AMERICAN JOURNAL
of LAW *and* EQUALITY

RACE, RELIGION, AND THE ANTIPARALLEL

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INTRODUCTION

On June 29, 2023, the Supreme Court issued a monumental decision in *Students for Fair Admissions v. Harvard*,[1] which saw a 6–3 conservative majority effectively strike down affirmative action in university admissions. It did so twenty years, almost to the day, after deciding *Grutter v. Bollinger*,[2] by which the Court originally authorized the use of race-conscious decision-making to foster critical diversity interests in higher education.

But importantly, *SFFA* did more than simply outlaw the explicit consideration of race in college admissions. Rather, it upended entirely the doctrine and narrative set forth by *Grutter* and its progeny, offering a diametrically opposite view on the role of race—and racial discrimination—in modern America. On *SFFA*'s telling, such an explicit consideration of race in schooling, even one meant to benefit racial minorities, was *itself* discrimination, an impermissible violation of the Equal Protection Clause's mandate of total "color-blindness." In this way, the Court told a story of a post-racial America, one in which racial classification may be more pernicious than racial remedy.

Critically, though, this doctrinal and narrative sea change in the Court's view of race, racism, and discrimination in schooling has not been the only such shift in the Court's recent education jurisprudence. Across the same period, roughly twenty years, the Court

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1 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

2 Grutter v. Bollinger, 539 U.S. 306 (2003).

https://doi.org/10.1162/ajle_a_00079

also has transformed its approach to evaluating the role of religion in schooling, from religious exercise in educational institutions to state funding of religious activity. Indeed, for the better part of the twentieth century, the Court consistently deployed the First Amendment's Religion Clauses—the Establishment Clause and the Free Exercise Clause—to enforce a Jeffersonian wall of separation between church and state. Over this time, the Court struck down official policies mandating prayer in schools; declined repeatedly to sponsor religious activity with public funding; forbade state officials from publicly conducting religious exercise in an education setting; and adhered to an ideal that because students were susceptible to implicit coercion, state religious endorsement must be viewed skeptically.[3]

With the advent of the Roberts Court, however, and the beginning of the twenty-first century, this view changed, as the newly constituted conservative-majority Court dismantled its Religion Clause jurisprudence in the religious-schools context and turned away from its once-firmly held belief in the "wall of separation." Indeed, over this time, the Court has issued a series of decisions that, bit by bit, permitted religion to creep into the public educational space. For example, it upheld voucher programs permitting public funds to flow to religious schools; required aid programs to include religious schools in their mandates; and, as of just one Term before *SFFA*, required districts to allow state officials to engage in public prayer without any inquiry into the activity's coercive potential.[4]

These race and religion shifts in the Court's education jurisprudence have not occurred in isolation: rather, they have always, and perhaps necessarily, been in conversation with one another. As this paper argues, one cannot properly consider the impact of cases like *Students for Fair Admissions*, and the post-racial change it portends, without taking account of the Court's increasing allegiance to and protection of interests. Examining these movements together reveals that while these changes have taken place in chronological parallel—significant shifts over the past quarter century—they have moved in opposite, or *antiparallel*, directions. Put differently: on one hand, the Court has used its religious-schools shift to carve out increasing protections for religious exercise, crafting a deliberate narrative that the true minority in American life is the religious observer. On the other, the Court has used its race-consciousness jurisprudence to shrink protections for racial minorities, crafting a counternarrative that attempts to erase "race" entirely.

This paper makes this argument in several parts. Part I surfaces the monumental shifts taken in the Court's race- and religion-based education jurisprudence over the past quarter century, locating these shifts against the Court's record in its schools cases. As it explains, in both the race and religion tracks, the Court has not only upended doctrine but also upended its narratives about who is deserving of judicial protection—and what form that protection should take. Part II argues that, taking these cases together, the Court's

3 *See infra* part II.

4 *See infra* part II.

changing views on judicial neutrality, color- and religion-blindness, discrimination, and who counts as a "minority" are made clear. In this way, as the paper explains, the Court has wholly embraced the view that the *true* persecuted minorities subject to judicially recognizable protection are Christian evangelical observers rather than racial minorities. Part III briefly concludes.

I. RACE AND RELIGION: ANTIPARALLEL TRACKS IN THE COURT'S EDUCATION JURISPRUDENCE

Since the year 2000,[5] the Court has decided[6] approximately fifty education-law cases.[7] Seven concern the application of the Individuals with Disabilities Education Act, the Americans with Disabilities Act, or both;[8] three involve student free speech under the First Amendment;[9] two each pertain to FERPA,[10] antitrust actions of the National Collegiate Athletic Association,[11] COVID-19 loan relief,[12] the application of the Fourth Amendment in schools,[13] and recruitment of student athletes;[14] and a hodgepodge of other, more idiosyncratic cases include challenges to Title IV[15] and IX,[16] federal funding for military institutions,[17] jurisdictional debates,[18] and the constitutionality of a state education aid

5 To be clear, "the year 2000" is an estimate not meant to act as a hard-and-fast demarcation. Rather, I use interchangeably the ideas of "since 2000," "the past quarter century," and "over twenty years" to describe the rough time period over which these changes have taken place.

6 The use of "decided" here indicates that the Court has issued a substantive opinion. This paper does not address, for purposes of this reflection, decisions such as denials of *certiorari*.

7 "Education law," here, means cases of the Court that have required the Court to grapple with doctrine as specifically applied in the context of schools. There are no doubt a handful of cases not addressed here in which, for example, schools may be the setting for a case, but their status as schools does not play an important role in the adjudication of the case. The same is true for the many cases involving the Religion Clauses and race-conscious decision-making that occur outside the schools context: I may refer throughout to these as references but do not squarely address their doctrinal import here.

8 Schaffer v. Weast, 546 U.S. 549 (2005); Arlington Cent. Sch. Dist. v. Murphy, 548 U.S. 291 (2006); Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009); Fry v. Napoleon Cmty. Schs., 580 U.S. 154 (2017); Endrew F. v. Douglas Cty. Sch. Dist., 580 U.S. 386 (2017); Luna Perez v. Sturgis Pub. Schs., 598 U.S. 142 (2023).

9 Morse v. Frederick, 551 U.S. 393 (2007); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Mahanoy v. B.L., 594 U.S. __ (2021).

10 Owasso Indep Sch. Dist. v. Falvo, 534 U.S. 426 (2002); Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

11 NCAA v. Alston, 594 U.S. __ (2021); Murphy v. NCAA, 584 U.S. 453 (2018).

12 Biden v. Nebraska, 600 U.S. __ (2023); Dep't of Educ. v. Brown, 600 U.S. __ (2023).

13 *See* Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Safford Unified Sch. Dist. v. Redding, 557 U.S. __ (2009).

14 *See* Tenn. Secondary Sch. Athletic Ass'n v. Brentwood, 551 U.S. 291 (2007); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

15 *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

16 *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

17 *See* Rumsfeld v. F. for Acad. Rts., 547 U.S. 47 (2006).

18 *See* Hibbs v. Winn, 542 U.S. 88 (2004).

statute.[19] But two primary themes have been central to the Court's education jurisprudence over the past quarter century: race-conscious decision-making and religious exercise in schools. Indeed, over this time, the Court has settled twelve religious exercise cases[20] and seven affirmative action disputes.[21] In so doing, as this part explains, the Court has constructed two doctrinal tracks, each of which has built on—and upended—precedents from the last millennium.

But these race and religion tracks have not moved in parallel. Precisely the opposite. As the Court in its education jurisprudence has expanded its deference to, protection of, and space allocated to religious observance, particularly Christian observance, it has correspondingly shrunk its deference to, protection of, and space allocated to racial minorities, particularly Black and brown students, children, and teachers. These antiparallel[22] doctrinal paths, as described below, have in recent years led the Court to their (perhaps) logical conclusions: on one end, the commingling of religion, the state, and the public fisc,[23] and on the other, the erasure of race-conscious remedies at all levels of schooling in favor of color-blind postracialism.[24]

Religion

Since the mid-twentieth century, the Court has stepped in to resolve a host of religious-schools cases under the First Amendment's Free Exercise and Establishment Clauses. Indeed, as Derek Black has written, the Court has "chosen education as a primary stomping ground for rewriting Free Exercise Clause doctrine."[25] Scholars on both sides of the aisle, however, have decried inconsistencies in the Supreme Court's interpretation of the Religion Clauses, particularly with respect to their application to schools.[26] Even the

19 *See* Zuni Pub. Sch. Dist. v. Dep't of Educ., 550 U.S. 81 (2007).

20 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Mitchell v. Helms, 530 U.S. 793 (2000); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Locke v. Davey, 540 U.S. 712 (2004); Christian Legal Soc. v. Martinez, 561 U.S. 661 (2010); Ariz. Christian Sch. v. Winn, 563 U.S. 125 (2011); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. __ (2017); Espinoza v. Mont. Dep't of Revenue, 591 U.S. __ (2020); Our Lady of Guadalupe v. Morrissey-Berru, 591 U.S. __ (2020); Carson v. Makin, 596 U.S. __ (2022); Kennedy v. Bremerton, 597 U.S. __ (2022).

21 *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013) ("Fisher I"); Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014); Fisher v. Univ. of Tex. at Austin, 579 U.S. __ (2016) ("Fisher II"); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

22 "Antiparallel" means "parallel but oppositely directed or oriented." *Antiparallel*, Merriam-Webster's Collegiate Dictionary, https://www.merriam-webster.com/dictionary/antiparallel (last visited May 25, 2024).

23 *See infra* section I.

24 *See infra* section I.

25 Derek Black, *When Religion and the Public-Education Mission Collide*, 132 Yale L.J. F. 559, 559 (2022).

26 *See, e.g.*, Mark Strasser, *On* Espinoza*, Schools, and the Religious Clauses*, 14 Drexel L. Rev. 543, 544–56 (2022) (noting the "twists and turns" in Establishment Clause jurisprudence).

Court itself has noticed its "consistent[] struggle[s] to apply these simple words [of the Establishment Clause] in the context of governmental aid to religious schools."[27]

But the Court's religious-schools jurisprudence has not always been so incoherent. Rather, for the better part of fifty years, beginning in the mid-twentieth century, the Court held firm to a series of interpretive principles and doctrinal frames designed, as the Court wrote, to ensure that there would remain a "wall of separation between Church and State."[28]

1. ***The First Fifty Years: The Religion Clauses in the Court***—In 1947's *Everson v. Board of Education*, the Court decided its first case applying the Establishment Clause to the states (via the Fourteenth Amendment),[29] making clear in doing so its fidelity to this "impregnable" wall.[30] While the *Everson* Court upheld a busing program that would transport both public- and parochial-school students, it did so with clear limitations, noting, for example, that the state "contribute[d] no money to [parochial] schools" and "d[id] not support them."[31] *Everson*, then, would come to stand for the principle that taxation could not be used "to support" religion, but that the government must provide some public services to religious institutions: "police and fire protection, connections for sewage disposal, [and] public highways and sidewalks," for example, were neutral offerings that religious organizations could benefit from.[32] More importantly, the case set forth a set of balancing principles that would become central not only to Establishment but also to Free Exercise principles:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . .[33]

27 Mitchell v. Helms, 530 U.S. 793, 807 (2000) (noting further that "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area").

28 Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (citing Reynolds v. United States, 98 U.S. 145 (1878)).

29 As Carl H. Esbeck has observed, only one case pre-*Everson* even made mention of the Establishment Clause. *See* Carl H. Esbeck, *The 60th Anniversary of the Everson Decision and America's Church-State Proposition*, 23 J.L. & RELIGION 15, 20 n.17 (2015).

30 *Id.* at 18.

31 *Everson*, 330 U.S. at 18.

32 *Id.* at 17–18.

33 *Id.* at 15–16.

Everson would set the stage for decades of First Amendment questions pertaining to if—and how much, and in what form—the state and religious schooling may intertwine. Fifteen years after *Everson*, in *Engel v. Vitale*,[34] the Court would double down on its dedication to this "wall of separation." There, the Court found unconstitutional a New York school district's policy requiring a purportedly nondenominational (though monotheistic) prayer to be said aloud by the class at the beginning of each school day.[35] The Court opined on the historic recognition of the "dangers of a union of Church and State,"[36] paying particular heed to the ways in which state- and school-sponsored religious activity—any at all—subjected students to "indirective coercive pressure . . . to conform to the prevailingly officially approved religion."[37] More, the Court flatly rejected the district's argument that striking such laws would indicate "hostility toward religion or prayer": as the Court wrote, "it is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers."[38]

The decade that followed would see the Court continue to emphasize the critical importance of both a rigid separation between church and state and the balance struck by the interplay between the Establishment and Free Exercise Clauses. Just one year after *Engel*, the Court considered the constitutionality of a mandatory reading of Bible verses by students at the beginning of the school day.[39] The Court first extended its observation from *Everson* that it would be practically impossible to "take every form of propagation out of the realm of things which would directly or indirectly be made public business."[40] But it emphasized the critical, "firm[]" holdings of both *Everson* and *Engel*—that the First Amendment's primary objective, repeatedly "reaffirmed" by the Court, was to "create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or or support for religion."[41] And doctrinally, the Court, as it had in *Engel*, continued to recognize the key "interrelationship" of the Establishment and Free Exercise Clauses. Finally, the *Schempp* court firmly established a test for future Establishment Clause and Free Exercise Clause cases. First, under the Establishment Clause, the enactment at issue must be examined and may have only a "secular legislative purpose and a primary effect that neither advances nor inhibits religion"—"direct

34 Engel v. Vitale, 370 U.S. 421 (1962).

35 *Id.* at 422. The prayer read, in full: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

36 *Id.* at 429.

37 *Id.* at 430–31.

38 *Id.* at 435.

39 Abington Twp. v. Schempp, 374 U.S. 203 (1963).

40 *Id.* at 217 (citing Everson v. Bd. of Educ., 330 U.S. at 15 (Jackson, J., dissenting)).

41 *Id.* at 217 (citing *Everson*, 330 U.S. at 15 (Rutledge, J., dissenting)).

coercion" need not be proved given the "indirect pressure" upon religious minorities to conform.[42] Free-exercise challenges, however, required proof of coercion: the claimant must "demonstrate the coercive effect of the enactment as it operates against him in the practice of his religion."[43] Applying these principles, the Court found the policy unconstitutional. And, as it had in *Engel*, the Court again rejected the argument that absenting the state from religion would create a "religion of secularism": the concept of neutrality, the Court observed, could not require a state to require religious exercise.[44]

The Court would apply these principles—the commitment to governmental neutrality, the delicate balance between the Religion Clauses, and the premise of "indirect coercion" from state actors—for the next thirty years to a host of establishment and free-exercise questions in the schools, particularly those concerning school prayer and secular curricular choices. Indeed, the Supreme Court and other federal appellate courts would, across the 1950s and 1960s, issue more than fifty opinions that generally deployed the Establishment Clause to insulate religious minorities and the public from "overwhelming Christian majorities."[45] In 1968, for example, the Court struck as unconstitutional an Arkansas law forbidding the teaching of evolution in public schools.[46] The Court there observed that government "in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice"[47] and echoed the "absolute prohibition" on states to not "aid one religion, aid all religions, or prefer one religion over another."[48] That same year, the Court upheld, under the logic of *Everson* and *Schempp*, a New York statute requiring school districts to loan textbooks to students in all types of schools, including parochial schools.[49] Like *Everson*'s bus fares, the Court held that the textbook law had a "secular legislative purpose," satisfying the Establishment Clause, and found no free-exercise problem absent evidence of coercion.[50]

Challenges to aid schemes like those in *Everson* began to percolate in the Court beginning in the 1970s. The Court in 1971 decided *Lemon v. Kurtzman*,[51] which concerned both a Rhode Island statute that provided salary benefits to only "eligible" teachers, meaning they could not teach courses in religion, and a Pennsylvania statute that reimbursed parochial schools for teacher salaries and materials. The *Lemon* Court again cautioned against the "dangers" of intertwining church and state, noting that the three "main evils"

42 *Id.* at 221.

43 *Id.* at 222–23.

44 *Id.* at 225.

45 David Schultz, *The Roberts Court Takes Aim at the Establishment Clause*, The Hill (May 31, 2023), https://thehill.com/opinion/judiciary/4026628-the-roberts-court-takes-aim-at-the-establishment-clause/.

46 Epperson v. Arkansas, 393 U.S. 97 (1968).

47 *Id.* at 103–04.

48 *Id.* at 106 (citing Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

49 Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

50 *Id.* at 241–43, 248–49.

51 Lemon v. Kurtzman, 403 U.S. 602 (1971).

the Establishment Clause protected against were "sponsorship, financial support, and active involvement of the sovereign in religious activity."[52]

Synthesizing the Court's precedents, the *Lemon* Court articulated a three-prong test for Establishment Clause claims: first, to be upheld, the statute must have a "secular legislative purpose"; second, its "principal or primary effect must be one that neither advances nor inhibits religion"; and third, that the statute must not foster "an excessive government entanglement with religion."[53] Applying this test, the Court found that it could not "ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of . . . education" and that these dangers were present in the Rhode Island and Pennsylvania programs.[54] And again, the Court committed to what had been a repeatedly echoed principle: "under our system the choice has been made that government is to be entirely excluded from the area of religious instruction."[55]

Just two years later, the Court applied the *Lemon* test in considering whether New York state financial aid programs that provided direct money grants to private and parochial schools violated the Establishment Clause.[56] The Court struck the program, finding that because the program required direct state funding of parochial schools, it violated *Lemon*'s first prong.[57] The Court similarly rejected arguments that because the grants were incentives to parents, this broke the chain between church and state, noting that the effect of the aid was "unmistakably to provide desired financial support for nonpublic, sectarian institutions."[58] Over the next two decades, this trend continued. The Court would on similar grounds strike as unconstitutional a Pennsylvania policy under which equipment that could be "diverted for religious purposes" was loaned to parochial schools;[59] a Michigan "shared time" program that provided classes to private and parochial school students at public expense;[60] and a New York program that deployed federal funds to pay the salaries of public employees teaching in parochial schools, such as guidance counselors, psychologists, and social workers.[61] And in each case, the Court doubled down on its

52 *Id.* at 612 (citing Walz v. Tax Commission, 397 U.S. 664, 668 (1970)).

53 *Id.* at 612–13.

54 *Id.* at 614–22.

55 *Id.* at 625.

56 Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

57 *Id.* at 780–83.

58 *Id.*

59 Meek v. Pittenger, 421 U.S. 349 (1975).

60 Sch. Dist. v. Ball, 473 U.S. 373 (1985).

61 Aguilar v. Felton, 473 U.S. 402 (1985). Over this time, and consistent with its jurisprudence, the Court also upheld *Everson*-style programs, such as the provision of interpreters and remedial instruction to students with disabilities in private and religious schools, as well as tax deductions for transportation to all schools, public and parochial alike. *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Agostini v. Felton, 521 U.S. 203 (1997) (modifying *Lemon* to collapse the entanglement prong into the other factors as simply a factor to evaluate in determining the effect of a statute) (overruling in part *Aguilar*, 473 U.S. 402).

commitments to the avoidance of state indoctrination, the interplay struck between the Religion Clauses, and the implicit and explicit coercion exerted by authority figures in schools.[62]

Lemon, of course, was applied beyond the school aid context. Under a *Lemon* analysis, the Court would over the next two decades strike as unconstitutional an Alabama school prayer and meditation statute as having no legitimate secular purpose;[63] a Louisiana statute forbidding the teaching of evolution unless accompanied by the teaching of "creation science;"[64] a Rhode Island policy under which principals could, and did, invite clergy to offer prayers at official school events such as graduation ceremonies;[65] and a Texas school's policy under which student-initiated prayer was offered over a loudspeaker system.[66] Similarly, in these cases, the Court echoed the themes it had firmly centered in its Religion Clause jurisprudence.[67]

In the twentieth century, then, the Court's jurisprudence centered on several consistently held principles. First, as discussed above, the Court demonstrated fealty to the Jeffersonian principle of the "wall of separation" between church and state. The Court also held firm to its belief in the "play in the joints" between the Establishment and Free Exercise Clauses and the compromise struck by the two: working in tandem, neither endorsing nor prohibiting religious exercise. Relatedly, the Court also demonstrated allegiance to *Lemon*-era balancing principles of neutrality and the notion of both implicit and explicit coercion, particularly in the schools context. Finally, and perhaps most importantly for developments to come, the Court's narrative in these cases was not one of secularism-as-discrimination—rather, its focus was to protect, under openly secular principles, students from religious indoctrination.

2. ***The New Millennium: Reshaping Religious Schools Doctrine***—But none of these rhetorical and doctrinal principles—a commitment to a "wall of separation" between church and state; a focus on the interplay between the Free Exercise and Establishment

62 *See*, *e.g.*, *Ball*, 473 U.S. at 385 (noting the "devastating effects" and "great . . . risk" of "indoctrination" that can be present in schools with religious pressure); *id.* at 395 (rejecting the argument that even if it flows through parents, "all aid to religious schools ultimately 'flows to' the students"); *Aguilar*, 473 U.S. at 412–13 (noting *Lemon* entanglement because aid would be provided in a "pervasively sectarian environment"); *Meek*, 421 U.S. at 359 (reaffirming that "no tax in any amount . . . can be levied to support any religious activities or institutions"); *id.* at 370 (stating that the "prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of [e]ntanglement between church and state").

63 Wallace v. Jaffree, 472 U.S. 38 (1985) (observing that legislative intent showed that the statute was aimed at "return[ing] prayer to the public schools").

64 Edwards v. Aguillard, 482 U.S. 578 (1987).

65 Lee v. Weisman, 505 U.S. 577 (1992).

66 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

67 *Id.*

Clauses; concern about implicit and explicit coercion, particularly in schools; and an application of *Lemon* and its progeny—survive today. Instead, the Court, over roughly the past two decades, has eroded its religious-schools jurisprudence[68] and replaced it with an emergent framework dedicated to an entirely different set of guiding principles. Gone are *Lemon* and its guidance, replaced by an oblique inquiry into "history and tradition;"[69] absent entirely, if not refuted outright, is support for the Jeffersonian wall between church and state. And, perhaps most consequentially, the Roberts Court has abandoned the "play in the joints" between the Religion Clauses; it has been supplanted entirely by Free Exercise supremacy.

Practically, this has already had several significant impacts. First, the line of religious-schools cases has dramatically increased public funding of religious activity. Second, this line of cases has turned entirely away from doctrine of the pre-2000 era, reshaping if not overruling entirely long-held precedent. And third, this revamp, or inversion, has caused a doctrinal and narrative about-face in the Court's prevailing expression about the function of the Religion Clauses. Where, perhaps, they once operated in tandem as protections against indoctrination, coercion, and religious pressure, they are now to be deployed, through Free Exercise supremacy, as bulwarks against "religious discrimination," repositioning religious observers—particularly, Christian observers—as their own minority.

Political context for this transition may be helpful. The turn of the millennium coincided with a general polarization of the political process not simply in the judiciary, but in all branches of government. In 1970, for example, moderates constituted nearly half the Senate, but today they constitute less than five percent—the center "has all but disappeared."[70] Similarly, the influence and weight of interest groups in support of judicial nominees to the Court has ballooned: nominees had an average of 1.6 groups in support between 1952 and 1967; 8.8 between 1968 and 1983; 27.6 between 1984 and 1994; and over 100 per nominee since 2000.[71] More, the confirmation process post *Bush v. Gore*[72] has become what some have called a "high stakes reality show," as the Supreme Court has

68 Others have similarly observed the ways in which the Court's emphasis on color-blindness in the affirmative-action cases are at odds with their approach to religious exemptions to anti-discrimination laws under the First Amendment. *See*, *e.g.*, Kent Greenfield, *Using the First Amendment to Save Race-Conscious College Admissions*, 4 Am. J.L. & Equality 201 (2024).

69 Caroline Mala Corbin has explained this turn toward "history and tradition" as an act that has "reaffirmed Christianity's hegemony in the United States," as the Roberts Court has protected Christianity while declining to intervene to protect other religious faiths. *See* Carolina Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 Wisc. L. Rev. 475, 476 (2023).

70 Geoffrey Richard Stone, *The Supreme Court in the 21st Century*, Daedalus (Spring 2013), https://www.amacad.org/publication/supreme-court-21st-century.

71 *Id.*

72 Bush v. Gore, 531 U.S. 98 (2000).

been amplified as an ideological body.[73] Further to this point, between 1964 and 2000, only 27 percent of eighteen nominees to the Court received twenty or more negative votes in the Senate; since 2000, 100 percent have received more than twenty negative votes. The religious makeup of the Court has also changed with the advent of the Roberts Court, ushering in a "remarkable transformation" that has seen six Catholic Justices appointed to the Court.[74] Others have argued that "the powerful role of political factors appears undeniable and substantial" in Establishment Clause cases and that "Republican-appointed judges were more likely than their Democratic-appointed counterparts to reach a pro-religion decision in school cases."[75] This change in religious makeup has, unsurprisingly, at least correlated to—if not caused in part—a corresponding shift in the Court's religious-schools jurisprudence.

In *Mitchell v. Helms*,[76] for example, the Court considered a Louisiana program that would offer financial assistance to public and private religious and nonreligious schools. Under the program, religious schools could use the aid only for "services, materials, and equipment" that were "nonideological."[77] In upholding the program, the Court recast the now two-factor *Lemon* test into a purpose-and-effect inquiry.[78] To define "effect," the Court offered a new test: whether the aid "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement."[79] As the Court held, whether the aid results in indoctrination is "a question [of] whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[80] And no indoctrination of this kind could occur, the Court established, if the program offered aid to both religious and nonreligious schools alike—this, it held, was prima facie evidence of a program's neutrality.[81] The Court further underscored that another way of "assuring neutrality" was that aid flowed to religious schools only through parental choice.[82]

In several ways, then, *Mitchell* is emblematic of the early stages of the Court's rejection of landmark Establishment Clause principles. First, it set a bright-line rule that programs aiding religious and nonreligious schools alike were presumptively neutral under *Lemon*.

73 *See* Stone, *supra* note 70.

74 William Blake, *God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences*, 1 Pol. Res. Q. (Dec. 2012), https://www.jstor.org/stable/41759316.

75 Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 Notre Dame L. Rev. 1371, 1374 (2013).

76 Mitchell v. Helms, 530 U.S. 793 (2000).

77 *Id.* at 802.

78 *Id.* at 808.

79 *Id.*

80 *Id.* at 809.

81 *Id.*

82 *Id.* at 810.

This "new criterion," as the dissenters argued, was "unequaled in the history of Establishment Clause interpretation," elevating this presumptive neutrality to "a single and sufficient test" of a program's constitutionality.[83] In this way, the Court foreshadowed an interpretation of "neutrality" that would emerge over the next two decades: that any program purporting to offer aid to *nonreligious* schools must include, in equal measure, *religious* schools. Second, the opinion underscored the importance of "genuine parental choice" as a cleanser to the whiff of indoctrination. Third, as the *Mitchell* dissenters noted, the plurality glossed over the potential for funds to be diverted to religious education, refusing to examine how and when state aid could be and was being used in Louisiana schools.[84]

These newly evolving principles, from the collapse of *Lemon* into a facial-neutrality test to emphasis on parental choice and beyond, laid the foundation for the next decade of religious-schools jurisprudence. Just one year later, the Court held that a public school's exclusion of a Christian club from use of school facilities after hours was unconstitutional viewpoint discrimination, rejecting the school's argument that the denial was required under the Establishment Clause's neutrality principles.[85] In doing so, the Court applied a modified version of *Mitchell*'s neutrality test, noting that the Christian club sought "nothing more than to be treated neutrally and given access to speak about the same topics as other groups."[86] In this way, the school—as a matter of this notion of neutrality—was not only prohibited from stopping the club's activities but also was *required* to support the organization. Or, put differently, this framework of neturality now meant that to *not* bless the club's existence would violate the Establishment Clause's mandate—a 180-degree turn from precedents.

The *Good News Club* Court also took aim at another pillar of Establishment Clause jurisprudence, dismissing questions of potential explicit or implicit coercion. "Whatever significance we may have [previously] assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults," the Court wrote, "we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct . . . merely because it takes place on school premises where elementary school children may be present."[87] Moreover, the Court held, children *could not be* subject to coercion under this program, as the club required consent of parents to join.[88] As the dissenters observed, however, the facts "affirmatively suggest[ed] the imprimatur of officialdom in the minds of the young children" attending the school in which

83 *Id.* at 900 (Souter, J., dissenting).

84 *Id.*

85 Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

86 *Id.* at 114.

87 *Id.* at 115.

88 *Id.*

the club operated. The club, for example, was open solely to elementary school students; was the only club permitted to operate immediately after the conclusion of the school day; and increased its numbers threefold when the school, rather than the local church, became the site of the club's activities.[89]

The notion of parental choice as a cleanser for potential Establishment Clause violations was front and center the next year, in 2002's *Zelman v. Simmons-Harris*,[90] the landmark school-funding case upholding a school voucher program that provided funds to parents to use for any type of schooling, including religious and parochial schools. There, the Court cemented the distinction between programs that provide aid "directly to religious schools" and programs of "true private choice," in which government aid reaches religious schools only through "genuine and independent choices" of families.[91] Because the program funneled funds for religious schooling through parents—and because the program ostensibly began to "assist poor children in failed schools," it could not, the Court held, be deemed an endorsement of religious schooling.[92] Critically, the majority opinion nowhere mentioned the *Lemon* test; it entirely omitted reference to its significant religious-schools precedents, focusing only on its recent decisions in *Good News Club*, *Zobrest*, *Mueller*, and others.[93]

In this way, as the *Zelman* dissenters noted, the majority elevated the notion of "private choice" to doctrinal supremacy: "Today," Justice John Paul Stevens wrote, "the Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds."[94] *Zelman* and its progeny stood, then, for a new set of "twin standards": neutrality, meaning "evenhandedness in setting eligibility as between [both] religious and secular recipients of public money," and "free choice."[95] And as importantly, the Court would later interpret *Zelman* and *Good News Club* as implicit rejections of *Lemon*'s

89 *Id.* at 144 (Souter, J., dissenting).

90 Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

91 *Id.* at 649.

92 *Id.* at 654–60.

93 *See generally id.*; *see also id.* at 687–88 (Souter, J., dissenting) ("How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers?").

94 *Id.* at 687 (Stevens, J., dissenting). Just two years later, the Court would reaffirm *Zelman*'s holding, noting that under its Establishment Clause precedent, "the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke v. Davey*, 540 U.S. 712, 719 (2004) (finding that Washington's refusal to fund devotional theology instruction did not violate the Free Exercise Clause). For a discussion of how support for public funding for private schooling was aligned to religious conservatives' belief that public schools had moved away from Christian values, see James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. Rev. 547, 563–78 (2007).

95 *Zelman*, 536 U.S. at 696–97 (Souter, J., dissenting).

principles—and the beginning of a turn toward a different test, one of "history and tradition."[96]

Zelman was a powerful catalyst for what later become the Roberts Court's pronounced turn toward protection of religious liberty, particularly Christian religious liberty—often above all other interests. The Roberts Court would in this way serve, as one scholar has explained, as a "historic anomaly in its religious liberty decision-making,"[97] engendering a "transformation of constitutional protections for religion."[98] Notably, the Court would not have occasion to address another significant religious-schools First Amendment question for a decade post-*Zelman*—though it did fill this time by reworking its Religion Clause precedent outside of schools. But in a series of cases decided from 2017 onward, the Court would build on its foundation in *Mitchell, Good Luck Club, Zelman*, and beyond to entirely revamp its religious-schools precedent and carve out significant space for the protection of private Christian interests.

In 2017, the Court considered the constitutionality of the Missouri Scrap Tire program, which provided grants to qualifying nonprofit organizations to install playground surfaces made from recycled tires.[99] The program excluded from grant eligibility any applicant owned or controlled by a church, sect, or other religious entity; the Trinity Lutheran Church Child Learning Center, a school affiliated with a church, therefore was denied grant funding to repair its playground.[100] The lower court denied Trinity Lutheran's challenge to the constitutionality of the program and the Eighth Circuit affirmed, observing that a monetary grant to a religious institution was a "hallmark of [] established religion" and thus a classic antiestablishment violation.[101]

In deciding *Trinity*, the Court looked not to *Lemon, Agostini, Schempp*, or other religious-schools Establishment Clause precedent but instead primarily to a Burger Court–era free-exercise case under which Court struck down a Tennessee statute disqualifying ministers from serving as delegates to the state's Constitutional Convention.[102] The

96 *See*, *e.g.*, Van Orden v. Perry, 545 U.S. 677, 686 (2005) (finding display of monument inscribed with Ten Commandments on grounds of Texas State capitol did not violate Establishment Clause) ("Many of our recent cases simply have not applied the *Lemon* test"); *Zelman*, 536 U.S. 639; Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); *Van Orden*, 536 U.S. at 686 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful [here]. . . . Instead, our analysis is driven both by the nature of the monument and by our Nation's history.").

97 Harry Bruinius, *How Religious Liberty Became the Roberts Court's North Star*, Christian Sci. Monitor (June 30, 2023), https://www.csmonitor.com/USA/Justice/2023/0630/How-religious-liberty-became-the-Roberts-court-s-North-Star.

98 *Id.*

99 Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).

100 *Id.* at 453–54.

101 *Id.* at 457.

102 *Id.* at 459.

Missouri policy, the Court held, acted as a similar "disqualification statute" that put Trinity Lutheran to an impossible "choice": receive the benefit, or retain religious status.[103] The program was unconstitutional, then, under Free Exercise—not Establishment Clause—principles, as it mandated "automatic and absolute exclusion" for Trinity Lutheran "from the benefits of a public program for which [it was] otherwise fully qualified."[104] Excluding Trinity Lutheran because of its religious status was thus "discriminatory" and harmed Trinity Lutheran "solely because of its religious character," thereby violating the Free Exercise Clause.[105]

As the dissenters observed, the *Trinity Lutheran* majority's myopic focus on the free-exercise ramifications of the case ignored the critical Establishment Clause inquiry: whether "funding of exactly this kind—payments from the government to a house of worship"—would violate Establishment principles.[106] Here, funds flowed "directly from the public treasury to a house of worship"[107] and would be used, as admitted by Trinity Lutheran, "to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers."[108] And this program went beyond even *Mitchell*: it contained no provision for the secularity of aid, nor safeguards to prevent aid being diverted for religious use.[109]

The *Trinity Lutheran* Court in this way introduced a new narrative frame, one that had percolated since the *Mitchell* era but that with *Trinity Lutheran* gained new life. To deny funding to a religious organization would *itself* evidence religious discrimination: a zero-sum game with the state as predator, the church prey.[110] Or, put differently, the Court endorsed an emergent idea: that the "only alternative to governmental support of religion is governmental hostility."[111] And under *Trinity Lutheran*'s mandate, not even the flimsy chain-breaker of "genuine choice" need be present—funding flowing directly from the state to the church could now pass constitutional muster.

Doctrinally, the implications for Religious Clause precedent, particularly in schools, were stark. The Court's preference for deciding the case as a Free Exercise vehicle, as Caroline Mala Corbin has explained, was a "double blow to the Establishment Clause": it both "requires the government to give taxpayer money to churches, eliminating the

103 *Id.* at 462.

104 *Id.*

105 *Id.* at 466.

106 *Id.* at 473 (Sotomayor, J., dissenting).

107 *Id.* at 474.

108 *Id.* at 475.

109 *Id.* at 477.

110 Indeed, in the Court's famous footnote 3, it wrote: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* at 465 n.3.

111 *Id.* at 493.

longstanding ban on direct cash payments" to religious institutions, and also "opens the door to the government favoring some religions over others."[112] This "remarkable privileging of religion"[113] would, in fact, continue until the present day.

This pervasive "discrimination" narrative continued in earnest in the Roberts Court's next major religious-schools case, 2020's *Espinoza v. Montana Department of Revenue*.[114] There, parents challenged a Montana program that granted tax credits to those who donate to organizations that award scholarships for private tuition but prohibited families from using the scholarships at religious schools pursuant to Montana's constitution.[115] The parents intended to use the aid to attend the private Stillwater Christian School. In striking the program, the *Espinoza* Court first cast the program as a free-exercise, not establishment, question.[116] It then zeroed in on the fact that the funds reached schools only as a matter of "private choice."[117] It then delivered the hammer blow: under what it cast as *Trinity Lutheran*'s "unremarkable" conclusion, a state could not, under the Free Exercise Clause, "disqualify[] otherwise eligible recipients from a public benefit 'solely because of their religious character.'"[118] And the Court rejected arguments that *Trinity Lutheran* could not apply because the plain use here would be to support religious education, skirting entirely the question of the funds' use: the case turned "expressly on religious status and not religious use."[119] Moreover, it amplified its support for an examination of history in lieu of a *Lemon*-style analysis, noting that throughout the founding era and early nineteenth century, governments funded private and religious schools.[120] The *Espinoza* Court then delivered its landmark ruling: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[121]

112 Caroline Mala Corbin, Trinity Lutheran*: A Double Blow to the Establishment Clause*, Take Care (June 30, 2017), https://takecareblog.com/blog/trinity-lutheran-a-double-blow-to-the-establishment-clause.; *see also* Leslie Griffin, *Symposium: Bad News from* Trinity Lutheran*—Only Two Justices Support the Establishment Clause*, SCOTUSblog (June 26, 2017), https://www.scotusblog.com/2017/06/symposium-bad-news-trinity-lutheran-two-justices-support-establishment-clause/ (noting that only the two dissenting justices recognized the Establishment Clause problems inherent in the funding scheme).

113 *Id.*

114 Espinoza v. Montana Dep't of Revenue, 591 U.S. 464 (2020).

115 *Id.*

116 As Justice Thomas wrote in concurrence, "This case involves the Free Exercise Clause, not the Establishment Clause." This rejection of the "play in the joints" between the Religion Clauses eliminated, as Justice Breyer wrote in dissent, the once-critical potential for "religious exercise to exist without sponsorship and without interference." *Id.* at 489 (Thomas, J., concurring).

117 *Id.* at 474 (majority op.) (citing Zelman v. Simmons-Harris, 536 U.S. 639 (2002)).

118 *Id.* at 475.

119 *Id.* at 476–77.

120 *Id.* at 480–81.

121 *Id.* at 287.

After *Espinoza*, the meaning in the tea leaves was clear: programs that exempted religious institutions from funding—even *direct* funding—would not survive the Roberts Court's "discrimination" inquiry. This came to bear merely two years later, when the Court decided its two most recent religious-schools cases, both heavily tinged with the narrative of religious discrimination. First, in *Carson v. Makin*,[122] the Court considered a Maine program that subsidized attendance at private schools for rural students who lived in communities too remote to have a public school of their own. Maine limited its tuition assistance, however, to nonsectarian schools.[123] Parents seeking tuition assistance to send their children to two Christian schools—Bangor Christian Schools ("BCS") and Temple Academy—challenged the policy.[124] Notably, both BCS and Temple explicitly—and publicly—espouse homophobic, transphobic, and other discriminatory views. BCS, for example, states on its website that it may punish by penalty of "probable expulsion" "presenting oneself as a gender other than the one included on his or her birth certificate"[125] and notes its belief that any sexual activity outside of heterosexual marriage, even conduct "becoming more accepted in the culture and the courts, are sinful perversions of and contradictory to God's natural design."[126] Temple, for its part, requires all employees to acknowledge on their employment agreement that "God recognizes all homosexuals and other deviants as perverted,"[127] and the school "will not admit a child who lives in a two-father or a two-mother family."[128]

Unsurprisingly, the Court relied on *Trinity Lutheran* and *Espinoza*, finding that Maine's requirement violated the Free Exercise Clause, primarily because Maine had "disqualified [BCS and Temple Academy] from [a] generally available benefit solely because of their religious character."[129] Because the program was a "neutral" one under which "the independent choices of private benefit recipients" dictated the flow of funds, Maine then would have been required to fund religious schooling equally to its private counterparts.[130] And the Court, as it had in both *Trinity Lutheran* and *Espinoza*, made clear its belief in Free Exercise supremacy: "an interest in separating church and state 'more fiercely' than the Federal Constitution" required, as the Court deemed the Maine program did, "cannot

122 Carson v. Makin, 596 U.S. 767 (2022).

123 *Id.*

124 *Id.*

125 Bangor Christian Schools Student Handbook 21 (July 30, 2019), https://assets.speakcdn.com/assets/1940/bcs_student_handbook_2019-2020_7_30_2019.pdf.

126 *Id.* at 4.

127 Press Release, ACLU, *Civil Rights and Religious Groups Urge Federal Appeals Court to Affirm That Maine Need Not Fund Religious Education* (Jan. 8, 2020), https://www.aclu.org/press-releases/civil-rights-and-religious-groups-urge-federal-appeals-court-affirm-maine-need-not-0.

128 *Id.*

129 *Carson*, 596 U.S. 767.

130 *Id.*

qualify as compelling in the face of the infringement of free exercise."[131] Further, the Court eviscerated the potential to evaluate the extent of religious activity that state funding would sponsor, noting that "scrutizining whether and how a religious school pursues its educational mission would [] raise serious concerns about state entanglement with religion."[132] Again, the Court centered Maine's program not as an attempt to abide by Establishment Clause principles but instead as naked religious "discrimination" against Christian schools.[133] The Court, of course, also made no mention of BCS and Temple Academy's respective anti-gay, anti-trans, and heteronormative policies, a point taken up in dissent.[134]

Carson v. Makin's practical and doctrinal implications were also significant. Under *Carson*, Maine would be mandated to subsidize students' attendance at schools like BCS and Temple Academy, nakedly funding religious practice and teaching. More, *Carson* powerfully signaled the Court's rejection of the compromise once struck by the Religion Clauses and its effective erasure of Establishment Clause protections in the religious-schools context.

The final nail in the Establishment Clause coffin would come just six days later, when the Court issued its opinion in another religious-schools case, *Kennedy v. Bremerton*.[135] *Kennedy* concerned a Washington high school football coach who had been placed on leave after refusing to cease midfield prayer. The prayers at midfield were attended by nearly all, if not all, members of the football teams, as well as family and audience members, immediately after football games.[136] The Court sided with Kennedy, finding that the decision violated Kennedy's rights under the Free Exercise Clause: the program was not neutral or generally applicable, as it targeted Kennedy's actions "at least in part because of their religious character" and was a "bespoke requirement" specifically addressed to his religious exercise.[137]

But the Court also rejected the district's argument that it had to restrict Kennedy's activity to avoid running afoul of the Establishment Clause. In doing so, the Court

131 *Id.* at 781.

132 *Id.* at 787.

133 *Id.* at 779.

134 *Id.* at 803–05 (Breyer, J., dissenting) ("Bangor Christian and Temple Academy, for example, have admissions policies that allow them to deny enrollment to students based on gender, gender-identity, sexual orientation, and religion. . . . Legislators did not want Maine taxpayers to pay for these religiously based practices—practices not universally endorsed by all citizens of the state.").

135 Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

136 Puzzlingly, the majority described the midfield events as "short, private, personal prayer[s]." *Id.* at 525. As Justice Sonia Sotomayor explained in dissent, providing photographic evidence, the "record told a different story" than that presented by the majority, which attempted to cast the midfield prayer as "private." *Id.* at 545–52 (Sotomayor, J., dissenting).

137 *Id.* at 526–27.

explicitly disavowed prior Courts' "ambitious, abstract, and ahistorical approach" to the Establishment Clause, claiming that the Court had "long ago abandoned *Lemon*" and its progeny.[138] Instead of the endorsement test under *Lemon*, the Court reframed the Establishment Clause's key inquiry to be an interpretation based on "reference to historical practices and understandings"—one explicitly focused on "original meaning and history" of the relationship between religion and schooling.[139] Moreover, the Court rejected entirely theories of implicit coercion wrought by school officials when conducting religious activity in front of students, instead focusing on the alleged "absence of evidence of coercion" in the record—despite, as the dissenters noted, record evidence showing that at least one student stated he felt pressured to join the prayer.[140] And again, the Court framed the case not as one of protection from state indoctrination but rather one meant to ferret out "discrimination" against religious observance.[141]

In sum: over the past twenty-plus years, the Court's treatment of religion in schools has taken a drastic doctrinal and narrative shift. Indeed, as Justin Driver has written, these "[t]wo decades [of religious-schools jurisprudence] have succeeded in transforming yesteryear's Hail Marys into today's answered prayers."[142] Doctrinally, from *Mitchell* to *Zelman* to *Trinity Lutheran* and its progeny, the Court has radically reshaped Religion Clause doctrine. Gone, officially, is the *Lemon* endorsement test and an inquiry into the purpose and effect of state action, replaced by a nebulous reliance on "history"; erased entirely is the belief in implicit coercion, particularly of young students, when state actors conduct religious exercises. Gone, too, is the Court's once-sturdy belief in, rhetorical reference to, and support for the Jeffersonian "wall of separation between church and state," supplanted by the theory that, perhaps, religion has always been a part of how the state is run. And, perhaps most critically, gone is the "play in the joints" between the Religion Clauses, as case after case in the Roberts Court has transformed into a Free Exercise-above-all inquiry, Establishment Clause be damned.

The narrative shift, then, follows. What was once a story of protecting young minds from religious indoctrination by the state has become a story of protecting religious exercise—namely, *Christian* religious exercise—from all comers. Under this telling, a state

138 *Id.* at 534.

139 *Id.* at 534–35.

140 *Id.* at 539–40; *id.* at 546 (Sotomayor, J., dissenting) (noting the majority's "nearly toothless version of the coercion analysis"); *id.* at 557 (noting the district court's factual finding that "players had reported 'feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time'").

141 *Id.* at 544.

142 Justin Driver, *Three Hail Marys:* Carson, Kennedy*, and the Fractured Détente over Religion and Education*, 136 Harv. L. Rev. 208, 210 (2022) (noting also that even "as recently as the turn of the century, it seemed virtually unimaginable that the Supreme Court would have voted to grant certiorari in either *Carson* or *Kennedy*, let alone that it would find the underlying claims of religious infringement meritorious").

that chooses not to equally fund religion, does not permit state officials to publicly exercise religion, or deigns to question the legitimacy of religious exercise is on its face a discriminatory actor. Indeed, many have celebrated the line of cases culminating in the *Carson-Kennedy* one-two punch as critical bulwarks against this type of religious discrimination.[143]

Race-Conscious Decision-Making in Schools

The Court's treatment of race-conscious decision-making in the school setting has also, over the past twenty-five years, undergone a dramatic shift. But, as this part explains, these developments have been what we may call "antiparallel" to the shift in the Court's religious-schools jurisprudence. While the Court's Religion Clause jurisprudence, particularly with respect to schooling, has worked to carve out increased protections for the rights of (certain) religious students, teachers, and organizations, its case law on race consciousness in the schools has done the opposite—minimized space for the protection of racial minorities. More, it has, as this section explains, increasingly endorsed an idea that would erase the notion of race entirely—a "color-blind" approach to education.

1. Bakke, Grutter, and Gratz: The Foundational Cases—The Court first recognized that the use of race as an admissions criterion was constitutionally permissible in 1973's *Regents of the University of California v. Bakke*.[144] The highly fractured Court produced six opinions, with five justices apiece agreeing that while race-conscious decision-making was constitutional, a strict racial quota system was not.[145] In doing so, the Court recognized as compelling a university system's interest in the "attainment of a diverse student body" but established that a "fixed number of places" given to a minority group would not be a "necessary means toward that end."[146] As the Court observed, pluralism and academic freedom that would be engendered by a diverse student body was critical, as the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this [n]ation."[147]

The Court would not consider the use of race in public higher education for another twenty-five years, when in 2003 a divided Court for the first time upheld an affirmative action scheme.[148] In *Grutter*, the Court considered the University of Michigan Law

143 *See*, *e.g.*, Sarah Perry & Jonathan Butcher, *With* Carson v. Makin*, the Supreme Court Closed the Book on Religious Discrimination in School Choice*, Heritage Found. (Sept. 2, 2022), https://www.heritage.org/education/report/carson-v-makin-the-supreme-court-closed-the-book-religious-discrimination-school.

144 Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

145 *See id.*

146 *Id.* at 315–16.

147 *Id.* at 312, 314.

148 Grutter v. Bollinger, 539 U.S. 306 (2003).

School's admissions policy, under which admissions officers "consider[ed] an applicant's race" along with other factors in a holistic decision-making process, with the goal of enrolling a "critical mass" of racially diverse students.[149] In upholding the program, the Court formally reaffirmed and cemented *Bakke*'s holding that diversity was a compelling state interest under the Equal Protection Clause to justify the use of race in higher education admissions.[150]

Notably, the Court explicitly deferred to the law school's "educational judgment" that diversity was necessary, noting the "special niche occupied by" and unique expertise of university personnel.[151] And beyond this deference, the Court also took pains to independently recognize the educational benefits that would flow from student body diversity, from preparation for a multiracial society to helping break down racial stereotypes.[152] This diversity was critical, the Court held, to uphold the promises of *Brown v. Board of Education* and its progeny: to make good on education as "the very foundation of good citizenship."[153] The Court further recognized that the "unique experience of being a racial minority society" was critical at a time in which "race unfortunately still matters."[154]

As it had in *Bakke*, however, the Court rejected the use of a quota system, noting that any constitutionally permissible admissions program must be flexible and holistic, with race or ethnicity only as a "plus" in a file.[155] The Court also expressed its hope that race-conscious admissions programs of this sort could have a termination point, noting that in the quarter century since *Bakke*, the number of higher-education students who were members of racial minorities had improved. As the Court wrote: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[156] In concurrence, Justice Ruth Bader Ginsburg recognized also that both unconscious bias and "rank discrimination" based on race continued to exist, resulting in dramatically unequal educational opportunities.[157]

To be clear: I by no means suggest here that the promises of *Brown, Grutter*, and their progeny were robust or even sufficient to address racial inequality, or that they were the products of a Court genuinely concerned with racial repair. To the contrary. As many have long argued, the Court has, for the better part of its existence, failed to take steps to properly recognize, address, and remedy the legacy of racial harm in America. Instead, I argue

149 *Id.* at 318–19.
150 *Id.* at 325.
151 *Id.* at 328–29.
152 *Id.* at 330.
153 *Id.* at 331.
154 *Id.* at 333.
155 *Id.* at 334.
156 *Id.* at 343.
157 *Id.* at 345–46 (Ginsburg, J., concurring).

in this part that in the past twenty years, the Court has not only receded from these limited equity gains but also begun the work of winding back the clock: of returning the nation, the state of the law, and the narrative surrounding race relations to a time of even greater and more endemic inequality. And it has done so, as the following section argues, through embracing a single, simple narrative: a postracial view of color-blindness and a perverse form of "reverse discrimination."

2. From Parents Involved to SFFA: Becoming Color-Blind—Just two years after *Grutter* and *Gratz*, however, the Court's makeup changed: most notably, Justice Samuel Alito replaced the retiring Justice Sandra Day O'Connor, the sole conservative vote for affirmative action policies, on the bench. In the years that followed, the conservative-majority Court would make an about-face from its commitment to the goals of racial diversity, its recognition of anti-Black racism, and the notion that race should be considered—at all—in educational admissions at all levels. Instead, it would wholeheartedly endorse an ideology of "color-blindness," an attempt to eradicate race consciousness—and racial recognition—in their entirety.

The Court began its assault on race consciousness in schools in 2007's *Parents Involved v. Seattle School District No. 1*,[158] which consolidated challenges to similar programs out of K-12 public school districts in Seattle, Washington, and Jefferson County, Kentucky. The programs both adopted student assignment plans that allowed students to select their desired schools and that had race as a factor in school-assignment decisions: Seattle as a tiebreaker and Jefferson County as an affirmative factor in achieving racial diversity in schools.[159] The Court, in a splintered opinion, struck both programs, and in doing so reached several primary conclusions.

First, the Court held that *Grutter* and its compelling interest in diversity did not govern in the K-12 context given the "unique context of higher education."[160] The Court explicitly held that racial diversity was not a compelling interest that could justify the use of race in admissions processes in public high schools.[161] Second, the Court held that even if diversity were a compelling interest, the programs at issue were not narrowly tailored given that they were, as the Court held, tied to the districts' racial demographics and effectively tailored to attaining a specific level of enrollment that would correspond to the districts' racial makeup.[162] The Court rejected this as impermissible "racial balancing," rejecting the districts' attempts to argue that these arrangements were needed to avoid

158 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

159 *Id.*

160 *Id.* at 724–25.

161 *Id.*

162 *Id.* at 727.

the consequences of racialized housing patterns that produced segregated communities. Third, the Court dramatically recast *Swann*, painting the case as one that addressed only a "possible state objective," not the "means . . . that a school district might employ to achieve that objective."[163] More, the Court framed as entirely dicta *Swann*'s conclusion that districts could deploy race-conscious criteria to achieve integratory goals.

Fourth, and perhaps most consequentially, the Court reframed the narrative to situate *Parents Involved*'s conclusion as *required* under the promise of *Brown*. As the Court interpreted *Brown*, it stood for the principle that admission to the public schools required use only of a "nonracial basis." As the Court wrote, "[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts [here] have not carried the heavy burden of demonstrating that we should allow this once again."[164] Or, put differently, measures meant to aid students of color were themselves discriminatory under the auspices of *Brown*. Justice Roberts stamped this color-blind conclusion in the final line of the opinion: "The way to stop discrimination on the basis of race," he wrote, "is to stop discriminating on the basis of race." Any consideration of color, race, or ethnicity, then, was itself discrimination.

Seven years later, a plurality of the Court would conclude that *Grutter*'s guarantees could be cabined by the voters of a state who chose to prohibit the use of race-conscious preferences.[165] In *Schuette*, the Court upheld a Michigan amendment, voted by referendum, that banned the use of affirmative action in state programs, specifically with respect to university admissions. While the Court noted that the case was ostensibly not about the constitutionality of race-conscious admissions programs, it nonetheless made its shifting position clear: "Government action that classifies individuals on the basis of race," the Court wrote, "is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend."[166] Justice Scalia went further still in concurrence, chiding the Court's "sorry line of race-based-admissions cases" that were, in his mind, discriminatory by their very nature.[167] And Justice Roberts, also in concurrence, doubled down on his *Parents Involved* color-blind canon: "it is not out of touch with reality," he wrote, "to conclude that racial preferences may themselves have the debilitating effect of reinforcing" racial discrimination.[168]

The crux of the Court's holding, however, was based in the importance of the political process and the fact that Michigan's voters had empowered the amendment. The ability of

163 *Id.* at 738.

164 *Id.* at 747.

165 Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014).

166 *Id.* at 308.

167 *Id.* at 317 (Scalia, J., dissenting).

168 *Id.* at 316 (Roberts, J., concurring).

the public to question "programs designed to increase diversity," the Court wrote, was "necessary . . . to transcend the stigma of past racism."[169] But in so holding, the Court ignored respondents' arguments about the very nature of that democratic process: both that the amendment specifically targeted racial minorities and that such racial minorities had always been represented unequally in the political system and voting body. As Justice Sotomayor wrote in dissent, the decision "reconfigure[d] the political process in a manner that burden[ed] only a racial minority."[170] More, she wrote, the majority ignored the political reality that minority groups lacked "meaningful and equal access" to the democratic process, recounting the long post–Civil War history of states' categorical denial of political representation to racial minorities that would lead to the decisions in *Seattle* and *Hunter*.[171]

The Court would next squarely take up the question of affirmative action in *Fisher v. University of Texas*,[172] a case sponsored from inception by the conservative activist Edward Blum, who was also behind the voting-rights case *Shelby County v. Holder*. In a narrow majority opinion authored by Justice Anthony Kennedy, the Court upheld the University of Texas's "Top Ten Percent" admissions plan, under which admissions officers considered race as part of a holistic review.[173] In doing so, it clarified its pronouncements in *Fisher I*: that now, only "some" judicial deference was owed to universities on measuring the benefits that flow from diversity, and virtually "no deference" was owed universities when determining whether the use of race was narrowly tailored under strict scrutiny.[174]

Even as it upheld the plan, however, the Court took a new, cautionary view of the use of "[f]ormalistic racial classifications."[175] More, it warned of a looming "challenge": how to reconcile the "pursuit of diversity with the constitutional promise of equal treatment and dignity."[176] And, it held, its holding did not absolve the University of Texas or other institutions from future scrutiny: educational institutions, the Court held, had an "ongoing obligation" to continue to review admissions policies to determine whether they were necessary.[177] The four conservative justices, in dissent, further forecasted the storm

169 *Id.* at 314. (majority op.).

170 *Id.* at 341 (Sotomayor, J., dissenting).

171 *Id.* at 342–47.

172 Fisher II, 579 U.S. 365 (2016). The case was preceded by the Court's first pass at reviewing the plan, under which the Court held the plan must be evaluated under strict scrutiny and remanded back to the lower courts to apply the correct standard. *See* Fisher I, 570 U.S. 297 (2013).

173 *Id.* at 373.

174 *Id.* at 376–77.

175 *Id.* at 380.

176 *Id.* at 388.

177 *Id.*

coming for the diversity rationale—Justice Thomas, for example, called it a "faddish theory."[178]

The Court's makeup again changed dramatically after *Fisher*: namely, the conservative trio of Justices Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett filled the seats of Justices Kennedy, Ginsburg, and Scalia. What was once a 5–4 majority in favor of maintaining—albeit narrowly—race-conscious remedies transformed to an at least 6–3 coalition in favor of their abolishment. Notably, though none of the newly appointed justices had a demonstrated record in the affirmative-action area, the new members' records on race portended a radical change in the Court's race-consciousness cases.

Justice Brett Kavanaugh, for example, was, before his judicial service, a staunch opponent of affirmative-action programming. Not only was he "integral" to developing the George W. Bush administration's case against the University of Michigan's affirmative-action programming at issue in *Grutter*, but he also openly opposed policies that would promote minority businesses as "naked racial set-aside[s]."[179] Kavanaugh also explicitly argued against affirmative-action programming, albeit outside the schools context, in a case concerning whether parties could benefit from programming that acknowledged their status as native Hawaiians.[180] Justice Kavanaugh argued, as then-counsel of record on the brief, that "a state has no right to engage in racial classifications on the right to vote in state elections simply to preserve a particular culture."[181] Indeed, in a 1999 statement discussing the case, now-Justice Kavanaugh made his views clearer still: "I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government."[182] More, Justice Kavanaugh, throughout his tenure on the D.C. Circuit, repeatedly, in both majority and dissenting opinions, rejected Black litigants' retaliation and discrimination claims.[183]

Justice Amy Coney Barrett, for her part, ruled in 2019 that the repeated and frequent use of the "n-word" by a supervisor directed to their Black employee did not constitute a

178 *Id.* at 389 (Thomas, J., dissenting).

179 *See* Li Zhou, *Kavanaugh Bragged About His Clerks' Diversity. His Legal Record Is Another Story*, Vox (Sept. 8, 2018), https://www.vox.com/2018/9/8/17821478/supreme-court-nominee-brett-kavanaugh-diversity.

180 *Id.* (citing Rice v. Cayetano, 528 U.S. 495 (2000)).

181 Brief of Amici Curiae Ctr. for Equal Educ. Opp'y, et al., Rice v. Cayetano, No. 98-818, 1999 WL 345639 (May 27, 1999).

182 Notably, though, when asked about this statement at his confirmation hearings, Justice Kavanaugh stated that his remark was merely an "aspirational suggestion," and that the "long march for racial equality is not finished and racial discrimination is still a reality we see on an all-too-frequent basis." Confirmation Hearing on the Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Committee on the Judiciary, 115th Cong. 545 (2018) (response of then Judge Brett M. Kavanaugh to then Sen. Kamala Harris, Ranking Member, S. Comm. on the Judiciary).

183 *See*, *e.g.*, Howard v. Off. of the Chief Admin. Officer of the U.S. House of Representatives, 840 F. Supp. 2d 52 (D.D.C. 2012); Rattigan v. Holder, No. 13-5374 (D.C. Cir. 2015).

racially hostile work environment.[184] And similarly, Justice Neil Gorsuch, while on the Tenth Circuit, held that requiring a housekeeping staff to speak only English while on the job did not create a hostile work environment for Hispanic employees,[185] and he joined a majority opinion finding in favor of an employer who demanded that an employee provide right-to-work papers—and then fired him, and demanded an apology, when the employee ultimately produced the paperwork.[186] This shift away from a coalition that included Justice Anthony Kennedy, a long-time friend to affirmative-action causes and the deciding vote in cases such as *Fisher*, would bear fruit in the 2022–23 Term, when Ed Blum's conservative coalition would successfully shepherd another affirmative-action challenge through to the Court.

In *Students for Fair Admissions v. Harvard*,[187] Blum's Students for Fair Admissions ("SFFA"), a nonprofit group formed to "combat racial classifications" in college admissions,[188] brought a pair of challenges to Harvard University's and the University of North Carolina's admissions policies. After two lengthy trials—at which the universities offered dozens of fact and expert witnesses and SFFA called only two to testify[189]—the trial court held, and the First Circuit affirmed, that both UNC's and Harvard's policies comported with the Court's affirmative-action precedents. As most predicted it would, the newly constituted 6–3 conservative majority of the Court found in favor of SFFA in the consolidated case.[190]

184 *See* Smith v. Ill. Dep't of Transp., 936 F.3d 554 (7th Cir. 2019) (noting that while the "n-word is an egregious racial epithet," the plaintiff "can't win simply by proving that the word was uttered" and must have "demonstrate[d] that [the supervisor's] use of this word altered the conditions of his employment and created a hostile or abusive working environment"). Notably, Justice Brett Kavanaugh, then on the D.C. Circuit, said he would have held that the use of the "n-word" would have "suffice[d] by itself to establish a racially hostile work environment." *A Look at Judge Amy Coney Barrett's Notable Opinions, Votes*, AP (Oct. 11, 2020), https://apnews.com/article/race-and-ethnicity-donald-trump-confirmation-hearings-discrimination-amy-coney-barrett-4380ef16b3da79836151bcaaa7eda224. The NAACP filed a brief in opposition, based on the *Smith* ruling, to Justice Barrett's confirmation. *See NAACP Condemns Misrepresentation by Amy Coney Barrett on Racial Justice Ruling, Calls for Judiciary Committee to Pursue*, The Crisis (Oct. 21, 2020), https://naacp.org/articles/naacp-condemns-misrepresentation-amy-coney-barrett-racial-justice-ruling-calls-judiciary.

185 *See* Montes v. Vail Clinic, 497 F.3d 1160 (10th Cir. 2007).

186 *See* Zamora v. Elite Logistics, Inc., 478 F.3d 160 (10th Cir. 2007).

187 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

188 Students for Fair Admissions, https://studentsforfairadmissions.org/#:~:text = Students%20for%20Fair%20Admissions%20is,unfair%2C%20unnecessary%2C%20and%20unconstitutional. (last visited Mar. 1, 2024).

189 *Students for Fair Admissions*, 600 U.S. at 343 (Sotomayor, J., dissenting).

190 Importantly, some have argued that *SFFA* did not, at least on its face, formally overrule *Grutter*. *See generally, e.g.*, Jonathan Feingold, *Affirmative Action After* SFFA, 48 J. Coll. & Univ. L. 239 (2024) (arguing, for example, that while the case had "practical" and "doctrinal impact," *SFFA* "did not end 'affirmative action'" and should instead be viewed to be, as a "formal matter, a surprisingly narrow opinion").

In so doing, the Court also reframed both doctrinally and narratively not only nearly fifty years of affirmative-action precedent but significant pillars of the Court's centuries-long civil-rights jurisprudence. Under this new color-blind narrative, for example, the Court interpreted *Brown v. Board of Education* not as a critical achievement for Black equality but instead as a firm statement that "the time for making distinctions based on race had passed."[191] The invalidation of miscegenation statutes in *Loving v. Virginia*, the Court wrote, should be celebrated not solely as a ban on interracial marriage but also as a reminder that "all invidious racial discriminations" are unlawful.[192] *Yick Wo v. Hopkins*[193] then held that race-neutral laws applied in prejudicial ways to minorities are unconstitutional and that law must not consider *any* "differences of race."[194] As to these landmark precedents and more, the Court made itself clear: "color-blindness" was "in fact the proud pronouncement[] of cases like [these]."[195]

The Court's affirmative-action precedents fared no better. First, *Grutter*'s twenty-five-year hope became doctrinal law: "[A]t some point," the Court wrote, affirmative action "must end."[196] And the interests that the Court once lauded—preparation for pluralist societies, respect and empathy for others unlike ourselves, and a robust exchange of ideas—were not "not sufficiently coherent" or "measurable" to survive strict scrutiny.[197] More, the use of race-conscious decision-making, the Court held anew, did not actually *benefit* students of color; rather, admitting students in part on the basis of race was harmful "stereotyping" that could only cause "hurt and injury" to its beneficiaries.[198] Justice Sotomayor, in dissent, noted the Court's about-face from a half-century of race-conscious precedent, "from *Brown* to *Fisher*," that once had worked as an attempt to "equalize educational opportunity in a society structured by racial segregation."[199] The "superficial rule of race blindness" endorsed by the Court, Justice Sotomayor wrote, would undo any progress made toward racial equality by the Court's prior affirmative action work.[200]

The arc of the affirmative-action cases of the past twenty years perhaps always inevitably led here. The Court once endorsed the importance of race-conscious intervention as a compelling interest necessary to safeguard democracy, produce robust interactions, and prepare students for life in a very racialized and very real world. And it once cast its

191 *Id.* at 204.
192 *Id.* at 205.
193 Yick Wo v. Hopkins, 118 U.S. 356 (1886).
194 *Id.* at 206.
195 *Id.* at 227.
196 *Id.* at 213.
197 *Id.* at 214.
198 *Id.* at 220–21.
199 *Id.* at 333 (Sotomayor, J., dissenting).
200 *Id.*

landmark judicial interventions, in education and beyond, as powerful attempts to equalize life in modern America. But over the past two decades, from *Parents Involved* to *SFFA*, the Court has roundly rejected these ideals—and in doing so has rejected its role as an advocate for racial equity. More, these two decades have seen the Court move toward a postracial America in which any mention of or action based on race is not only nefarious but unconstitutional. It has not only as a matter of doctrine eliminated interventions meant to support racial minorities but also has, as a matter of narrative, erased any space once carved out for them. And as the space occupied by race has shrunk, the space occupied by religion has ballooned. As discussed in the following part, this antiparallel trajectory has seen the Court shift its attention away from racial minorities to a new ostensible "minority" in need of protection and intervention.

II. "NEUTRALITY," "COLOR-BLINDNESS," "DISCRIMINATION," AND "MINORITIES"

As discussed above, the Court's tracks in its religious-schools and affirmative-action jurisprudence have moved in opposite directions: one toward maximizing space for (Christian) religious observance, the other toward minimizing space for (Black and brown) racial minorities. But an examination of this dual-track system also reveals the Court's shifting, slippery, and inconsistent approaches to issues critical to both sets of doctrine and to education, antidiscrimination, and constitutional law more broadly. These include, for example, the notion of state "neutrality" or "blindness" toward racial and religious identity in schools; the concept of "discrimination" and whom it insulates; and the degree of "deference" to be afforded various constituents in the school system.

As this part will make clear, the Court has over the past two decades increasingly endorsed irreconcilable visions of these critical doctrinal and theorical considerations in the race and religion contexts in schools. Neutrality, on this telling, demands that the state must act blindly toward race but permit, support, and fund even majority religious observance. A state discriminates on the basis of religion when it does not endorse religious exercise, but it discriminates on the basis of race when it endorses racial minorities. And religious persons, organizations, and educational institutions are owed nearly absolute deference, while secular administrators, schools, districts, and universities are afforded nearly none. As this part will explain, this has created not only antiparallel doctrinal tracks but also antiparallel theoretical frameworks: one designed to protect Christian religious exercise, the other designed to undermine racial equity. Indeed, as Derek Black has written, the Court has, with these competing systems, set a "collision course" between "equal educational opportunity and religion."[201]

201 Black, *supra* note 25, at 582.

"Neutrality" and "Color-Blindness"

It was perhaps once true, particularly in the schools context, that "all agreed[]" that "neutrality is a value to be sought after in government interaction with religion."[202] And it was also perhaps once true that the Court would routinely subject to strict scrutiny state exercises that failed the test of neutrality while burdening religious exercise.[203] Indeed, the Court's view once was that the Religion Clauses, in fact, *compelled* the state to "pursue a course of neutrality toward religion."[204]

More, neutrality was once defined in the religious-schools context as an abstention of the state from religious affairs entirely. Under the auspices of *Everson*, for example, the state could not take action that "aid[s] one religion, aid[s] all religions, or prefer[s] one religion under over another."[205] And the *Barnette* Court made clear that the "essence of the religious freedom guaranteed by our Constitution" is that "no religion shall either receive the state's support or incur its hostility."[206] Indeed, from the 1960s to the 1990s, the Court consistently echoed its support for this idea of neutrality-as-abstention, even as it moved away from strict separationism: "It is neither sacrilegious nor antireligious," the Court wrote in *Engel*, "to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers."[207] The *Lemon* test, too, codified this principle of neutrality as firmly a secular construction: to survive, the government action must "have a secular legislative purpose" and "neither advance[] nor inhibit[] religion."[208] Some have called this view one of "formal neutrality," under which, so long as a government provides a neutral governmental process, the effects of government action need not be examined.[209]

But the modern Court has turned away from this type of separationist neutrality and embraced a diametrically opposite view of a "neutral" approach to religious exercise in schools. On this telling, regulations aimed at secular state activity, particularly in schools, are on their face *not* sufficiently neutral, as they treat secular activity more favorably than

202 Lincoln Davis Wilson, Note, *Judgmental Neutrality: When the Supreme Court Inevitably Implies That Your Religion Is Just Plain Wrong*, 38 Seton Hall L. Rev. 715, 719 (2008).

203 Ronald J. Colombo, *The Repeal of Religious Accommodations—A Constitutional Analysis*, 73 Am. U. L. Rev. 729, 733 (2024).

204 Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792–93 (1973).

205 Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

206 West Virginia v. Barnette, 319 U.S. 624, 654 (1943).

207 *Id.* at 435.

208 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

209 *See*, *e.g.*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990); *see also* Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 Duke L.J. 1493, 1544 n.259 (2023) (citing Laycock and comparing "formal neutrality" to a "religion-blindness" approach); Joy Milligan, *Religion and Race; On Duality and Entrenchment*, 87 N.Y.U. L. Rev. 393 (2012) (discussing the evolution of "formal neutrality" theories in race- and religion-conscious actions).

individual religious exercise.[210] Or, put differently, facially neutral laws that the Court deems to burden religious practice—*at all*—are constitutionally problematic if they aim to endorse secular activity without equally endorsing religious activity.[211]

As proponents of this line of cases have argued, for example, attempts to "sanitize religion from the public square" out of a "misguided reverence to neutrality" are unconstitutional on their face, as "secularism is not neutrality."[212] In this way, policies such as those that would restrict Coach Kennedy's prayer, exclude Bangor Christian Schools and Temple Academy from Maine's educational funding program, or fail to provide playground materials to church-affiliated schools, were not neutral because they "allowed secular exceptions while excluding [a party's] religious expression."[213] Those who disagree with this neutrality-as-secular approach have decried the "secularization of public education" as troubling, claiming that public schools have thus "chosen to pretend that religion does not exist"—a choice that, on their telling, is a "lesson[] about religion" and is therefore not "neutral."[214]

Some also have labeled this approach one of "equality": while neutrality requires even-handedness by the government, equality reframes the dialogue to focus on the protection of certain religious groups from discrimination.[215] Notably, however, this "equity" frame has generally been discussed through the lens of protecting religious minorities—not the largely Christian, largely white parties in the religious-schools cases. Others still have argued that the Court has increasingly endorsed, particularly in its aid-to-religious-schools cases, a view of "substantive" or "incentive" neutrality.[216] Under this frame of neutrality, an interpretation of the Religion Clauses would require government to examine the extent to which a state action would encourage or discourage religious belief or exercise—government must, then, provide equal and neutral "*incentives* with respect to religion."[217] This squares directly with cases like *Zelman*, which emphasized that the charter-funding program contained "'no financial incentives' that 'ske[w]' the program toward religious

210 *See*, *e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

211 *See* Steve Vladeck, *The Most Favored Right: COVID, The Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & Liberty 699, 703 (2022).

212 Mallory B. Rechtenbach, *Personal Foul-Enroachment: How* Kennedy v. Bremerton School District *Blurs the Line Between Government Endorsement of Religion and Private Religious Expression*, 35 Regent U. L. Rev. 295 (2023).

213 Kayla A. Toney & Stephanie N. Taub, *A Cord of Three Strands: How* Kennedy v. Bremerton School District *Changed Free Exercise, Establishment, and Free Speech Clause Doctrine*, 24 Fed. Soc. Rev. 2, 4 (2023).

214 Michael McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146, 162–63 (1987).

215 *See*, *e.g.*, Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 Hastings L.J. 799, 711–12 (2005).

216 *See*, *e.g.*, Thomas C. Berg & Douglas Laycock, Espinoza*, Government Funding, and Religious Choice*, 35 J.L. & Religion 361, 371–73 (2020); James R. Beattie, Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill*, 43 Cath. Law. 367, 375 (2004) (stating that "substantive neutrality" means a law must be implemented neutrally).

217 *Id.* at 372 (emphasis added).

schools," meaning it did not violate the Religion Clauses.[218] Notably, however, the Court has held firm to its belief that this approach actually best maintains formal neutrality—for example, in its aid regimes, the existence of private choice and facial neutrality have allowed such benefits to survive even if "used to proselytize."[219]

In this way, the Court in its religious-schools cases has variously endorsed neutrality in both degree and type—and has moved toward an increasingly skeptical view of neutrality in government programs. To the extent the Court still values neutrality, it has moved away from the view that neutrality is tantamount to secularism and toward the view that secularism is itself a non-neutral assault on religion.[220] Or, put differently, an interrogation into whether a law or state action is neutral requires, to survive constitutional scrutiny, an assessment of whether and how such a law may burden, even if incidentally, the religious preferences of state officials. In tandem with the Court's turn toward free-exercise supremacy, this view of neutrality has decidedly put a thumb on the scale in favor of religious exercise.[221] Indeed, the Court has moved past neutrality and balance toward a view of the Religion Clauses as instead primarily fostering religious equality—"expanding the space for religion to flourish in private and in public more equally, more freely, and more fully."[222]

But the view and application of neutrality principles taken in the affirmative-action and race-consciousness cases has taken the opposite tack. From *Bakke* to *Grutter*, the Court embraced the idea that given the compelling interest in student-body diversity, educational institutions could deliberately deploy non-facially neutral measures to increase racial representation in schools. A plurality of Justices in *Bakke*, for one, explicitly agreed that it would likely be "impossible to arrange an affirmative-action program in a racially neutral way and have it [be] successful," noting that "to get beyond racism, we must first take account of race."[223] That is to say that, at the beginning, neutrality could be set aside so long as institutions had adequately considered potentially neutral alternatives.[224] And

218 Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487–88 (1986)).

219 Frank S. Ravitch, *Rights and the Religion Clauses*, 3 Duke J. Const. L. & Pub. Pol'y 91, 102 (2008).

220 *See*, *e.g.*, Gerard V. Bradley, *The Death and Resurrection of Establishment Doctrine*, 61 Duq. L. Rev. 1, 6 (2023) (calling secularism the once-"beating heart of *Lemon*" and the Court's perception of it as the "dark protagonist of the piece").

221 *See*, *e.g.*, Luke Boso, *Religous Liberty, Discriminatory Intent, and the Conservative Constitution*, 2023 Utah L. Rev. 1023, 1023 (2023) ("noting the "favorable treatment that Christian claimants [now] receive under today's religiously neutral and generally applicable" doctrine).

222 John Witte, Jr. & Eric Wang, *The New Fourth Era of American Religious Freedom*, 74 Hastings L.J. 1813, 1848 (2023).

223 Regents of the Univ. of California v. Bakke, 438 U.S. 265, 407 (1978) (plurality op.).

224 *See*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.").

while the Court noted favorably in *Grutter*, for example, that Michigan Law School would terminate its race-conscious programming as soon as it found a neutral alternative, it explicitly deferred to the law school's assessment that race-conscious means remained necessary to achieve the diversity required to provide the robust exchange of ideas and pluralist environment endorsed by the Court.[225]

But this would begin to change as the Court moved away from the arguably high-water marks of *Bakke* and *Grutter*. In *Parents Involved*, for example, Justice Kennedy, the powerful swing vote in concurrence with the plurality, heightened the burden of proof for school districts in their treatment of race-neutral alternatives: the districts had not adequately proved, the Court observed, that there was "no other way" than race-conscious admissions to satisfy any interest in diversity.[226] This burden was formalized in *Fisher v. University of Texas*, where the Court applied a higher evidentiary burden than that at issue in *Grutter*, requiring proof that there were no workable alternatives to race-conscious decision-making.[227]

Moreover, in *Fisher*, the dissenters warned of the ways in which the majority opinion undermined what they saw as the "driving force of the Equal Protection Clause": namely, "racial neutrality."[228] And in doing so, the dissenters—who would soon become the powerful conservative bloc that would decide *SFFA*—rejected the idea that universities were owed deference with respect to when, and how, a critical mass of diverse interests could be adequately achieved through race-neutral measures. Rather, the dissenters forecast, this was properly framed as a "careful judicial inquiry," one that required the parties to carefully describe and define what a "critical mass" requires.[229] The dissenters also expressed extreme skepticism of the University of Texas's proffered evidence that it had adequately considered race-neutral means, suggesting that they were not "satisfied by [UT]'s profession of its own good faith."[230]

The Court would ultimately make clear that the Equal Protection Clause demanded absolute, formal neutrality: the "core purpose" of the Equal Protection Clause was to do away with *all* "discrimination based on race." Or, more specifically, that the institutions must disregard *any* "differences of race" to survive constitutional review.[231] And it

225 *Id.* at 328–29, 340.

226 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).

227 *See* Chris Chambers Goodman & Natalie Antounian, *Dismantling the Master's House: Establishing a New Compelling Interest in Remedying Systemic Discrimination*, 73 Hastings L.J. 437, 450–51 (2022).

228 Fisher v. Univ. of Tex., 576 U.S. 365, 399 (2016) (Alito, J., dissenting).

229 *Id.* at 401–03.

230 *Id.* at 434. Ruth Colker has observed that in *Fisher*, the "winner was not affirmative action": rather, the "winner was a creative, largely race-neutral work-around for a Court that was otherwise determined to end all race-conscious affirmative action." Ruth Colker, *The White Supremacist Constitution*, 2022 Utah L. Rev. 651, 691 (2022).

231 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206 (2023).

doubled down on the idea that deference was not to be afforded in reviewing race-conscious policies: the programs must be "sufficiently manageable to permit judicial review," with a set of goals and programs "coherent" enough for the court to measure progress.[232] And in doing so, it recast *Brown* and its progeny, and the former affirmative-action and race-conscious schools cases, into a steady stream of doctrine leading toward a single conclusion: only color-blindness, or formal neutrality, could survive this searching judicial scrutiny.[233]

As Jonathan Feingold has written, color-blindness, which has become the "leading racial ideology on the Right," arises out of "both the doctrinal flow of Supreme Court cases that washed away Jim Crow and the larger flood of changing racial ideas over the twentieth century."[234] Feingold has called the type of neutrality endorsed by the color-blind regime "facial neutrality": namely, "a process that neither sees nor accounts for an applicant's racial identity," a step away from "seeing race" at all.[235] On the color-blind telling, affirmative-action policies that are not facially neutral violate both formal and substantive equality principles because the state must always maintain absolute racial neutrality in its actions.[236] But, of course, this "surface neutrality" necessarily masks underlying institutional, structural, and as-applied discrimination: as Thomas Crocker has observed, "[t]o be blind to race is therefore to be blind to social structure."[237] Color-blindess, in this way, is about seeing race as only a "surface phenomenon," one in which race and perceptions of "merit" may be neatly disentangled.[238]

And the move toward absolute facial neutrality in the affirmative-action cases is, as Brandon Hasbrouck has persuasively argued, yet another example of the Court's "twisting [its] interpretation of the Constitution to excuse systemic racism, and allowing the bigotry of years past to continue through ostensibly neutral laws."[239] As Hasbrouck explained, the transition from "overt anti-Black" decisions to "color-blind" ones in the affirmative action cases and otherwise was particularly pernicious, as these new policies allowed white supremacy to flourish under cover of ostensible "equality."[240] In this way, public discrimination "is allowed to persist through the adoption of ostensibly neutral standards that lack

232 *Id.* at 214.

233 *See* Rachel Moran, *The Unbearable Emptiness of Formalism: Autonomy, Equality, and the Future of Affirmative Action*, 100 N.C. L. Rev. 785, 828 (2022) ("The Justices have steadfastly endorsed a principle of colorblindness [in the affirmative action cases], and there is no reason to think that they will retreat from this position.").

234 Jonathan Feingold, *Colorblind Capture*, 102 B.U. L. Rev. 1949, 1958 & n.33 (2022).

235 *Id.* at 1959.

236 *See* Thomas P. Crocker, *Equal Dignity, Colorblindness, and the Future of Affirmative Action Beyond* Grutter v. Bollinger, 64 Wm. & Mary L. Rev. 1, 7–8 (2022).

237 *Id.* at 42.

238 *Id.*

239 Brandon Hasbrouck, *The Antiracist Constituion*, 102 B.U. L. Rev. 87, 90 (2022).

240 *See generally id.* at 112–16.

regard for the history of oppression that created racial disparities along the lines of those same criteria."[241]

Others, including Angela Onwuachi-Willig, have observed that the affirmative-action cases made clear the Court's endorsement of neutrality as a tool to maintain white supremacy. As Onwuachi-Willig explained, the plaintiffs in cases like *Bakke* and *Fisher*—and the Courts deciding their cases—failed to consider the structural advantages they enjoyed and the ways in which, as a result, affirmative action has often been viewed as a zero-sum game.[242] In this way, by failing to discuss the "ways that white privilege visibly and invisibly operates," the Court had swept under the rug the structures of racism that propped up societal institutions.[243] The Court's view, then, is that race and racism are consciously perceived rather than socially constructed and pervasively reinforced, which undermines the cumulative, generational, and intersectional experiences of Black and brown individuals.[244] Or, put differently, failing to shine a light on institutional racism has inevitably led to the the legal and narrative fiction that neutral schemes facilitate both equity and equality.

In sum: as Osamudia James has written, the Court has in its affirmative-action jurisprudence worked diligently to uphold facially neutral laws even as they have a disparate impact on minority groups and to strike down deliberately race-conscious policies meant to remedy persistent racial inequality.[245] In this way, in the context of race-conscious admissions and decision-making in schools, the Court has persistently, and increasingly, clung to a view of facial and formal neutrality that rejects entirely an impact or substantive analysis. This color-blind view of neutrality stands for the proposition, then, that state action can be fairly and equally applied only if it utterly omits race from the equation. This is underscored, of course, by recent attempts from the same conservative bloc to target other arguably race-conscious features of education, from the teaching of accurate racial history to the false-flag campaign against what has been termed "critical race theory."

This "de-racing" the schools stands in stark contrast to the Court's creeping views on religious exercise in public schooling. Attempts to "de-religion" schooling—whether

241 *Id.* at 107.

242 *See* Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 Va. L. Rev. 343 (2019).

243 *Id.*

244 *See* Andre J. Washington, *Race-Based Admissions Are Meritocratic Admissions*, 83 U. Pitt. L. Rev. 1, 3–4 (2022); *see also* Maria M. Lewis et al., *The Politicization of Education Law and the Implications for Re-Envisioning the Law School Curriculum for Racial Justice*, 24 Rutgers Race & L. Rev. 1, 8–9 (2022) ("The legal arguments against race-conscious admissions policies over the last fifty years rest on the assumption that because we live in a post-racial, 'color-evasive' society, the consideration of race in admissions is unnecessary and fundamentally violates principles of merit, fairness, and equality.").

245 *See* Osamudia James, *Superior Status: Relational Obstacles in the Law to Racial Justice and LGBTQ Equality*, 63 B.C. L. Rev. 199, 242 (2022).

through solely secular funding programs; the removal of public, official prayer in schools; or otherwise—have, as discussed above, been derided as discriminatory because of the burden they pose to the religious. This "burden" analysis, of course, is utterly absent from the Court's assessment of race-conscious policies, the impact to Black and brown students glossed over.

"Discrimination" and "Minorities"

Alongside this inverted set of doctrinal tracks and competing views of neutrality of race and religion in schools has emerged a new view on the "minority" interest being protected by the Court. As this section describes, while perhaps the Court once, both explicitly and implicitly, carved out space for legal safeguards of racial minorities in its education jurisprudence, it has shrunk that space dramatically in the past two decades, and particularly in the past five years. Moreover, it has repositioned the interests of racial minorities as no longer needing this specific type of protection, particularly in the color-blind, post-racial society envisioned by those at One First Street.

At the same time, the Court has worked assiduously to resituate the interests of certain religious groups as in dire need of protection by the judiciary. In this telling, sectarian interests are under constant attack by a secular state seeking to erase private religious exercise entirely. Notably, the interests actually protected in the Court's jurisprudence have been, of course, those of white Christian evangelicals: while no religious plaintiff in the Warren Court era belonged to a mainstream Christian religion, the Roberts Court has virtually never in its education cases applied religious-freedom doctrine to non-Christian interests.[246] Moreover, in its non-education cases, it has routinely denied non-Christian religious interests. In 2019, for example, the Court permitted the state of Alabama to execute a Muslim man without his religious advisor present, noting Alabama's practice that allowed only the state's Christian chaplain to be present in the execution chamber. As the Court of Appeals recognized, if the prisoner "were a Christian, he would have a profound benefit; because he is a Muslim, he is denied that benefit."[247] And just one year earlier, the Court upheld then President Trump's policy banning people from Muslim-majority nations from entering the United States, doing so despite Trump's proclamations that the plan deliberately aimed for a "total and complete shutdown of Muslims entering the United States."[248] The Black and brown students who may benefit from race-conscious policies, then, are the threats—and the Coach Kennedys of the world, the threatened.

This repositioning, aided significantly in its efforts by the Court, has both been part of and of its own accord has spurred the rise of dueling movements aiming to define who

246 Asma T. Uddin, *Religious Liberty Interest Convergence*, 64 Wm. & Mary L. Rev. 83, 126 (2022).

247 Dunn v. Ray, 588 U.S. ___ (2019).

248 Trump v. Hawaii, 585 U.S. __ (2018).

continues to count as a "minority" in modern America. On one hand, primarily left-leaning activists have continued to sound the bell for racial equality, arguing that institutional and structural racial barriers, the vestiges of slavery, and persistent racial achievement and wealth gaps mean that racism is hardly a thing of the past. In this telling, cases like *SFFA* sound in the register of denial, a rejection of racial realities. More, cases like *Kennedy* and *Carson* are creeping proof of the Court's embrace of anti-equity ideals, endorsements of a brand of Christian whiteness that not only takes priority over the interests of Black Americans but also itself is a threat to racial equality.

On the other hand, primarily right-leaning, religious advocates have framed the critical interest as one of avoiding "religious discrimination"—or "discrimination against expressions of faith."[249] Religious people and organizations have in this way made their claim clear: "Christians *are* being persecuted in America," one group has written,[250] and former President Trump on multiple occasions made claims, similar to one from late 2023, that "Americans of faith are being persecuted like nothing this nation has ever seen before."[251] For his part, Justice Samuel Alito claimed in 2020 that "religious liberty is fast becoming a disfavored right" in America.[252] As of 2023, for example, most white evangelicals said that Christians are regularly discriminated against—compared with only thirty-nine percent who believed LGBTQIA+ individuals face discrimination.[253] And half of all Americans, including seventy-five percent of Republicans and eighty percent of white evangelicals, said they believe that discrimination against Christians is as significant a problem as discrimination against racial minorities, particularly Black Americans.[254]

And these claims have skyrocketed as evangelical morality increasingly conflicts with changing and rapidly progressing cultural mores on abortion, gay rights, sexual and gender identity, and the like.[255] The Court's recent religious-schools cases, then, are a bulwark

249 Perry & Butcher, *supra* note 143.

250 William Wolfe, *Yes, Christians Are Being Persecuted in America. Here's How We Can Respond*, Standing for Freedom Ctr. (July 12, 2022), https://www.standingforfreedom.com/2022/07/yes-christians-are-being-persecuted-in-america-heres-how-we-can-respond/.

251 Angelo Fichera, *Biden's Christian 'Persecution'? We Assess Trump's Recent Claims*, N.Y. Times (Dec. 29, 2023, updated Jan. 2, 2024), https://www.nytimes.com/2023/12/29/us/politics/trump-biden-christianity.html.

252 Samuel Alito, Keynote Address at Fed. Soc. Nat'l Lawyers Conv. (Nov. 12, 2020) (transcript available at https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society).

253 Daniel A. Cox, *Why Most Evangelicals Say They Face 'a Lot' of Discrimination*, Survey Ctr. on Am. Life (Sept. 7, 2023), https://www.americansurveycenter.org/newsletter/why-most-evangelicals-say-they-face-a-lot-of-discrimination/.

254 Emma Green, *Most American Christians Believe They're Victims of Discrimination*, The Atlantic (June 30, 2016), https://www.theatlantic.com/politics/archive/2016/06/the-christians-who-believe-theyre-being-persecuted-in-america/488468/.

255 *See* Alan Noble, *The Evangelical Persecution Complex*, The Atlantic (Aug. 4, 2014), https://www.theatlantic.com/national/archive/2014/08/the-evangelical-persecution-complex/375506/.

against the progressive left's forceful vision of "how society ought to look and function": a critical safeguard for individual expression of religious ideas and moral beliefs.[256] And in its non-education cases as well, the Court has explicitly elevated the interests of religious preference beyond antidiscrimination mandates—and forbade any interrogation into the sincerity or extent of such religious beliefs.[257]

This all has coincided with a similarly dramatic shift in the racial makeup of America. The last decade marked the first time in American history that white racial dominance was on the demographic decline.[258] White Americans are expected to be a minority group within the next two decades.[259] More, the number of biracial and multiracial citizens is growing faster still, increasing at a rate "three times as fast as the population as a whole."[260] Similarly, the number of Christians in America has declined at a rapid clip: while, as of now, sixty-four percent of the American population identifies as Christian, Christians are projected to be a minority group in the country by 2070.[261] Nearly forty percent of young Americans, in fact, now claim no religious affiliation at all; only twenty-five percent identify as both white and Christian.[262] On this telling, as religion scholar Robert P. Jones has explained, "the United States has moved from being a majority-white Christian nation to one with no single racial and religious majority," a shift felt particularly "within one subgroup: white evangelicals."[263] As a result, white Christians' "anxieties about the future as they lose traction in the present have created a nostalgia" for prior periods of power.[264]

256 *See* Patrick M. Garry, *Establishing Religious Freedom*, Law & Liberty (July 5, 2022), https://lawliberty.org/establishing-religious-freedom/.

257 *See*, *e.g.*, Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617 (2018) (permitting a business to discriminate against gay couples based on the owner's religious beliefs given the "hostility" against religion demonstrated by reviewing board).

258 Asma T. Uddin, *Religious Liberty Interest Convergence*, 64 Wm. & Mary L. Rev. 83, 90 (2022) (citing Pew Rsch. Ctr., Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065: Views of Immigration's Impact on U.S. Society Mixed 23–27 (2015)).

259 *Id.*

260 Kim Parker et al., *Multiracial in America*, Pew Rsch. Ctr. (June 11, 2015), https://www.pewresearch.org/social-trends/2015/06/11/multiracial-in-america/.

261 *Modeling the Future of Religion in America*, Pew Rsch. Ctr. (Sept. 13, 2022), https://www.pewresearch.org/religion/2022/09/13/modeling-the-future-of-religion-in-america/.

262 Paul Massari, *Worry in White, Christian America*, Harv. Gazette (Feb. 23, 2018), https://news.harvard.edu/gazette/story/2018/02/divinity-school-speaker-examines-worry-in-white-christian-america/. As one commentator has observed, these trends have "fuel[ed] anxiety about the place of Christians in society, especially among evangelicals, alarmed by support for gay marriage and by the increasing share of Americans . . . who don't identify with a faith group." Rachel Zoll, *Survey: White Christians Are Now a Minority of U.S. Population*, AP (Sept. 6, 2017, 11:15 AM EDT), https://apnews.com/article/93fdf6d95477440ba47aa61c70087d0f.

263 Robert P. Jones, *White Christian America Ended in the 2010s*, NBC (Dec. 27, 2019), https://www.nbcnews.com/think/opinion/2010s-spelled-end-white-christian-america-ncna1106936.

264 *Id.*

In this way, then, the Court's actions are protecting the Christian right from perceived victimization by shifting progressive mores and the emergence of a non-white, non-Christian majority.[265] More, the Court has ignored the historic connections between Christian nationalism and racial discrimination: as Stephen Feldman has explained, evangelical Christian efforts post-*Brown*, led by nationalist groups including the Ku Klux Klan, "provided the white nationalist movement with a religious zeal as it aimed for an apocalyptic transformation of the United States—the elimination of all people of color, Jewish Americans, and other outsiders."[266] And much has been made of the ways in which "church schools" or "segregation academies" were a direct response to *Brown*'s desegregation mandates—a way to siphon public funding in the name of religion to preserve white separation.

In this way, the racial minority rhetoric of *Brown* and the early affirmative-action cases has been appropriated by the religious right to claim its own mantle of "victimhood"[267] as it positions itself as a new minority. And this, of course, is not isolated to the Court's schools cases. This shifting of minority status, recognition, and legal protection toward evangelical Christians and away from other demographic minorities, including racial minorities, LGBTQIA+ individuals, and women, echoes through the Court's recent jurisprudence not simply in schooling cases but across doctrines.

This also has arisen in the context of women's rights and reproductive rights. For example, the Court in 2014's *Burwell v. Hobby Lobby Stores*[268] held that the for-profit corporation Hobby Lobby, a Christian-oriented chain of craft stores, could deny, on religious grounds, health coverage of contraception to which Hobby Lobby employees were otherwise entitled. The Court held that Hobby Lobby counted as a "person" subject to the religious protections of the Religious Freedom Restoration Act and consequently concurred that it could not force Hobby Lobby to "perform an act that . . . has the effect of enabling or facilitating the commission of an immoral act by another."[269] More, the Court rejected the Department of Health and Human Services' justifications for the law—"public health" and "gender equality" for women—finding these interests to be "too broadly framed."[270] In this way, as Justice Ginsburg noted in dissent, the Court's opinion constructed an

265 *See* Luke A. Boso, *Religious Liberty, Discriminatory Intent, and the Conservative Constitution*, 2023 Utah L. Rev. 1023, 1027–31 (2023).

266 Stephen Feldman, *White Christian Nationalism Enters the Mainstream: Implications for the Roberts Court and Religious Freedom*, 53 Seton Hall L. Rev. 667, 687 (2023).

267 For a discussion of the rise of white Christian nationalism and the ways in which it in many ways is responsive to America's liberalization since the *Brown* era, see Linda Greenhouse, *Victimhood and Vengeance*, N.Y. Rev. of Books (Feb. 9, 2023), https://www.nybooks.com/articles/2023/02/09/victimhood-and-vengeance-the-flag-and-the-cross/.

268 Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014). The owners' religious objections to the contraception mandate included their "sincere belief that life begins at conception," meaning that they could not endorse insurance coverage of methods of birth control that "may result in the destruction of an embryo." *Id.* at 720.

269 *Id.* at 724.

270 *Id.* at 725–30.

obvious hierarchy: "In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby."[271]

Similarly, Melissa Murray and Kate Shaw have written about the ways in which the Court's 2022 decision in *Dobbs v. Jackson Women's Heath Organization*[272] overturning *Roe v. Wade* positioned the Court "as the hero—the Knights Templar, if you will, vindicating the historic injustices that *Roe* and [*Planned Parenthood v.*] *Casey* wrought," in so doing "equating its work with the work of the Court in *Brown v. Board of Education*" and claiming its work was done to "correct the injustices done to racial minorities."[273]

So too have the Roberts Court's cases concerning LGBTQIA+ rights illustrated the primacy of religion. In 2018's *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, for example, the Court held that the Colorado Civil Rights Commission had not treated baker Jack Phillips neutrally when it evaluated whether Phillips had discriminated, in violation of Colorado law, against a gay couple seeking wedding cake services.[274] The Commission, the Court held, exhibited "clear and impermissible hostility toward [Phillips's] sincere religious beliefs" when it described religion as a "despicable piece of rhetoric that people can use" to discriminate against minority groups.[275]

Similarly to its religious-schools cases, the Court positioned Phillips as the victim of free-exercise discrimination, observing that the Commission "was obliged under the Free Exercise Clause to proceed in a manner neutral toward" Phillips's beliefs.[276] Again in dissent, Justice Ginsburg argued that the Court had once more elevated the alleged discriminator's interest (Phillips's, in this case) in protection of his religious beliefs over those of the gay couple's against discrimination: "I see no reason why the comments of one or two Commissioners," she wrote, "should be taken to overcome Phillips' refusal to sell a wedding cake to [the couple]."[277] In this way, as Jeremiah Ho has argued, the Court, in

271 *Id.* at 740 (Ginsburg, J., dissenting). Justice Ginsburg also argued that the majority's position could be extended beyond the contraceptive context, asking, for example, if the Court's decision could be applied to a refusal to serve Black patrons, *id.* at 769–70, a position the majority rejected as implausible, *see id.* at 733 (majority op.) ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield.").

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

273 Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 Harv. L. Rev. 728, 800–02 (2024).

274 Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617 (2018).

275 *Id.* at 635.

276 *Id.* at 638.

277 *Id.* at 673 (Ginsburg, J., dissenting). Notably, Jeremiah Ho has also described the ways in which the *Masterpiece Cakeshop* couple was even further minoritized, noting that the two men "did not share many of the other normalized, respectable features of the *Obergefell* [*v. Hodges*] plaintiffs," as they "flaunted their sexuality in public," "played with androgyny and avoided wearing conventional clothing to court appearances," and could be perceived as "more queer" than "gay." Jeremiah A. Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 Yale J.L. & Feminism 249, 287–88 (2020).

effectively endorsing "religion as a means to challenge[]" and stall "political progress for sexual minorities," reinforced "a discriminatory status quo that is partly validated and perpetuated by religious freedom [that] has received heightened legal protection."[278]

I hope to illustrate here that the Court's treatment of race and religion in the schools context—and its perhaps inverted notions of both discrimination and minority status—is not isolated to schools. Rather, the Court's treatment of schools over the past twenty-five years has, as perhaps it always has, pantomimed its shifting values framework in the theater of the classroom—"the most significant site of constitutional interpretation within the nation's history."[279] Or, as Caroline Mala Corbin has written, the Roberts Court has not solely in its schools jurisprudence but also across its constitutional doctrine consistently prioritized the right to practice one's faith "over other equally critical ones, most notably the right to equal treatment."[280]

CONCLUSION

This reflection aims to raise one central point: that peering into the Court's affirmative-action turn is only half the story. *SFFA* and its endorsement of color-blindness is only one side of the tale of the Roberts Court's turn not only in its education cases but also in its broader jurisprudential views on who, in modern America, is the real "minority." Put differently, a robust understanding of precisely what has animated the Court's retreat from race consciousness, and from protection for racial minorities, requires a concomitant look at another group the Court has carved out increasing protection for.

Over the past quarter century, the Court has undertaken simultaneous but antiparallel movements in its race and religion schools cases. While it once (at least rhetorically)[281] carved out protection for racial minorities—and endorsed interventions ostensibly aimed at pluralism, social mobility for minorities, and race-conscious recognition—it has moved away from racial awareness and toward a pervasive theory of color-blindness and racial neutrality that seeks to erase altogether race itself. At the same time, the Court has turned away from its once-robust demands, under the auspices of the Establishment Clause, that the government entirely absent itself from religion and act secularly in the name of avoiding religious indoctrination, undue coercion of young minds, and endorsement of any one religious identity. Instead, it has flipped the doctrinal and narrative framework, ushering in an era of free-exercise supremacy in which the First Amendment operates not to protect

278 Ho, *supra* note 277, at 302–03.

279 Justin Driver, The Schoolhouse Gate (2021).

280 *See* Corbin, *supra* note 69, at 476.

281 For a discussion of the Court's rhetoric surrounding the relationship between education and democracy, including its view on race, pluralism, and values inculcation in schools, see generally Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 Geo. L.J. 530 (2023).

from indoctrination but to preserve religious exercise by state officials even in the public sphere.

More, this has caused the Court to embrace an emergent and shifting set of views: who counts as a "minority" subject to persecution, what expression or identity deserves judicial protection, and to what extent the state should intervene or abstain to advance the needs of these constituencies. As this reflection argues, the balance in each of these inquiries, particularly in the Court's schools cases, has tipped away from racial minorities and, in dramatic fashion, moved toward the Court's "new minority."