⁷ Very likely, travelers from some of the countries originally on the list were similarly situated with respect to the government's interest in national security. Whether the government's subsequent amendments cured the equal value problem with respect to Muslims who remained affected by the travel ban is not entirely clear. Because equal value does not turn on purpose, an initial violation probably can be cured by subsequent revision. Discriminatory purpose may taint later changes in policy,³⁵⁸ but structural inequality is not like that—either it is present or it is not. So the question really ought to be whether the final version of the ban, the one reviewed by the Court, devalued Muslim travelers as compared to others.

Were Muslim travelers in *Hawaii* really comparable to others, so that they were devalued relative to the government's legitimate security interests? The Trump Administration argued that the whole point of the study it eventually conducted was to separate countries that presented a security challenge from those that did not and to apply the ban only to the former. However, the majority's ability to answer that question was complicated by its decision to apply rational basis review, which required some degree of deference to the government. Essentially, the Court decided to defer to

356. *Id.* at 2418 (describing the policy as “neutral on its face” and “facially neutral toward religion”). An earlier version of the ban did explicitly exempt members of the Christian minority in Syria. *Id.* at 2436 (“President Trump explained that [the first version of the travel ban] was designed ‘to help’ the Christians in Syria.”).

357. Compare *id.* at 2403 (listing the affected countries in the first version of the travel ban as Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen), with *id.* at 2404 (listing countries affected by the second version as Iran, Libya, Somalia, Sudan, Syria, and Yemen), and *id.* at 2405 (explaining that the final ban applied to Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen).

358. See *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 850–51 (2005) (holding that a Ten Commandments display violated the Establishment Clause not so much because the ultimate display would have been unconstitutional if it had no history but rather because the government began with a Christian display that was gradually and grudgingly modified in response to litigation); see also Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, in *Political Legitimacy* 201, 220–23 (Jack Knight & Melissa Schwartzberg eds., 2019) (considering the questions of whether and how it is possible to remove the “moral taint” that accompanies laws that were enacted for impermissible purposes).

the government in its selection of countries on the ground that it was examining an executive decision concerning immigration and national security.³⁵⁹

Consequently, the question of whether Muslim travelers subject to the ban were comparable to those not subject to the ban became almost irrelevant to the Court's decision. Notably, Justice Sotomayor, in dissent, argued strenuously that they were. Quoting *Lukumi*, she argued that the travel ban was actually "nothing more than a 'religious gerrymander.'"³⁶⁰ Two countries without Muslim majorities, North Korea and Venezuela, were included in the final version. However, neither one implicated the government's national security interests. North Koreans already had been prohibited from entering,³⁶¹ and only a few Venezuelan officials and their family members were subject to the ban.³⁶² As for the countries that were removed from the list, or not subject to it, the government's report was secret and not part of the record. Another litigation had revealed that the report on worldwide emigration safeguards consisted of only seventeen pages.³⁶³ What's more, the government's interests seemingly did not pertain to these countries, which were already subject to strict regulations on immigration.³⁶⁴

Finally, and perhaps most revealing, the policy allowed certain individuals from countries subject to the ban to obtain nonimmigrant visas, undermining the government's plea that it lacked sufficient information to assess the safety of individual travelers from banned countries.³⁶⁵ So

359. It was far from obvious that the national security concern warranted deferential review. See *Hawaii*, 138 S. Ct. at 2441 n.6 (Sotomayor, J., dissenting).

360. *Id.* at 2442.

361. Exec. Order No. 13,810, 82 Fed. Reg. 44,705 (Sept. 20, 2017) (cited in *Hawaii*, 138 S. Ct. at 2442).

362. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,166 (Sept. 24, 2017).

363. *Hawaii*, 138 S. Ct. at 2443 (Sotomayor, J., dissenting).

364. These included the visa waiver program, which regularly assessed the travel policies of foreign countries. *Id.* at 2444.

365. See Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165–69 (allowing, for example, nationals of Iran to enter with valid student and exchange visitor visas, subject to enhanced screening, and allowing most Venezuelan nationals to enter); see also *Hawaii*, 138 S. Ct. at 2445 (Sotomayor, J., dissenting) ("[The travel ban] permits certain nationals from the countries named . . . to obtain nonimmigrant visas, which undermines the Government's assertion that it does not already have the capacity and sufficient information to vet these individuals adequately."). It is true that banned individuals had recourse to a waiver program, but according to Justice Sotomayor,

[T]here is reason to suspect that the Proclamation's waiver program is nothing more than a sham The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security. See [id.] at 2430–2433 (Breyer, J., dissenting) (outlining evidence suggesting "that the Government is not applying the Proclamation as written," that "waivers are not being

whether comparable travelers were exempted from the travel ban was at least a serious question.

The Court's response was simply that "the dissent can only attempt to argue" that the final ban was driven by antipathy to Muslims "by refusing to apply anything resembling rational basis review."³⁶⁶ But for my purposes, that itself is the remarkable fact—the Court failed even to ask whether Muslim travelers were devalued when it decided whether to apply a deferential standard of review. That choice itself needs to be justified, and it cannot be supported by deferring to the government on the matter of comparability.

Nor should it necessarily have mattered that the main allegation against the administration was discrimination on the basis of religious status, while equal value usually pertains to religious activities or observances. Status and conduct—and the equality and liberty rules that protect them—interact in complicated ways in the context of equal value, as noted above in several places.³⁶⁷ But of course they are intimately related when it comes to free exercise and several other constitutional protections. If that is difficult to see, just suppose that some of the affected travelers wished to move from place to place for religious reasons. Elsewhere, the Court has been willing to credit believers' claims that their faith pervades every aspect of their activities.³⁶⁸

Failure to apply the new equality was especially notable because its animating rationales were so pertinent. Not only did the government seem to be acting on a value judgment that Muslim travelers were less important or worthwhile, an impression bolstered by many statements of the sole lawmaker responsible,³⁶⁹ but also its decision to regulate only citizens of countries without serious influence on the United States left them without

processed in an ordinary way," and that consular and other officials "do not, in fact, have discretion to grant waivers").

Id.

366. *Hawaii*, 138 S. Ct. at 2420–21.

367. See *supra* note 1; text accompanying notes 253, 323–324.

368. Cf. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2056 (2020) (describing an employment agreement at a religious school, according to which "the school's mission was 'to develop and promote a Catholic School Faith Community,' and . . . '[a]ll [Morrissey-Berru's] duties and responsibilities as a Teache[r were to] be performed within this overriding commitment'" (first and third alterations in original) (citation omitted) (quoting Joint Appendix to the Petition for a Writ of Certiorari at 154, *Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049 (No. 19-267), 2020 WL 564754)); *id.* at 2066 (accepting this characterization as significant for considering whether a teacher was a "minister" for purposes of the ministerial exception); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706–07, 720–21 (2014) (accepting the relevance of religious commitments to the activities of a business corporation).

369. How equal value and neutrality of purpose work together is interesting and worth exploring. It is possible that in certain circumstances a violation of the former could provide evidence of the latter.

natural political allies they otherwise would have had in nations with influence on the administration.³⁷⁰ Even powerful individuals within the banned countries could obtain nonimmigrant visas under the exemption.³⁷¹ If ever unelected judges would have been needed to correct political dysfunction under a positive-political-economy analysis, it would have been in precisely such a situation.

Considerations of judicial deference cannot convincingly distinguish *Trump v. Hawaii* from the coronavirus cases. Sunstein believes that the Court has declared in the coronavirus cases that it will no longer defer to executive branch officials, even in emergency situations.³⁷² For him, the *Roman Catholic Diocese* opinion is “our anti-*Korematsu*,” a corrective to judicial reticence in moments of exigency. He cites *Hawaii* approvingly for repudiating *Korematsu*.³⁷³ But then it has to be confronted that the *Hawaii* Court did not scrutinize the travel ban, despite its susceptibility to an equal value analysis.³⁷⁴ Justice Sotomayor did insist that constitutional rights remained in force even in emergencies³⁷⁵—precisely the position that Sunstein advocates—but she was dissenting.³⁷⁶

Another understanding of what separates *Hawaii* from decisions like *Tandon*, despite the striking parallels, depends not on whether equal value is considered at all but on how it is applied once it is chosen. And that depends on baseline selection. Had Chief Justice Roberts considered the question and concluded that Muslim travelers subject to the travel ban were comparable to those exempt from it, that would have given him a reason to apply a presumption of invalidity. To explain the choice of baselines, we must look for a pattern of decisionmaking that can reveal the underlying judgments.

370. For the list of countries subject to the final ban, see *supra* note 357.

371. See *supra* note 365.

372. Sunstein, *Our Anti-Korematsu*, *supra* note 17, at 2, 9 & n.57 (quoting the passage in which the *Hawaii* Court repudiated *Korematsu*).

373. *Id.* at 9 n.57 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)) (“[T]o make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.” (alteration in original) (quoting *Trump v. Hawaii*, 138 S. Ct. at 2423)).

374. See Dorf, *supra* note 24 (“[I]n granting extreme deference to political authorities based on bogus assertions of national security, the majority . . . in *Travel Ban* more nearly followed than repudiated *Korematsu*.”). Adding to the irony, Trump himself compared the travel ban to Japanese internment. *Hawaii*, 138 S. Ct. at 2435.

375. *Hawaii*, 138 S. Ct. at 2441 n.6 (“[I]t is clear from our precedent that ‘[w]hatever power the United States Constitution envisions for the Executive’ in the context of national security and foreign affairs, ‘it most assuredly envisions a role for all three branches when individual liberties are at stake.’ . . . Deference is different from unquestioning acceptance.” (citations omitted)); see also Jamal Greene, *Is Korematsu Good Law?*, 128 *Yale L.J. Forum* 629, 629 (2019) (calling the *Hawaii* Court’s repudiation of *Korematsu* “not just empty but also grotesque”).

376. It is true that the *Hawaii* Court did not completely abdicate because it did “look behind the face of the [travel ban] to the extent of applying rational basis review.” *Hawaii*, 138 S. Ct. at 2420. But that is cold comfort.

B. *The Coronavirus Cases*

Trump v. Hawaii was a religious freedom decision that reviewed executive decisionmaking in a situation of assumed national exigency. So it resembled the coronavirus cases, in which judges were explicitly adopting the principle of equal value. Yet in the coronavirus context, the outcomes favored religious litigants, most of whom belonged to mainstream denominations. Unlike the Muslim travelers in *Hawaii*, Christian objectors prevailed on claims of discrimination, along with minority faiths. What explains the difference?

One possibility is that the rule of deference was relevant to national security but not public health. In *Jacobson v. Massachusetts*, however, the Court did require deference to executive officials managing public health emergencies.³⁷⁷ In 1902, the board of health of Cambridge, Massachusetts enacted a regulation requiring all inhabitants to be vaccinated against smallpox, which had become epidemic.³⁷⁸ Henning Jacobson refused, not because of any individual medical condition but because he believed vaccines to be ineffective and medically dangerous.³⁷⁹ The Supreme Court turned away his substantive due process challenge, saying that it would be inappropriate for judges to second guess the judgment of legislators and local administrative officials that mandatory vaccination was safe, effective, and necessary. Courts could enforce individuals' rights to liberty, but they were confined to applying something like rational basis review.³⁸⁰ Under any less deferential approach, judges would be in the position of reviewing the policy judgments of government officials on matters of public health in the midst of an epidemic.

Jacobson came down in 1905, the same year as *Lochner* itself.³⁸¹ That Court knew how to use judicial review to enforce unenumerated rights, and yet it stayed its hand in deference to legislatures and public health officials.

In the recent coronavirus cases, the Court showed less restraint. Concurring in the Court's first pandemic case, Chief Justice Roberts quoted *Jacobson* to support his decision to join the four liberals in denying

377. 197 U.S. 11, 25 (1905) (“[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”).

378. *Id.* at 12–13.

379. *Id.* at 36.

380. That standard was described in *Jacobson*:

[I]f a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 31.

381. *Lochner v. New York*, 198 U.S. 45 (1905).

a religious exemption from California's restrictions on gatherings.³⁸² Dissenting in *Calvary Chapel*, however, Justice Alito argued that "it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic," and he urged that *Jacobson* "must be read in context," meaning a due process challenge to a local regulation, not a free exercise challenge to a state regulation.³⁸³ Justice Kavanaugh also warned against excessive deference under *Jacobson*:

COVID-19 is not a blank check for a State to discriminate against religious people, religious organizations, and religious services. There are certain constitutional red lines that a State may not cross even in a crisis This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equality-treatment and free-speech principles. The court of history has rejected those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake.³⁸⁴

In *Roman Catholic Diocese*, Justice Gorsuch also distinguished *Jacobson*. He pointed out that the Court there had applied rational basis review, which was the "normal[]" standard for "Fourteenth Amendment challenges, so long as they [did] not involve suspect classifications . . . or a claim of a fundamental right."³⁸⁵ The *Jacobson* Court did not depart from that standard in the context of a public health emergency, Gorsuch reasoned, so in *Roman Catholic Diocese* the Court should apply the usual standard for review of disparate treatment of religion, namely strict scrutiny.³⁸⁶ Whether or not Gorsuch convincingly distinguished that ruling, my point here is simply that several Justices have worked hard to avoid deference to executive officials who are managing an emergency.

If judicial deference did not explain the difference, what did? Why were these Justices amenable to religious freedom challenges to public

382. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief) ("The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" (quoting *Jacobson*, 197 U.S. at 38)).

383. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting from the denial of application for injunctive relief).

384. *Id.* at 2614–15 (Kavanaugh, J., dissenting).

385. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

386. *Id.*

health regulations in the context of the coronavirus pandemic when they had resisted similar challenges to the travel ban?

Their articulated reasons were weak. History has not so thoroughly condemned judicial deference in emergency situations that it could not be applied in the coronavirus context. And public health officials' articulated distinctions between religious gatherings and "essential" businesses were not outlandish even if they were not always narrowly tailored.³⁸⁷ Something else may be driving conservative judges' selection of baselines for comparison. Raw partisanship may have had an effect in the coronavirus cases, and there is some descriptive empirical evidence to support that view.³⁸⁸

Changes in court personnel did seem to correlate with outcomes.³⁸⁹ Early in the pandemic, Chief Justice Roberts joined the four more liberal members to refuse orders that would have exempted houses of worship from restrictions on gatherings in California and Nevada.³⁹⁰ After Justice Barrett replaced Justice Ginsburg in the fall of 2020, the Court voted 5-4 in favor of the free exercise argument in *Tandon* and *Roman Catholic Diocese*, with the Chief dissenting both times.³⁹¹ Looking at the voting patterns alone, it is hard not to form an impression that the historic shift in

387. See, e.g., Opposition to Application for Writ of Injunction at 7, *Roman Cath. Diocese*, 141 S. Ct. 63 (No. 20A87) (defining "essential" businesses as those "providing products or services that are required to maintain the health, welfare, and safety of the citizens of New York State . . . such as hospitals, grocery stores, and banks").

388. See Zalman Rothschild, Free Exercise Partisanship, 107 Cornell L. Rev. (forthcoming 2022) (manuscript at 3), <https://ssrn.com/abstract=3707248> [<https://perma.cc/F6SC-ZWNA>] ("A close examination of over one hundred federal court adjudications relating to these challenges reveals an interesting phenomenon: in deciding free exercise challenges by religious plaintiffs to COVID-19 lockdown orders, 0% of Democrat-appointed judges . . . , 66% of Republican-appointed judges . . . , and 82% of Trump-appointed judges sided with religious plaintiffs.").

389. See generally Lee Epstein & Eric A. Posner, The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait, 2021 Sup. Ct. Rev. (forthcoming 2021) (manuscript at 1, 4), <https://ssrn.com/abstract=3825759> [<https://perma.cc/YCE8-M47K>] (arguing that, statistically, "the Roberts Court represents a sharp break from earlier Supreme Court religion jurisprudence," ruling for religious actors "far more frequently," and contending that "a large part of the [explanation] is the appointment by Republican presidents of Supreme Court justices who favor religious rights and liberties"); Adam Liptak, An Extraordinary Winning Streak for Religion at the Supreme Court, N.Y. Times (Apr. 5, 2021), <https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html> (on file with the *Columbia Law Review*) (reporting on Epstein & Posner, *supra*, as well as on Rothschild, *supra* note 388).

390. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603 (2020) (mem.) (Nevada); *S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief) (California).

391. *Tandon v. Newsom*, 141 S. Ct. 1296, 1298 (2021) (per curiam) ("The Chief Justice would deny the application."); *Roman Cath. Diocese*, 141 S. Ct. at 75 (Roberts, C.J., dissenting). It is true that Roberts expressed some sympathy for the free exercise argument in *Roman Catholic Diocese*:

the balance of power on the Court represented by Justice Barrett's arrival made a difference.³⁹² Court appointments and accompanying partisan realignments probably were not the only drivers, however.

Muslims prevailed in *Fraternal Order*, Justice Alito's leading equal value decision from his time on the Third Circuit, and Native Americans benefitted from his opinion in *Blackhawk*.³⁹³ But today, the approach overwhelmingly is working to protect mainstream religious denominations—including the United States' largest Christian groups, Roman Catholics and Protestant Evangelicals.³⁹⁴ Instead of providing a shield for minority sects against majoritarian policymaking, equal value today seems to be participating in polarized ideological conflict. Even occasional support for unorthodox faiths now gives every appearance of being driven by an alliance with traditional religious conservatives. That coalition may well be designed to bolster the political legitimacy of traditional religious actors in their conflict with political progressives. Along the way, support for the principle of equal value by egalitarians like Eisgruber and Sager has become increasingly anomalous.

Of course, some Jewish organizations have brought challenges to coronavirus regulations as well. One of the plaintiffs in the New York cases was Agudath Israel of America, an Orthodox Jewish organization.³⁹⁵ And an allegation in *Roman Catholic Diocese* was that the New York regulations purposefully and facially targeted neighborhoods with ultra-Orthodox Jewish populations.³⁹⁶ Moreover, the outcomes in cases like *Tandon* and

Numerical capacity limits of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause. It is not necessary, however, for us to rule on that serious and difficult question at this time As noted, the challenged restrictions raise serious concerns under the Constitution, and I agree with Justice Kavanaugh that they are distinguishable from those we considered in [*South Bay* and *Calvary Chapel*].

Id. Still, he called the question "difficult" and he stopped short of committing to a view on the merits. Id.

392. See, e.g., Ari Shapiro, Supreme Court Bars New York's Pandemic-Related Restriction on Religious Gatherings, NPR: All Things Considered (Nov. 26, 2020), <https://www.npr.org/2020/11/26/939367443/supreme-court-bars-new-yorks-pandemic-related-restriction-on-religious-gathering/> [<https://perma.cc/6VFH-7GCL>] (hosting Douglas Laycock, who said, "[*Roman Catholic Diocese*] is the first case where Amy Coney Barrett really makes a difference as compared to Ruth Bader Ginsburg. And it flipped the result").

393. See *supra* section I.B.

394. Religious Landscape Study, Pew Rsch. Ctr., <https://www.pewforum.org/religious-landscape-study/> [<https://perma.cc/J8BU-7WL8>] (last visited Aug. 8, 2021) (listing Protestant Evangelical as the largest religious denomination in the United States at 25.4% and Roman Catholic as the second largest at 20.8%).

395. *Roman Cath. Diocese*, 141 S. Ct. at 65 (per curiam).

396. Id. at 66 ("[S]tatements made in connection with the challenged rules can be viewed as targeting the 'ultra-Orthodox [Jewish] community.'" (alterations in original) (quoting *Agudath Isr. of Am. v. Cuomo*, 980 F.3d 222, 229 (2d Cir. 2020))).

Roman Catholic Diocese benefitted all denominations, including Black Protestant churches and mosques. So, in some sense, it is misleading to describe the politics of equal value as majoritarian.

Yet that is actually the hypothesis in this section. If it no longer makes sense to think about free exercise doctrine—including the principle of equal value—as protecting religious minorities against majorities, that is because religious freedom law is participating in wider political polarization between liberals and conservatives.³⁹⁷ Religious traditionalists have embraced equal value, both as a matter of principle and as a matter of political pragmatics, in the context of wider cultural contestation. Not only in Supreme Court cases but in constitutional discourse more generally, equal value has become entangled in that contest. Smaller faiths are aligned with larger ones but perhaps only incidentally and incompletely—a supposition the travel ban decision supports.³⁹⁸ Although egalitarians are understandably drawn to the principle of equal value—rightly so, as argued above—they are also right to be wary of its susceptibility to these particular power dynamics.

To see the patterns of constitutional politicking even more clearly, it is helpful to look beyond religious freedom to other areas of equality law. How likely are we to see the migration of equal value to doctrines concerning racial justice, for instance? If that is unlikely—and if we are likely to see expansion in constitutional law concerning freedom of expression—what does that suggest?

C. Racial Justice

Current equal protection law presumptively prohibits only “racial classifications,” meaning distinctions on the basis of race that are explicit or that form the government’s purpose or object.³⁹⁹ It does not stand against policies with a disparate racial effect but no facial or purposive

397. See, e.g., Andrew R. Lewis, *The Fight for Religious Freedom Isn’t What It Used to Be*, Atlantic (June 17, 2021) <https://www.theatlantic.com/ideas/archive/2021/06/fulton-and-polarization-religious-freedom/619158/> [<https://perma.cc/AU52-2XN9>] (“In politics, the way the religious-freedom cause is deployed drives a perception that conservative Christians, who are tightly linked to Republican politics, will be the beneficiaries of its expansion. This promotes division.”); Elana Schor & Hannah Fingerhut, *Religious Freedom in America: Popular and Polarizing*, AP News (Aug. 5, 2020), <https://apnews.com/article/donald-trump-religion-u-s-news-virus-outbreak-reinventing-faith-535624d93b8ce3d271019200e362b0cf> (on file with the *Columbia Law Review*).

398. Lee Epstein and Eric Posner notice that religious actors have won most of their cases in the Roberts Court, and they identify *Trump v. Hawaii* as an exception to this pattern. They resolve the tension by arguing that, if attention is paid to whether a decision favors Christians rather than religion more generally, “*Trump v. Hawaii* is no longer an anomaly but fits the pattern: the outcome is not pro-religion (it harms Muslims) but it advances, or at least is consistent with, a pro-Christian agenda.” Epstein & Posner, *supra* note 389, at 7–8. But see *id.* (cautioning that the Roberts Court does rule in favor of nonmainstream faiths as well).

399. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

classification.⁴⁰⁰ While disparate effect can be evidence of disparate treatment,⁴⁰¹ which is presumptively prohibited, the Court has upheld disparities that are unaccompanied by other indicia of impermissible purpose.⁴⁰²

For those who believe that the failure to constitutionalize a guarantee against disparate racial impact does much to explain “why equal protection no longer protects,” equal value holds some promise⁴⁰³—but only in theory. Consider again the example of a statute that restricts absentee and mail-in voting.⁴⁰⁴ There is little chance that the Court would deploy the Equal Protection Clause to invalidate such a law on the ground that it unfairly accommodates voters out of state and members of the military while regulating Black voters who rely on such electoral mechanisms. Challengers would have to find evidence of discriminatory purpose or disparate impact made illegal by the Voting Rights Act.

Commentators hint at the political reality. For example, Cass Sunstein acknowledges that it “is not unfair to wonder” whether anything like equal value will actually be extended to racial justice cases.⁴⁰⁵ Sunstein here is evaluating a suspicion that “[t]hose with realist inclinations” might have, namely that equal value is designed to tacitly and narrowly overrule *Smith* rather than to open up a new horizon for equality law more generally.⁴⁰⁶ Regardless of whether equal value would persist after an overruling of *Smith*, Sunstein’s thought experiment does suggest that equal value is likely to remain confined to the First Amendment, under which it works in a particular manner to manage social and political destabilization of large faiths.

But if equal value plays a specific role within religious freedom law, applying to religious minorities where it bolsters the legitimacy of claims by mainstream religions but not in cases like the travel ban decision, and if the principle is unlikely to migrate to other areas of equality law such as racial justice, it is also critical to compare areas where it is quite likely to be adopted, such as free speech jurisprudence.

400. *Id.*

401. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 564 (1977) (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it ‘bears more heavily on one race than another’ may provide an important starting point.” (citation omitted) (quoting *Washington*, 426 U.S. at 242)).

402. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292–99 (1987) (upholding administration of the death penalty in Georgia despite statistical evidence of racial disparity in sentencing).

403. Siegel, *supra* note 342, at 1111, 1130.

404. See *supra* text accompanying notes 319–322.

405. Sunstein, *Our Anti-Korematsu*, *supra* note 17, at 15 (imagining a racial justice analogue to *Roman Catholic Diocese*).

406. *Id.*

D. *Freedom of Expression*

One of the primary mechanisms through which the Roberts Court has been strengthening its particular conception of freedom of expression has been through the doctrine of content neutrality. If the Court has been promoting a laissez-faire jurisprudence in this area,⁴⁰⁷ then it has been doing so using the mechanism of its rule against content discrimination, in significant part.⁴⁰⁸ A principle of equal value could promote that program.

As described above, something like the new equality has already been used in the context of press freedom.⁴⁰⁹ And the similarity to free exercise has not been missed: Justice Kennedy cited some of the press cases to support language in *Lukumi* describing a requirement of general applicability.⁴¹⁰ Section IV.B also suggests areas in which equal value has not been, but could be, applied to protect certain types of speech. For example, some of the unevenness in coronavirus regulations could affect not just religious observance but also political expression and assembly. It is easy to imagine the Court adopting the doctrine in such settings.

It is true that in this context, as in others, equal value can be cured by leveling down—and that result would not alleviate the burden on speakers. For instance, a government could simply extend the prohibition on gatherings of more than three households. Yet that is true of many equality violations, and it does not mean that the initial discrimination is fair. Equal value will still appeal to those who believe speech should not be devalued and that the best way to protect speakers in the political process is to align their interests with nonspeakers in general regulations.

E. *Our Lochner?*

There are at least two ways in which the tendencies identified in this Part affect the administration of equal value. First, the rule may be applied

407. See, e.g., *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (warning that the Court has “weaponize[ed]” the First Amendment “in a way that unleashes judges . . . to intervene in economic and regulatory policy”); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2381–83 (2018) (Breyer, J., dissenting) (recognizing that the Court’s approach “invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation”) (citing *Lochner v. New York*, 198 U.S. 45 (1905)); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 602–03 (2011) (Breyer, J., dissenting) (“At worst, [the majority decision] reawakens *Lochner*’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.”); see also *supra* note 345 (citing articles on First Amendment *Lochnerism*).

408. See Tebbe, *Political Economy*, *supra* note 346, at 981 (arguing that application of the content discrimination rule promoted a laissez-faire conception of the First Amendment in *Citizens United v. FEC*, 558 U.S. 310, 337 (2010)).

409. See *supra* section IV.A.

410. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993) (citing cases).

to certain cases and not others—even though it could have been extended to all of them. So this Article has noted that equal value featured in the coronavirus cases but not in the travel ban decision. Second, within a particular decision, the Court may find certain select categories of unregulated activity to be comparable to the protected activity. So in *Tandon*, retail services were found to implicate the government’s interests in just the same way as at-home gatherings—but not by the dissenters.⁴¹¹

Patterned decisionmaking in either of these two dimensions, or in their combination, can be suggestive. Particularly when judges make determinations of comparability based on nonlegal considerations such as public health policy, iterations of those determinations can reveal the shape of a politics. In *Roman Catholic Diocese*, for instance, the majority wrote that there was “no evidence that the [two houses of worship bringing the claim] have contributed to the spread of COVID-19,” and it concluded that the New York restrictions were “far more severe than has been shown to be required to prevent the spread of the virus.”⁴¹² And in the Kentucky case, the court rejected the governor’s determination that elementary schools posed a greater risk to public health than preschools or colleges and universities.⁴¹³ Unelected judges countermanded the policy judgments of state officials overseeing the pandemic.

There may be nothing wrong with that. In fact, one possible response is to applaud equal value precisely because it encourages judges to exercise judicial review even under emergency conditions. Sunstein is drawn to the decision for precisely this reason, and understandably.⁴¹⁴ Rather than a lack of deference, or in addition to it, something more profound is at work in the implementation of equal value. The tendencies described in this Part suggest not just judicial assertiveness, understood as a willingness to invalidate executive action, but also selectivity of a particular kind.

It was Cass Sunstein himself who shifted constitutional theory away from a focus on judicial assertiveness, and he did it in the context of a reinterpretation of *Lochner*.⁴¹⁵ Yet today he is drawn back into the debate over judicial review when discussing the coronavirus cases. Perhaps we can gain greater insight into the administration of equal value by comparing it to the conversation about *Lochner*, rather than by orienting the discussion around *Korematsu*, as he now urges.

There are at least three ways of understanding what was wrong with *Lochnerism*. First is the conventional view that the *Lochner* Court was

411. These two features are related, moreover. One reason a court might decline to apply the approach is if it believes that any exempted categories are so distinct that no question of equal value is even presented.

412. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam).

413. *Danville Christian Acad., Inc. v. Beshear*, 503 F. Supp. 3d 516, 524–25 (E.D. Ky. 2020).

414. See Sunstein, *Our Anti-Korematsu*, supra note 17, at 11.

415. Cass R. Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873, 873 (1987) [hereinafter Sunstein, *Lochner’s Legacy*].

activist in the sense that it aggressively substituted its own view of economic and social policy for that of elected representatives of the people.⁴¹⁶ Members of the Court early in the New Deal period believed that laissez-faire policy promoted individual freedom and maximized social wealth, and they constitutionalized those views in doctrines of substantive due process and limitations on Congress's commerce power, among others. On this view, the corrective was deference to democratic bodies on questions of economic and social policy.⁴¹⁷ This seems to have been the understanding of Justices Breyer and Kagan when they have critiqued Roberts Court decisions as instances of Lochnerism.⁴¹⁸

This first view is closely related to the political process interpretation of *Carolene Products* footnote four and John Hart Ely.⁴¹⁹ Overturning democratically enacted laws can be justified only where it is necessary to correct defects in the democratic process itself, such as racial prejudice or censorship of speech.⁴²⁰ In all other cases, the judiciary ought to stay its hand and allow matters of policy to be resolved by other branches of government.

One standard objection to this view is that it runs up against *Roe v. Wade* and the longer line of substantive due process cases in which that ruling sits. Ely famously critiqued *Roe*, arguing that it responded to no procedural defect that could justify the exercise of judicial review.⁴²¹ For him, the solution to restrictions on reproductive freedom was political, not constitutional.⁴²² Similarly, Chief Justice Roberts passionately dissented from the same-sex marriage decision on the ground that the Court had engaged in Lochnerism.⁴²³ Over and over, Roberts accused the *Obergefell* Court of

416. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920, 937 (1973) ("According to the dissenters at the time and virtually all the commentators since, the [*Lochner*] Court had simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures.").

417. See, e.g., *Ferguson v. Skurpa*, 372 U.S. 726, 730 (1963) (positing that the *Lochner* doctrine—"that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded," and that courts now "do not substitute their social and economic beliefs for the judgment of legislative bodies").

418. See *supra* note 407.

419. See Ely, *supra* note 416, at 939 ("The Court continues to disavow the philosophy of *Lochner*. Yet . . . it is impossible candidly to regard *Roe* as the product of anything else."); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

420. Ely, *supra* note 416, at 933 (citing *Carolene Products*, 304 U.S. at 152 n.4).

421. See *id.* at 933–37.

422. See *id.*

423. *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting) ("[A]s this Court has been reminded throughout our history, the Constitution 'is made for people of fundamentally differing views.' *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). . . . The majority today neglects that restrained conception of the judicial role.").

using substantive due process to override the results of democratic processes that were working perfectly well.⁴²⁴

Those who wished to defend *Roe* pursued a second critique of *Lochner*. What troubled the Court before the New Deal was not that it was making normative judgments—that was inevitable—but instead that it was making the wrong judgments.⁴²⁵ Laissez-faire economic policy fails the twin criteria of justification and fit, to use Dworkin’s terminology.⁴²⁶ Invalidation of abortion restrictions, by contrast, enforces a fundamental right that is both morally justified and properly located in the American constitutional tradition.⁴²⁷ What matters here is not deference or lack of deference but instead whether constitutional decisionmaking is enforcing the right kinds of values for the right reasons, as part of a defensible practice of legal interpretation. On this second view, which is common among those who condemn *Lochner* but support *Roe*, examples of judicial abuse do not include *Obergefell* but might include decisions that fail to invalidate democratically enacted laws such as those that allow disparate impact on racial minorities.⁴²⁸

Sunstein articulated a third critique of *Lochner*. He too sought a way to defend *Roe*, but he found it in a distinct understanding of what went wrong during the laissez-faire era. For him, the difficulty was that the Court identified violations of liberty and government neutrality by reference to the existing distribution of wealth and entitlements.⁴²⁹ That practice naturalized the inequalities that the New Deal sought to correct, masking their origins in government policy, and it constitutionalized them.⁴³⁰ By setting the baseline for measuring burdens and biases in this way, the *Lochner* Court insulated the economy and the society against efforts to redistribute. Sunstein concluded that the modern inheritors of laissez-faire constitutionalism—“*Lochner’s* legacy”—consisted of decisions like *Washington v. Davis*,⁴³¹ which assumed the naturalness and moral innocence of existing

424. See *id.* at 694, 696–97, 699, 703–05 (citing *Lochner*, 198 U.S. 45).

425. See Laurence Tribe, *American Constitutional Law* 578–86 (2d ed. 1988) (laying out this view); see also *id.* at 584 (suggesting that “the central notion which contributed to *Lochner’s* decline” was “the realization that a judicial choice between invalidating and upholding legislation altering the ground rules of contract and property is nonetheless a positive *choice*,” and arguing that the difficulty with *Lochner* was that its majority deployed indefensible substantive judgments).

426. See Ronald Dworkin, *Law’s Empire* 65–68 (1986).

427. See Ronald Dworkin, *Taking Rights Seriously in the Abortion Case*, 3 *Ratio Juris* 68, 72 (1990).

428. See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976).

429. See, e.g., Sunstein, *Lochner’s* Legacy, *supra* note 415, at 875.

430. *Id.* at 903 (“The *Lochner* Court chose the status quo, as reflected in market ordering under the common law system, as the baseline for measurement of departures from neutrality and of action and inaction.”).

431. 426 U.S. 229.

racial stratification when it denied constitutional protection against disparate impact.⁴³²

Critically, the problem was not a lack of judicial deference, for the Court did stay its hand in decisions like *Washington v. Davis*. Instead, the difficulty was a choice to constitutionalize baselines—existing distributions of political and economic power—that had been constructed by government law and policy. That critique also included decisions like *Buckley v. Valeo*,⁴³³ which likewise invalidated efforts to redistribute speech opportunities.⁴³⁴ The most productive conversation was not about activism or deference but about the practice of setting baselines for identifying violations of liberty or neutrality. A related divide between private and public absolved the government of distributional unfairness—and insulated that unfairness against government efforts to redistribute.

This third critique was related to the first two but in indeterminate ways. Sunstein might have concluded that the solution was simply to defer to legislatures on questions of comparability, which were not only difficult but also driven by contestable commitments. Yet his support of *Roe* and his critique of *Washington v. Davis* suggests another reading, namely that constitutional decisionmaking is inherently normative and that its challenge is to identify and defend the most justified view of American law. And this reading brings Sunstein's view into functional alignment with the second critique.

This Article has argued that deference should not be the main concern. To the degree that the first critique of Lochnerism emphasizes that issue, it is not the most revealing of the three. Yet the first critique, along with the second, also train our attention on judicial policymaking. Aspects of the current implementation of equal value appear worrisome in that spotlight. By selectively applying the approach to cases brought by mainstream Christian denominations but not consistently to those brought by minority faiths, and by applying the approach in the areas of free exercise and free speech but not antiestablishment or racial justice, the Roberts Court risks the impression that it is pursuing a distinctive mix of preferentialism and libertarianism.

On the second account, there might be no real difficulty—after all, equal value may well represent a defensible reading of constitutional equality.⁴³⁵ Yet the problem with laissez-faire constitutionalism was not simply the justification of the abstract right involved in any particular case. Rather, the core difficulty was the way the doctrine was applied across a

432. See Sunstein, *Lochner's Legacy*, supra note 415, at 897–98.

433. 424 U.S. 1 (1976), superseded by statute, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S.C.), as recognized in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), overruled by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

434. Today, we could add *Citizens United v. FEC*, 558 U.S. 310.

435. See supra Part III (on justification).

range of cases to implement a politics that was used to invalidate pieces of social and economic legislation that were central to the government's effort to respond to the suffering of citizens.⁴³⁶

Today too, the values that seem to be governing the administration of equal value—special solicitude for religion and the construction of a public–private divide that naturalizes existing distributions of power and wealth—are more difficult to warrant or assimilate to constitutional history. Preferentialism controverts the deep theory and enduring practice of nonestablishment,⁴³⁷ and First Amendment libertarianism flattens out a constitutionalism that has long included negotiation of the public–private divide.⁴³⁸ While I cannot fully defend that claim here, I can argue that the most serious difficulty with equal value lies here and not elsewhere.

Sunstein's third view captures a salient dynamic in recent cases, namely the way they measure violations of government neutrality by choosing comparators. At the core of *Roman Catholic Diocese*, for instance, was a decision to compare houses of worship to big-box stores, which were exempted from the restrictions on gatherings, rather than to lectures and concerts, which were restricted even more strictly than churches. Laycock and Collis argue that there is a metric for choosing a comparator, namely whether it implicates the government's interest in the same way as the religious claimant.⁴³⁹ But that was precisely what was in dispute—New York argued that retail stores were fundamentally different because they were not designed as gathering places and they did not entail large crowds lingering for long periods.⁴⁴⁰ That did not stop the majority. In essence, it constructed inequality as any departure from the lowest level of regulation—and in that way it constitutionalized a maximally deregulatory notion of neutrality.

436. Volokh also compares equal value to Lochnerism, but he draws a different conclusion. Volokh, Brief Amicus Curiae, *supra* note 45, at 28 (“[J]ust like rejecting *Smith* would revive the main problems of the early 1900s substantive due process cases, so would an approach that requires comparing proposed religious exemptions with existing secular exceptions.”). Volokh believes the lesson of the comparison is that the equal value approach is unworkable because “courts have no principled way of determining when the differences are great enough to justify different treatment.” *Id.* at 29. My conclusion, by contrast and in brief, is that there are better and worse applications of equal value, judged by interpretive fit and political-moral justification.

437. See Caroline Mala Corbin, The Supreme Court's Facilitation of White Christian Nationalism, 71 Ala. L. Rev. 833, 835–36 (2020) (describing Christian nationalism); see also Michael C. Dorf, For Four SCOTUS Conservatives, Insufficient Discrimination in Favor of Religion Is Discrimination Against Religion, Dorf on L. (June 2, 2020), <http://www.dorfonlaw.org/2020/06/for-four-scotus-conservatives.html> [<https://perma.cc/5KKK-A2PA>] (endorsing Corbin's analysis of “Christian privilege”).

438. See, e.g., Genevieve Lakier, The Non-First Amendment Law of Freedom of Speech, 134 Harv. L. Rev. 2299, 2304, 2314–15 (2021) (contrasting a free speech tradition outside the courts to judicial doctrine, which is significantly more laissez-faire).

439. See Laycock & Collis, *supra* note 39, at 11.

440. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting).

Now, if the values fueling that determination are defensible as constitutional interpretations, they may not be problematic. But if practices on the ground suggest that the new equality is not working in the same way for everyone, then it may indicate that it has another driver. This third option gives us critical leverage to discern the mechanism by which a justifiable principle like equal value can be practiced in a manner that serves specific interests.

CONCLUSION

Equal value is plausible as an abstract interpretation of the Constitution. Although the concept is unfamiliar, it finds resources not only in free exercise doctrine but also in cases concerning freedom of the press and in the fundamental interest branch of equal protection law. Conceivably, it could apply more widely, not only to aspects of nonestablishment within the First Amendment but also to racial justice under the Equal Protection Clause and to reproductive freedom located in the Due Process Clause. So the concept cannot easily be dismissed.

Unfortunately, but unsurprisingly, it is also subject to nonideal execution. Egalitarians who are attracted to the ideal therefore should pause before promoting it in practice, where it has been applied according to a particular politics. This may mean that it is best left undeveloped or contained within free exercise law. For purposes of this Article, the key conclusion is that whatever the significant appeal of equal value, its administration under current conditions looks quite different.

Before ending, I want to acknowledge that much the same is true of a great many other principles of constitutional doctrine and theory. *Smith* may soon be overruled and replaced with liberty protection for freedom of conscience. Yet any such rule will be similarly susceptible to instrumental implementation, as I argue in a companion article.⁴⁴¹ Its dynamics are distinct but they are not unforeseeable, especially in their susceptibility to the forces of power and preference.

Because equal value is newly visible and still plastic, it may prove more manipulable than the main free exercise rule, which only requires differential classifications of sacred practices to be convincingly justified. Rejecting it may help to preserve greater leverage for healthy institutional and social contestation.

441. Tebbe, *Liberty of Conscience*, supra note 22.