

2022

Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness

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Recommended Citation

David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. 1629 (2022).

Available at: <https://repository.law.umich.edu/mlr/vol120/iss8/4>

<https://doi.org/10.36644/mlr.120.8.most>

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MOST FAVORED RACIAL HIERARCHY: THE EVER-EVOLVING WAYS OF THE SUPREME COURT'S SUPERORDINATION OF WHITENESS

David Simson*

This Article engages in a critical comparative analysis of the recent history and likely future trajectory of the Supreme Court's constitutional jurisprudence in matters of race and religion to uncover new aspects of the racial project that Reggie Oh has recently called the "racial superordination" of whiteness—the reinforcing of the superior status of whites in American society by, among other things, prioritizing their interests in structuring constitutional doctrine. This analysis shows that the Court is increasingly widening the gap between conceptions of, and levels of protection provided for, equality in the contexts of race and religion in ways that prioritize the interests of whiteness and set those interests as the normative baseline in both areas of constitutional law. While the Court has increasingly moved toward an aggressive and religion-conscious "most favored nation" equality theory in the Free Exercise Clause context, its continued march toward mandating colorblindness is arguably moving toward something akin to a "least favored nation" equality theory for race and race consciousness in the equal protection context. Arguments can be made that the most favored nation approach should also be applied to race. Doing so would provide more doctrinal space for racial equality-enhancing government programs and call into question deeply entrenched aspects of the Court's current affirmative action jurisprudence. The Court's refusal to even hint at the possibility of such an approach points to a racial project of superordinating the interests of white Americans to be constitutionally protected from race-conscious interference with their dominant position in the racial hierarchy over the application of consistent constitutional principles.

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INTRODUCTION

This Article takes as its starting point that America’s constitutional commitment to racial equality currently appears to be facing a “Second Redemption”¹—that is, a backlash reaction to progress in racial equality similar (though not identical) to that which developed after the Civil War and Reconstruction.² As such, our current moment illustrates the claim long made by Critical Race Theory (CRT) scholars that the trajectory of America’s racial equality progress is better described as a process of alternating cycles of reform and retrenchment, rather than as a more romantic story of continuous linear progress.³ One reason that retrenchment can continue to repeat itself is that the mechanisms of and the intellectual justifications for retrenchment con-

1. For some scholars’ uses of this term, see, for example, Marc Tizoc González, Saru Matambanadzo & Sheila I. Vélez Martínez, Foreword, *The Dispossessed Majority: Resisting the Second Redemption in América Posfascista (Postfascist America) with LatCrit, Scholarship, Community, and Praxis Amidst the Global Pandemic*, 23 HARV. LATINX L. REV. 149 (2020); Richard Primus, *Second Redemption, Third Reconstruction*, 106 CALIF. L. REV. 1987 (2018).

2. Constitutional law scholar Richard Primus has argued:

History never repeats itself precisely. Human society is too complicated for any generation to replicate all the conditions of some earlier period. Nonetheless, there are times when social patterns do look familiar to observers who are historically aware: history never quite repeats itself, but perhaps it sometimes rhymes. . . . [A number of current equality] storylines, laid alongside those of the time since the Second Reconstruction, present enough of a historical rhyme to explain why some say we are now living through an advanced stage of the Second Redemption.

Primus, *supra* note 1, at 1989.

3. See, e.g., Devon W. Carbado, Afterword, *Critical What?*, 43 CONN. L. REV. 1593, 1607–08 (2011).

continue to change and evolve in a process of “preservation-through-transformation.”⁴ In this process, the current justification and means for the continued subordination of historically subordinated groups are never quite the same as the previous ones and, in fact, often masquerade as egalitarian progress,⁵ permitting a kind of “plausible deniability” about the fact that longstanding social hierarchies persist and continue to be nurtured.⁶

One major task for civil rights lawyering and scholarship is to continue to expose and challenge the evolving ways in which the most basic civil rights goals of equality, liberty, and justice for all are being undermined, to develop arguments for how those goals could be more effectively pursued, and to hold accountable those leaders and institutions who could change the status quo for the better but fail to do so.⁷ This is simultaneously an “old” and enduring vision of civil rights lawyering, and yet it must continuously revitalize itself as a “new” vision that is both attentive to preservation-through-transformation and decisive in criticizing and responding to its ever-evolving forms.

This Article aims to contribute to this task through a critical comparative analysis of both the recent history and likely future trajectory of the Supreme Court’s constitutional jurisprudence in matters of race and religion. To date, constitutional law scholarship has only infrequently engaged in sustained comparative analysis of these two central areas of constitutional law.⁸ This Article argues that this oversight is problematic. It leaves comparatively unexplored important dimensions, and a new chapter, of the longstanding racial project⁹ through which constitutional law and the Supreme Court have con-

4. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997).

5. See *id.* (explaining that reforms to an existing status regime resulting from preservation-through-transformation will “revise its constitutive rules” and “may well improve the material and dignitary circumstances of subordinated groups, but they will also enhance the legal system’s capacity to justify regulation that perpetuates inequalities”).

6. JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE 42–43 (1999) (describing such deniability as “the ability to practice discrimination, while at the same time denying that any discrimination is actually taking place”).

7. Siegel, *supra* note 4, at 1148 (“Once we have judged the interpretive choices of our predecessors, it is just as important to reflect on our *own* acts of interpretive agency: to ask whether we are rationalizing practices that perpetuate historic forms of stratification . . .”).

8. See, e.g., Elizabeth D. Katz, “*Racial and Religious Democracy*”: *Identity and Equality in Midcentury Courts*, 72 STAN. L. REV. 1467, 1468 (2020) (calling for “additional studies that free racial civil rights and First Amendment religion scholarship from their current silos in order to better understand the concurrent development of these crucial and contested areas of law”); Paul Horwitz, *The Religious Geography of Town of Greece v. Galloway*, 2014 SUP. CT. REV. 243, 287 (noting that while many scholars have “recognized the importance of the similarities and differences between race and religion, . . . that work has been mostly intermittent and preliminary in nature”).

9. The term “racial project” was coined by sociologists Michael Omi and Howard Winant in their classic analysis of racial formation in the United States. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 125 (3d ed. 2015) (“A racial project is simultaneously an interpretation, representation, or explanation of racial identities and

tributed to the perpetuation of a basic social system structured by white supremacy.¹⁰ It also leaves comparatively unexplored potential ways of challenging this system and mobilizing against it.

With respect to new insights, a critical comparative analysis of race and religion jurisprudence uncovers new aspects of the ways in which the Court engages in what Reggie Oh has recently called the “racial superordination” of whiteness in the American racial hierarchy.¹¹ As Oh suggests, white supremacy is maintained not only through the subordination of non-white groups (though it is certainly also maintained in this way) but also through the *superordination* of whiteness—meaning practices that reinforce the perceived superior status of white Americans and whiteness in American society and that help consolidate white control over political power and material resources.¹² One way in which such superordination can proceed is by “prioritizing the

meanings, and an effort to organize and distribute resources (economic, political, cultural) along particular racial lines. Racial projects connect what race means in a particular discursive or ideological practice and the ways in which both social structures and everyday experiences are racially organized, based upon that meaning.” (emphasis omitted)).

10. Understanding, describing, challenging, and undoing this racial project, in constitutional law and other areas of law, is one of the main objectives of Critical Race Theory. See, e.g., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii (Kimberlé Crenshaw et al. eds., 1995) (“Although Critical Race scholarship differs in object, argument, accent, and emphasis, it is nevertheless unified by two common interests. The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as ‘the rule of law’ and ‘equal protection.’ The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it.”). For illustrative examples, see Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1450 (2016) (describing and challenging “a racial project by the U.S. Supreme Court to allow the police to control African-American men”); Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 76 (1998) (describing the racial project of redeeming whiteness through personal redemption of Chief Justice Earl Warren and institutional redemption of the Supreme Court in post-World War II racial equality jurisprudence that has underwritten “new structures of contemporary (colorblind) racial domination” (emphasis omitted)). As in my prior work, I rely on a broad and structural definition of the term “white supremacy,” as summarized powerfully by Frances Lee Ansley:

By “‘white supremacy’” I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.

Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989).

11. Reginald Oh, *Reading Loving into Brown: Racial Segregation, Interracial Marriage & the Anti-Supremacy Principle* (2021) (unpublished manuscript) (on file with author). For a classic analysis of how whiteness has been established and defended, often in brutal and repressive ways, as dominant in the American racial hierarchy, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

12. Oh, *supra* note 11, at 36.

interests of whites” in structuring legal doctrine.¹³ Applying this idea to race and religion jurisprudence, superordination of whiteness can occur *internal* to race jurisprudence,¹⁴ *internal* to religion jurisprudence,¹⁵ and *across* race and religion jurisprudence. This Article focuses predominantly on the last, cross-contextual dimension of superordination, which has so far received the least attention.

As Parts I and II describe, a critical comparative analysis of race and religion jurisprudence—what Russell Robinson has called “doctrinal intersectionality”¹⁶—shows that the Court is increasingly widening the gap between conceptions of, and levels of protection provided for, equality in the contexts of race and religion in ways that prioritize the interests of whiteness and set those interests as the normative baseline in both areas of constitutional law. This widening equality gap remains invisible if race and religion jurisprudence are analyzed, as they frequently are, in silos. But as Part II explores, it becomes visible through a comparison of the Court’s recent trajectory in the Free Exercise Clause context, where the Court has increasingly moved toward an aggressive and religion-conscious “most favored nation” equality theory,¹⁷ with its trajectory in the equal protection context, where the Court’s continued march toward mandating colorblindness is arguably moving toward something akin to a “*least* favored nation” equality theory for race and race consciousness. Plausible and persuasive arguments can be made that the most favored nation approach should also be applied to race. Doing so would provide more doctrinal space for racial equality-enhancing government programs and call into question deeply entrenched aspects of the Court’s current affirmative action jurisprudence. The Court’s refusal to even hint at the possibility

13. *Id.*

14. There is a vast body of scholarship that has explored how the interests of white Americans have been prioritized internal to constitutional racial equality jurisprudence. For illustrative examples, see David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635 (2019); Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297 (2015); Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1 (2015); Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95 (2014); Reva B. Siegel, Foreword, *Equality Divided*, 127 HARV. L. REV. 1 (2013); David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AM. U. L. REV. 729 (1995); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOWARD L.J. 1 (1995).

15. For a recent example of scholarship that explores how the Court’s religion jurisprudence prioritizes the interests of white Americans, see Caroline Mala Corbin, *The Supreme Court’s Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833 (2020).

16. Russell K. Robinson, *Justice Kennedy’s White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1030 (2019) (describing doctrinal intersectionality as “juxtaposing doctrinal domains that are often thought of as distinct in search of new insights” because “[p]lacing cases from different silos in conversation with each other may make visible broader projects that a Justice or coalition of Justices may pursue without naming the project as such”).

17. This has been most notably the case in the Court’s emergency docket cases relating to the COVID-19 health crisis. See generally Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397 (2021). For the first notable use of the term, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50.

of such an approach points to a racial project of superordinating the interests of white Americans to be constitutionally protected from race-conscious interference with their dominant position in the racial hierarchy over the application of consistent constitutional principles. This suspicion is further supported by the Court's selective application of the most favored nation theory even in the context of religion in ways that predominantly benefit the interests of white Americans.

Uncovering this cross-contextual superordination of whiteness shows that the Court's cramped racial equality jurisprudence is not merely an iteration of a generally cramped vision of constitutional equality protections—it is racially specific to the benefit of whites. The Court *is* innovating and strengthening constitutional equality protections for the religious (at least where those protections cover the interests of most religious white Americans). But it simultaneously refuses to extend those innovations to the race context where they would largely benefit communities of color—indeed, in this context, the Court is moving even further *away* from the implications of its equality innovations elsewhere. This is a racial project and ought to be discussed, analyzed, and criticized as such.¹⁸

As I discuss in a brief conclusion, this point, in turn, connects the Article's doctrinal analysis to what it suggests about possible ways of mobilizing against this racial project. The Court's march toward a "colorblindness" approach to racial equality has been criticized extensively and persuasively on its own terms since at least the mid-1980s.¹⁹ And yet the Court seems poised to continue and finish its march,²⁰ suggesting that the members of the Court's conservative majority are not willing to be persuaded (intellectually or ideologically) by those critiques in isolation. They have seemingly shown

18. This project need not involve crude, intentional, and explicit majoritarian preferentialism on the part of any one justice or group of justices (although it might) for it to generate the effect of the racial superordination of whiteness and thus the perpetuation of a racial hierarchy grounded in ideologies of white supremacy. Justices might think about their interpretational choices only in isolation, and consider them defensible in isolation, even though their choices reveal their pro-hierarchy preferentialism when viewed through a cross-contextual lens. Whatever the case may be, focusing on whether such preferentialism is crude, intentional, or explicit is a distraction that would replicate the flawed "perpetrator perspective" of racial inequality and discrimination that Critical Race Theory scholars have long criticized as a tool for avoiding the true extent of racial inequality, racial discrimination, and the social and legal changes necessary to effectively combat them. For a discussion of problems with, and critiques of, the perpetrator perspective, see, for example, David Simson, *Hope Dies Last: The Progressive Potential and Regressive Reality of the Antibalkanization Approach to Racial Equality*, 30 WM. & MARY BILL RTS. J. (forthcoming 2022) [perma.cc/7KDV-RXFR].

19. See, e.g., David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99. Critical Race Theory scholars as well as others have generated a rich literature on the many problems with colorblindness that is too voluminous to summarize here.

20. For a discussion of how moderate justices in the middle of the Court's ideological spectrum have hitherto prevented the full completion of this march, see Simson, *supra* note 18 at 43–50, and Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

somewhat greater sensitivity to allegations that their decisions are ideologically or politically motivated.²¹ They have also shown greater willingness to explicitly take account of scholarship and activism advocating for greater equality protections in the field of law and religion. Could cross-contextual alliances of scholars and activists develop an *anti-racist* project²² that calls out the Court's equality inconsistencies and their negative racial hierarchy implications and demands harmonization in line with robust equality protections for *all* groups for whom the Constitution shows special solicitude? Would such a project make a difference? I don't want to be naïve about the likelihood of such a project or its prospects of success. But it seems worth attempting as one aspect of a determined challenge to the dangers of a Second Redemption.

I. AGGRESSIVELY PROTECTING EQUALITY IN THE CONTEXT OF RELIGION

A. *The Rise of MFN*

One of the most significant and widely discussed decisions of the Supreme Court regarding the scope of constitutional protections for religion was the 1990 decision in *Employment Division v. Smith*.²³ *Smith* produced a significant departure from prevailing free exercise doctrine by changing the basic nature of the constitutional free exercise protections that courts would enforce²⁴ from a substantive liberty right “to a mere equality right.”²⁵ Where previously the

21. See, e.g., Adam Liptak, *Alito Responds to Critics of the Supreme Court's 'Shadow Docket,'* N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html> [perma.cc/3VVZ-4E25]; Brian Naylor, *Justice Amy Coney Barrett Insists that the Supreme Court's Rulings Aren't Partisan*, NPR (Sept. 13, 2021, 12:13 PM), <https://www.npr.org/2021/09/13/1036597871/supreme-court-justice-amy-coney-barrett-decries-labeling-the-court-as-partisan> [perma.cc/G3EA-GR3A].

22. Omi and Winant define “anti-racist projects” as “those that undo or resist structures of domination based on racial significations and identities.” OMI & WINANT, *supra* note 9, at 129 (emphasis omitted).

23. 494 U.S. 872 (1990).

24. *Smith* continued to permit legislatures to protect religious liberty rights beyond the constitutional floor that the Court set. See 494 U.S. at 890. Legislatures at various levels have done so. See, e.g., Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 3–4 (2016). For a critique of this shift on institutional grounds, see Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

25. Laycock, *supra* note 17, at 13. Under a liberty right approach, the constitutionality of a particular regulation would be based on the burden that it imposes on protected religious exercise interests, independently of whether activity other than religious exercise is similarly burdened. By contrast, an equality right approach determines the constitutionality of a particular regulation based on a principle of nondiscrimination between comparable religious and secular practices. See, e.g., Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 202–03 (2004) (“*Smith* changed free exercise from a substantive liberty—a rebuttable guarantee of freedom to act within the domain of religiously motivated behavior—to a comparative right, in which the constitutionally required treatment of religious practices depends on the treatment of

Court's jurisprudence had required the government to justify any imposition of substantial burdens on constitutionally protected religious exercise under strict scrutiny,²⁶ the Court ruled in *Smith* that the Free Exercise Clause does not protect against burdens on religious exercise imposed by laws that are neutral and "generally applicable."²⁷ In other words, when legislation does not impose burdens unequally on the basis of religion or religious exercise, the First Amendment does not demand heightened scrutiny.

While there have been calls for the repudiation of *Smith* essentially since the day it was decided, both by members of the Court²⁸ and scholars,²⁹ because of its limitations on the affirmative protection of religious liberty, what is of most importance for this Article is that the decision led to novel ways of thinking about and conceptualizing religious equality.³⁰ Specifically, Douglas Laycock and other scholars have put forward an argument that, properly interpreted, the "general applicability" requirement of *Smith* requires a "most favored nation" (MFN) approach to religious equality.³¹ Combining a close reading of *Smith* with the Court's later decision in *Church of the Lukumi*,³² and homing in on the concept of underinclusion,³³ this approach proposes that the religious equality protected by the Constitution is violated whenever a law that broadly regulates conduct, or distributes benefits or burdens, permits departures from the broadly applicable rule for certain secular interests and actors but does not permit the same departures for comparable religious

some comparable set of secular practices. . . . [F]ree exercise claims before *Smith* had not required proof of discrimination. . . . A burden on religious practice was a prima facie violation; discrimination was just an aggravating factor. . . . *Smith* changed all this. Eliminating the substantive liberty put the focus on the comparative right.").

26. The case initiating this type of protection was *Sherbert v. Verner*, 374 U.S. 398 (1963).

27. 494 U.S. at 878.

28. Soon after *Smith*, Justice Souter, for example, called for reconsideration of the case. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment). Most recently, Justice Alito put forward an extensive argument in favor of overruling *Smith*. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in the judgment). For a trenchant critique of Justice Alito's reasoning in *Fulton*, see Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, 5 AM. CONST. SOC'Y SUP. CT. REV. 221, 233–50 (2021).

29. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

30. See, e.g., Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753, 755 (1998) (calling for development of protections for religious liberty within the *Smith* regime).

31. See, e.g., Laycock & Collis, *supra* note 24, at 22–23; Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 880 (2001); Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 31 (2000); Sansom, *supra* note 30; Laycock, *supra* note 17, at 49–50. For a brief discussion of how the MFN approach deals with only one of a number of different possible "religious equality" questions, see *infra* notes 60–64 and accompanying text.

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

33. See, e.g., Duncan, *supra* note 31, at 867.

interests and actors without compelling justification.³⁴ In such instances, the government has implicitly made an impermissible value judgment that religious reasons for engaging in regulated activity are less valuable and thus less entitled to solicitude, and the Free Exercise Clause requires the government to justify such a value judgment under heightened scrutiny.³⁵

Religious interests and actors are comparable to secular interests and actors for purposes of this analysis whenever their request for an exemption, or the most favorable available treatment, would undermine the state's interests

34. Laycock, *supra* note 17, at 50. My use of the term “religious interests and actors” is admittedly somewhat vague, but this is in significant part because of open questions about the precise boundaries of the term “free exercise” of religion, how it relates to questions of status versus conduct, and how these considerations in turn relate to the MFN approach. For a general discussion of the possible meanings of the term “free exercise,” see Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 588 (1998) (noting that the “primary legal meaning of ‘free exercise’ . . . must protect the choice of individual citizens to refrain from as well as to engage in speech, ritual, and religiously motivated behavior without coercion by the state” but then immediately considering limitations on that meaning), and Tebbe, *supra* note 17, at 2398 n.1 (noting ambiguity about whether MFN, which Tebbe discusses under the heading of the broader concept “equal value,” pertains only to conduct or also status). Some of the broader formulations of the MFN principle recently put forth by Supreme Court justices suggest that religious status may at least in some instances entitle religious actors to the benefits of the MFN rule. *See, e.g.,* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2611–12 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (discussing examples of zoning laws and subsidies that may put different “secular organizations” into “favored” and “disfavored” categories of regulation and concluding that “religious properties” and “religious organizations” must be put into the “favored” category as a result of the MFN principle, without discussing any particular type of conduct that would be required before this conclusion can be reached). Moreover, some justices have expressed doubts about a simple “status versus conduct” distinction in the religion context more generally. *See, e.g.,* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring in part) (questioning whether “a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use” (emphasis omitted)). Thus, my use of the term “religious interests and actors” incorporates the fact that proponents of the MFN approach seem to be willing to provide free exercise equality protections on the basis of some mixture of status and conduct. I interpret the language in these cases to suggest that the key question is whether the “religious actors” at issue find themselves in the situation that exposes them to governmental regulation for reasons related to their religious circumstances and convictions. If a government regulation distributes burdens or benefits on the basis of status determinations, as in Justice Kavanaugh’s property regulation example, then religious status would be relevant. If the regulation concerns conduct, then the question would be whether the particular actor engaged in the conduct for religious reasons. *Cf. Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2278 (2020) (Gorsuch, J., concurring) (“Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same.”).

35. *See* Tebbe, *supra* note 17, at 2398–99 (noting that the “essence of equal value” or “what some are calling the ‘most favored nation’ approach to religious discrimination” is that if the “government regulates protected activities while exempting other[s]” and “its [regulatory] interest applies evenly to the regulated and unregulated categories, then it presumptively has devalued protected practices—it has treated them as less worthwhile than the exempted activities,” which triggers a “presumption of invalidity” that can only be overcome by meeting strict scrutiny (emphasis omitted)); *see also* Fraternal Ord. of Police v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) (“[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government’s actions must survive heightened scrutiny.”).

pursued by its broad regulation to a similar or lesser degree as the secular actors or activities that are being exempted.³⁶ In other words, when it permits the secular interests of some actors to undermine or qualify the broad interests that it otherwise pursues through its rules, the government must permit actors with religious interests to also do so on the same favorable terms—it must “equally value” secular and religious interests rather than “discriminate” against religion by not doing so. For example, if a police department prohibits beards in pursuit of the interest of a uniform appearance of officers to the public but makes exemptions for growing beards for medical reasons, it must also allow officers to grow beards for religious reasons since both exemptions analogously undermine the interest in uniform officer appearance.³⁷ Any refusal to provide such a religious exemption is discrimination against religion that has to be justified under strict scrutiny.³⁸

The MFN approach is an assertive and aggressive equality theory. Even a single secular exception can become the basis for a claim that religious equality rights have been violated and that this violation requires a compelling justification.³⁹ And it does not matter whether that exception is provided in the context of a system of “individualized exemptions” from a broad rule based on the discretion of individual government actors,⁴⁰ or in the context of the legislature making “categorical” exemptions, such as allowing for medical exemptions from a no-beard rule.⁴¹ Moreover, in theory, the MFN approach is applicable with respect to exceptions to broad selection criteria for receipt of government benefits, such as the “good cause” requirement for unemployment compensation,⁴² just like it is applicable to exceptions from broad government prohibitions on specific types of conduct, such as wearing a beard.

36. Laycock & Collis, *supra* note 24, at 11; Duncan, *supra* note 31, at 867.

37. See *Fraternal Ord. of Police*, 170 F.3d 359.

38. Laycock, *supra* note 17, at 50.

39. Laycock & Collis, *supra* note 24, at 21–23; Duncan, *supra* note 31, at 862, 867.

40. *Smith* itself recognized this point when it noted that prior caselaw on religious exemptions in the unemployment context had established “the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990) (quoting *Bowen v. Roy*, 476 U.S. 693, 804). The Court’s recent decision in *Fulton* reaffirmed this point. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); see also Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178 (2005); Duncan, *supra* note 31, at 862–63.

41. Laycock & Collis, *supra* note 24, at 22.

42. I say “in theory” because the Supreme Court has not addressed this question directly. Its MFN decisions in the COVID-19 context have so far been limited to the prohibition of conduct, such as religious gatherings. The Court’s decisions setting out the constitutional limits that the Free Exercise Clause imposes on benefits systems, such as unemployment compensation, were decided before *Smith* and on a burden-based theory, and thus addressed a discrimination-based equality theory only in dicta. See Duncan, *supra* note 40, at 1181–84. However, scholars discussing the MFN approach have discussed both sets of issues together. See, e.g., Laycock & Collis, *supra* note 24, at 10; Duncan, *supra* at 1186; Laycock, *supra* note 25, at 215; Duncan, *supra* note 31, at 861–62. Some Supreme Court justices have as well. See *Calvary Chapel Dayton Valley*

Supporters of MFN have put forward three general justifications for such an assertive approach to religious equality. The first is that the First Amendment demands that religious conduct and interests not be “devalued” as compared to their secular analogs.⁴³ Underlying this argument is a claim that religion is in some sense constitutionally “special,”⁴⁴ a category of social experience that is entitled to heightened constitutional consideration and protection from either covert discrimination or governmental indifference.⁴⁵ Where the government is willing to live with some underinclusion in its pursuit of governmental interests, it must ensure that religion as a category, and the way in which religion impacts people’s position vis-à-vis the government’s decision to distribute benefits and burdens, is not part of such underinclusion. One way to conceptualize this argument is that the MFN approach ensures constitutional “fairness” for religious people in a way that is sensitive to their antisubordination interests and fundamental rights.⁴⁶

The second, closely connected, justification is a political process justification: requiring MFN treatment for religious interests and actors provides

v. Sisolak, 140 S. Ct. 2603, 2611–12 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (discussing entitlement of “religious organizations” to MFN status in context of laws “that supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category” and “provide benefits only to organizations in the favored or exempt category”).

43. Laycock & Collis, *supra* note 24, at 23–24.

44. There is a longstanding debate about whether religion is or is not and should or should not be regarded as “special” for constitutional purposes. For extended discussions of this point, see, for example, Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017), and Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). For purposes of this Article, I proceed from the assumption that religion is, in Lund’s terms, “special enough” to justify heightened equality protections compared to many other aspects of social life. One justification for such a conclusion would be that religion is explicitly singled out for protection in the text of the First Amendment. See, e.g., Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 168 (1990). Another would be that religion is an aspect of social life that history suggests makes people particularly vulnerable to victimization. Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in *LAW AND RELIGION* 200, 203 (Stephen M. Feldman ed., 2000) (“The bitter divisions of humanity along religious lines, and the global persecution of religious minorities throughout most of recorded history, make the victims of religious intolerance the ultimate and tragic exemplars of vulnerability.”). The Court has recognized this special status by moving toward an MFN approach to religious equality. See *infra* notes 52–55 and accompanying text. My main purpose in this Article is not to resolve the propriety of that determination. Rather, it is to explore what the implications of the Court’s conclusion of religion’s special status vis-à-vis constitutional equality protections would or should be in the context of race, and what insights we can draw from the fact that the Court is highly unlikely to come to a similar conclusion in the racial equality context even though there are persuasive reasons that it should do so.

45. Laycock & Collis, *supra* note 24, at 26 (“Some readers may think that this [MFN approach to the] general-applicability requirement provides a higher level of protection. In a sense it does, and that is entirely appropriate. First Amendment rights are fundamental and deserving of the highest level of protection.”).

46. Tebbe, *supra* note 17, at 2438–44.

them with “vicarious protection” in the political process.⁴⁷ By requiring that any exemptions that sufficiently powerful secular interests can obtain are available to religious actors as well, the MFN approach protects religious actors who may not have the clout to influence legislation such that it is explicitly solicitous of their interests and needs.⁴⁸ In that way, MFN ensures that either the government’s interests in regulation are sufficiently strong to subject everyone to them in a similar fashion or that the government does not devalue religious interests when it is willing to pursue its goals in an incomplete fashion. This, too, is arguably an interest grounded at least in part in antisubordination concerns.⁴⁹

The third justification is that an MFN approach to equality helps to “implement[] a nondiscrimination requirement in the face of complexity.”⁵⁰ Because of the wide variety of both secular and religious interests and actors that could be used to determine whether any particular set of differential treatment did or did not involve discrimination against religion, tying the constitutionally required treatment of religious interests and actors to that of the most favorably treated secular interests and actors simplifies the inquiry and protects the constitutionally special status of religious interests and actors at the same time.⁵¹

Most importantly for this Article, the Supreme Court has recently adopted the MFN approach to religious equality at least to some extent, specifically in its emergency relief docket cases related to the COVID-19 pandemic.⁵² Beginning in separate dissenting opinions to decisions that upheld public health regulations as applied to churches and other places of worship,⁵³ the Court eventually (after the appointment of Justice Barrett) consolidated a majority around the proposition that government regulations “trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise.”⁵⁴ While the specific cases in which the Court did so were limited to the relatively narrow category of restrictions on worship specifically, some members of the Court’s majority—Justice Kavanaugh in particular—have proposed an expansive interpretation of MFN that is triggered whenever “secular organizations or

47. Laycock & Collis, *supra* note 24, at 25; Mark Storslee, COVID-19, Neutrality, and the Free Exercise of Religion 7–8 (July 31, 2021) (unpublished manuscript) (on file with author).

48. Laycock & Collis, *supra* note 24, at 24–26.

49. Tebbe, *supra* note 17, at 2444–48 (calling this an “argument from positive political theory” in favor of MFN).

50. Laycock & Collis, *supra* note 24, at 26.

51. *Id.* at 26–27.

52. For a more extended exposition of this point, see Tebbe, *supra* note 17, at 2416–22.

53. The most explicit and extensive opinion in this regard was Justice Kavanaugh’s opinion in *Calvary Chapel*. See *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612–13 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (grounding objection to the Court’s decision expressly in an argument that it violated the MFN status to which the religious claimants were entitled).

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

individuals” are treated “more favorably” (with respect to benefits or burdens) by being put into “favored or exempt” categories but “religious organizations” or “individuals” are not.⁵⁵ Moreover, while some commentators have suggested that the aggressive MFN approach to religious equality might be short-lived at the Court because it would be unnecessary if *Smith* were overruled and stronger independent religious liberty protections reinstated, others have suggested that the MFN religious equality principle could continue to exist alongside any religious liberty approach the Court might substitute for *Smith*.⁵⁶ And the Court’s recent *Fulton* decision has left it unclear whether and when the Court might, in fact, overrule *Smith*.⁵⁷

B. *Disaggregating Equality Questions: Intercategory Versus Intracategory Equality and MFN*

The Supreme Court has made clear that it is open to an assertive approach to protecting the constitutional equality rights of religious interests and actors both now and potentially moving forward. To evaluate the relevance of this development for constitutional racial equality jurisprudence, it is important to focus on what an MFN approach implies about the propriety of religion consciousness as a means of ensuring religious equality. By “religion consciousness,” I mean consideration of whether the way in which particular actors are affected by governmental regulation that imposes burdens or distributes benefits is related to their religious convictions.⁵⁸ The MFN approach requires religion consciousness to operate successfully, and it imposes such religion consciousness on policymakers who want to avoid violating its equality commands. Remember that under an MFN approach, a particular regulation, or system of regulations,⁵⁹ violates the equality rights protected by the Free Exercise Clause if (1) at least some actors are exempted from the usual operation of the regulation for *non-religious* (i.e., secular) reasons; (2) actors who are subject to the regulation for *religious* reasons are not exempted; and (3) exempting the religious actors from the regulation as well would not un-

55. See *Calvary Chapel*, 140 S. Ct. at 2611–13 (Kavanaugh, J., dissenting from denial of application for injunctive relief) (emphasis omitted). Similarly, in his opinion in *Danville Christian Academy, Inc. v. Beshear*, Justice Gorsuch, joined by Justice Alito, suggested that the MFN approach should apply to the treatment of religious schools when considered against the treatment of secular businesses. 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from the denial of application to vacate stay).

56. Tebbe, *supra* note 17, at 2415 (noting both arguments).

57. For a general discussion, see Lupu & Tuttle, *supra* note 28.

58. See *supra* note 34.

59. For the claim that it would be permitting a “circular” tautology to allow the government to prevent the application of the MFN principle by limiting its application to the scope of only singular regulations because that would allow the government to draft extremely narrow regulations, equivalent to a broader rule with exceptions, and still claim that the rule was generally applicable, see, for example, Laycock, *supra* note 25, at 207–08; Duncan, *supra* note 31, at 868; and Laycock, *supra* note 31, at 31.

dermine the state's overall regulatory interest to any greater degree than exempting the non-religious actors does. Because religious actors *would otherwise be devalued on the basis of their religious reasons for being subject to the regulation*, they must receive the most favorable available treatment. The fact that the claimants are subject to the regulation as a function of religion, rather than not religion, is not just required to be taken into account—it is entitled to priority consideration.

In this context, and to properly set up the comparison to race consciousness that follows below, it is important to distinguish between two levels of analysis that are relevant when analyzing religious equality questions and that involve different kinds of religious equality rules between them: the first is an *intercategory* level, which involves comparisons of the treatment of religion as *an overarching category* with the treatment of nonreligion, or secular dimensions of life. There are multiple types of intercategory religious equality questions that are relevant to the Free Exercise Clause, generally with corresponding Establishment Clause dimensions,⁶⁰ which one might conceptualize on a spectrum ranging from whether religion can be singled out for *negative* treatment compared to secular aspects of life⁶¹ to whether religion can be singled out for *positive* treatment.⁶² The MFN approach is an approach to religious equality at this *intercategory* level because it is concerned with the treatment of religion, regardless of which variety or denomination, as compared with certain secular interests and actors. In particular, the MFN approach applies to the middle of the spectrum, where religion and religious actors and interests are not clearly singled out in either direction, but rather the question is how they should be treated in relation to comparable secular actors and interests, some of which are treated more favorably than others. In

60. See generally Epps, *supra* note 34, at 588–89 (explaining that the major external limit on the reach of the Free Exercise Clause is the Establishment Clause, though other constitutional provisions impose limits as well).

61. Recent cases in the government funding context suggest that while there are complicated Establishment Clause rules that may allow the government to decide specifically not to fund certain religious activities, such as training for the ministry, see *Locke v. Davey*, 540 U.S. 712 (2004), or religious instruction in schools, see *Mitchell v. Helms*, 530 U.S. 793 (2000), religious actors cannot generally be excluded from otherwise generally available government benefit programs simply because of their religious status. See *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020) (holding invalid exclusion of religious schools from scholarship program for private school students); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (holding invalid exclusion of religious institutions from funding program for playground resurfacing).

62. While the Establishment Clause generally prohibits religious actors from being singled out for government *benefits*, see, e.g., *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), sufficiently strong free exercise interests can sometimes justify special accommodations for the interests of religious actors. See, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (approving an exemption from Title VII prohibitions against religious discrimination for certain religious employers).

that context, the MFN approach calls for religious actors and interests to receive the more favorable treatment.⁶³

The second level of analysis is an *intracategory* level, which involves comparisons of the treatment of *different religious groups and actors* relative to each other. At the *intracategory* level, the generally prevailing religious equality rule is that the government cannot grant so-called “denominational preferences”—that is, prefer one kind of religious belief or actor over another kind of religious belief or actor in how it treats their interests relative to each other—unless it can meet strict scrutiny.⁶⁴

Importantly, what is required to ensure “religious equality” at one level does not predetermine what is required to ensure religious equality at the other.⁶⁵ More importantly still, *consciousness of religion*, or taking religion into account, to ensure that the constitutionally special MFN status of religion is properly respected at the *intercategory* level does *not* as such equate to improper denominational preferences at the *intracategory* level. Whether such preferences exist is a separate and complex inquiry that depends on context and how the government might choose to implement an MFN approach.⁶⁶

63. Because there is no clear favoritism for either nonreligion or religion, there would seem to be no concrete Establishment Clause concern with respect to the MFN approach, and most of the sources discussing the MFN approach cited *supra* in note 31 in fact do not discuss any particular Establishment Clause concerns raised by the approach. One source briefly lays out why the approach should not raise such concerns under existing precedent. See Sansom, *supra* note 30, at 781–82. Similarly, Justice Kavanaugh in *Calvary Chapel* notes potential Establishment Clause concerns when discussing situations in which religious actors are *singled out* for benefits but not when discussing the different category of cases to which the MFN approach applies. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2611–12 (2020). However, an Establishment Clause limitation would still apply once one moves from the intercategory to the *intracategory* level of analysis discussed below, where the Establishment Clause prohibits the granting of “denominational preferences” internal to religion. See *infra* note 64.

64. *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *id.* at 246 (“[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”).

65. See *Town of Greece v. Galloway*, 572 U.S. 565, 619 (2014) (Kagan, J., dissenting) (distinguishing question of denominational preferences from the “further issue” of evaluating “governmental policies favoring religion (of all kinds) over non-religion”); *Amos*, 483 U.S. at 339 (seeing “no justification” for applying strict scrutiny test applicable to “laws discriminating among religions” to “laws ‘affording a uniform benefit to all religions’” (quoting *Larson*, 456 U.S. at 252)).

66. To modify a popular example used in caselaw and scholarship, if, to implement the demands of MFN, a government actor were to grant a religious exemption to a Prohibition law for sacramental use of wine, it “may not exempt sacramental wine use by Catholics but not by Jews.” See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715–16 (1994) (O’Connor, J., concurring in part and concurring in the judgment); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1000 (1990) (discussing this example to demonstrate different understandings of neutrality). At the same time, the Court has found there not to be a denominational preference in at least some circumstances where an exemption was “tailored broadly enough that it reflects valid secular purposes” and “valid neutral reasons exist for limiting the exemption” in a particular way. *E.g.*, *Gillette v.*

The Court clearly understands this. In not a single opinion that applied an MFN approach to evaluate the propriety of COVID-19-related restrictions on religious gatherings for worship did the Court evaluate whether permitting such gatherings, because they were comparable to *secular* gatherings that were allowed, would constitute a denominational preference for religious groups and beliefs that involve gathering in large groups over those that do not.⁶⁷ The key question in each case was an *intercategory* question: was religion and the way in which its influence exposed people's behavior to regulation treated equally—defined as MFN status—to secular influences on people's behavior.

The powerful takeaway from the Court's movement toward an MFN approach to religious equality in at least some contexts is twofold: first, the move involves a recognition that there are certain constitutionally protected aspects of social life, such as religion, that are entitled to a particularly powerful form of equality protection—MFN status. This powerful equality protection ensures that the government does not devalue these aspects by selectively ignoring them when imposing the burdens of government regulation or distributing its benefits while considering other aspects of social life that may be more powerful in the political process. Second, it recognizes that government *consciousness* and consideration of those constitutionally special aspects of social life is *necessary* to be able to implement the kind of equality protection that they are constitutionally due. This consciousness of the constitutionally relevant *category* as compared to other categories of social life to ensure *intercategory* equality does not predetermine whether the government is properly implementing a different kind of equality concern, namely the treatment of groups *within* that category. Such *intracategory* equality determinations involve separate considerations that are highly context specific.

United States, 401 U.S. 437, 454–55 (1971) (finding no denominational preference in limitation of religious exemption from military draft to objectors to all wars rather than only particular wars even though some belief systems only limit believers' participation in "unjust" wars because limitation reflected "interest in maintaining a fair system for determining who serves when not all serve" (internal quotation marks omitted)). For an in-depth discussion of the complexity and ambiguities in the treatment of the subject of denominational preferences, see Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences: Larson in Retrospect*, 8 N.Y.C. L. REV. 53 (2005).

67. Properly understood, it would not. If the burden imposed by gathering restrictions is uniquely applicable to some religious groups and denominations because of how their faith operates, removing this burden would not *prefer* them over other denominations who were not burdened by the restrictions because their faith does not require gatherings of the same kind. This distinction is important for the comparison to race-based affirmative action, as discussed below.

II. ANEMIC EQUALITY PROTECTIONS IN THE CONTEXT OF RACE: EXPOSING RACIAL SUPERORDINATION THROUGH CROSS-CONTEXTUAL ANALYSIS

A. *Applying MFN to Expose the Flaws of Current Affirmative Action Doctrine*

Now compare this equality trajectory in the religion context to the Court's trajectory in its racial equality jurisprudence, specifically its affirmative action jurisprudence.⁶⁸ In that sphere, far from adopting MFN status for race as a constitutionally especially protected aspect of social life that would often *require* the government to consider race when distributing benefits or burdens,⁶⁹ the Court is moving toward not even *permitting* the government to consider race in almost all circumstances. While this point could be made in a variety of contexts where the propriety of the consideration of race in government decisionmaking has been hotly disputed and debated,⁷⁰ in this Article, I focus on affirmative action in higher education. In that context, commentators have predicted that the reconstituted Court may use one of the cases challenging different universities' race-conscious admissions policies that are pending before the Court, most notably a case by a group called the Students for Fair Admissions (SFFA) against Harvard University,⁷¹ as an opportunity to impose a strict rule of colorblindness on universities.⁷² Taking

68. In his in-depth analysis of the MFN approach, Tebbe notes that the MFN approach arguably has clear potential application in the context of racial justice but defers discussion of how the approach might apply to affirmative action specifically because of the potential complexity of the questions involved. See Tebbe, *supra* note 17, at 2458 n.318. This Part explores some potential answers to those questions.

69. For an early analysis of how and why both affirmative action and antidiscrimination laws, properly understood, require race consciousness of different kinds and that therefore calls for "colorblindness" are fundamentally misconceived, see Strauss, *supra* note 19.

70. See generally Simson, *supra* note 18.

71. In the Harvard litigation, the First Circuit upheld the district court's judgment that Harvard's race-conscious admissions system did not violate Title VI of the Civil Rights Act of 1964, which incorporates the same racial equality strictures as the Constitution, and also that Harvard did not intentionally discriminate against Asian American applicants in its admissions process. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA II), 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.). The Supreme Court recently decided to take up the case, consolidated alongside a similar affirmative action suit against the University of North Carolina. Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html> [perma.cc/TER6-CWSK]. For a detailed analysis of the Harvard case, see Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019).

72. *E.g.*, Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1128–29 (2019) (noting that "the Supreme Court could shift in the direction of rendering [affirmative action] per se unconstitutional, especially given recent changes in its composition" in deciding the pending cases); Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2560–61 (2019) ("The question is no longer

the implications of the Court's adoption of an MFN approach to religious equality seriously in this context helps expose analytical flaws in the Court's approach to the permissibility of governmental race consciousness. It also helps expose how the Court's approach contributes to the constitutional superordination of whiteness.

With respect to exposing analytical flaws, consider that for some time now the Court has established the following rules as settled doctrine: (1) "Race may not be considered unless the admissions process can withstand strict scrutiny[;]"⁷³ (2) Under strict scrutiny, "racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests,'"⁷⁴ which in the university admissions context often means the educational benefits of a diverse student body;⁷⁵ and (3) Under the narrow tailoring prong, "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."⁷⁶ "If 'a nonracial approach could promote the substantial interest about as well and at tolerable administrative expense,' then the university may not consider race."⁷⁷ If the Court were to take seriously anything like an MFN approach to racial equality, neither the first rule nor the third rule would be justified.

Consider the first rule. This doctrinal rule addresses an *intercategory* question: May race be *considered as a relevant category* in a university admissions system? Current doctrine says that it *cannot* be considered unless strict scrutiny is met, regardless of what the admissions system looks like otherwise. This is emphatically not an MFN approach for race, even though race is undoubtedly an aspect of social life that receives special constitutional consideration, perhaps more than any other.⁷⁸ Indeed, the prohibition against racial

whether but when and how a post-Kennedy Court will break with the constitutional precedent established in *Bakke* and its progeny.").

73. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 309 (2013).

74. *Id.* at 310 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

75. *See id.*

76. *Id.* at 312.

77. *Id.* (alterations omitted) (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986)).

78. Justice Kavanaugh seemed to explicitly recognize this comparability of the constitutionally special status of race and religion in his opinion in *Calvary Chapel* in which he called for an MFN approach to religious equality when he noted:

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

Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614–15 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

discrimination is perhaps the most well-established antidiscrimination norm of all.⁷⁹ Thus, if the Court was truly interested in the consistent application of constitutional principles, there is a strong case for applying an MFN approach to racial equality, and one would expect the Court to at the very least explain why an MFN approach to racial equality is not appropriate.⁸⁰

Under an MFN approach, of course, the Court would have to engage in a much more nuanced analysis of the propriety of race consciousness than it does under current doctrine. We can begin to explore this point in reference to the First Circuit's decision in the SFFA case against Harvard. At a broad level, Harvard's admissions process can be conceptualized as analogous to a combination of types of situations in which the MFN approach applies: the unemployment benefits cases because it is a process involving individualized eligibility determinations for certain "benefits" that restricts those benefits only to certain specified reasons or selection criteria;⁸¹ and the kinds of processes referenced by Justice Kavanaugh that "divvy up" benefits recipients "into a favored or exempt category and a disfavored or non-exempt category" and "provide benefits only to [those] in the favored or exempt category."⁸² Specifically, Harvard's admissions system is highly individualized but generally considers applicants for admission on the basis of six ratings—academic ratings, extracurricular ratings, athletic ratings, school support ratings, personal ratings, and overall ratings—which are assigned to all candidates before

79. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 595, 598 (1983) (noting, in rejecting tax-exempt status for a university that had excluded Black applicants and prohibited interracial dating on religious grounds, that "[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education," that "it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising 'beneficial and stabilizing influences in community life,'" and that there was an "unmistakably clear" and "firm public policy" against racial discrimination as declared by "all three branches of the Federal Government" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)).

80. Indeed, *Mary Ann Case* has made a similar argument in favor of the permissibility of race consciousness based on earlier Religion Clauses cases, such as *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), that had made the more limited holding "that religion and the religious cannot be singled out for extraordinarily unfavorable treatment." *Mary Anne Case, Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, 2000 SUP. CT. REV. 325, 334. As noted above, the MFN approach reflects stronger equality protections for religious interests that permit (indeed require) more extensive religion consciousness. See *supra* notes 65–67 and accompanying text. This widening of the inconsistency in the Court's approach between the two lines of jurisprudence that consistently benefits the interests of white Americans thus more clearly illustrates the Court's project of the racial superordination of whiteness.

81. See *Laycock & Collis, supra* note 24, at 22; *Duncan, supra* note 40, at 1186; see also *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (stating that a "law is not generally applicable," and thus subject to MFN reasoning, "if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions'" (quoting *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990)).

82. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2611–12 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief); see also *supra* note 55 and accompanying text.

their individual candidacy is put to an “all things considered” vote by the admissions committee.⁸³ Crucially, however, through an “overlay” to its process, Harvard also provides a specific benefit—so-called “tips” or “plus factors” that increase a candidate’s chance of admission.⁸⁴ While there are a number of possible “tip factors,”⁸⁵ “the four most notable groups of applicants” receiving these tips⁸⁶ (in addition to racial minority applicants, as I discuss separately below)⁸⁷ are recruited athletes, legacy applicants, applicants on the Dean’s Interest List (usually because they are children or relatives of donors), and children of faculty or staff (the “ALDC” applicants).⁸⁸ “These applicants have a significantly higher chance of being admitted than” everyone else.⁸⁹

In other words, Harvard considers these special life circumstances that it particularly values to be “good cause” for providing an admissions benefit to ALDC candidates that is not available to others,⁹⁰ just like in the unemployment compensation cases there were some reasons, or “good causes,” based on which certain people would receive benefits despite rejecting work that others had to accept.⁹¹ Or in Justice Kavanaugh’s terms in *Calvary Chapel*, Harvard “divvies up” applicants and puts applicants “into a favored or exempt category”⁹² that receives the benefit of tips in its admissions process on the basis of the ALDC selection criteria. If race were treated under an MFN equality approach, the conclusion from this would be that just like “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason,”⁹³ Har-

83. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA II)*, 980 F.3d 157, 166–70 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.).

84. *Id.* at 170–71.

85. *Id.* at 170.

86. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA I)*, 397 F. Supp. 3d 126, 142 (D. Mass. 2019).

87. See *infra* notes 116–117 and accompanying text (discussing Harvard’s use of race in admissions and the flaws of how current jurisprudence regulates such use).

88. *SFFA I*, 397 F. Supp. 3d at 142; *SFFA II*, 980 F.3d at 171.

89. *SFFA II*, 980 F.3d at 171 (“ALDC applicants make up less than 5% of applicants to Harvard but around 30% of the applicants admitted each year.”); see also *SFFA I*, 397 F. Supp. 3d at 160 n.42 (“ALDCs . . . are admitted at a rate of 43.6% or nearly eight times the 5.5% admissions rate for non-ALDC applicants.”). Notably, 67.8% of the ALDC applicants are white while “only 40.3% of the non-ALDC applicants are.” *SFFA II*, 980 F.3d at 171.

90. See *SFFA I*, 397 F. Supp. 3d at 142 (“Harvard’s objective in giving tips to applicants based on criteria other than individual merit, such as to legacies and the children of its faculty and staff, is to promote the institution.”).

91. See Laycock & Collis, *supra* note 24, at 10; Duncan, *supra* note 40, at 1185; see also *Sherbert v. Verner*, 374 U.S. 398, 400 n.3, 401 n.4 (1963).

92. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2611–12 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

93. *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990) (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)); accord *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (quoting *Smith*, 494 U.S. at 884).

vard could not “refuse to extend [its] system” of tips “to cases of ‘[racial] hardship’ without compelling reason.”⁹⁴ And in order to accomplish this, Harvard would have to include race in the group of “special circumstances” criteria for determining who is put into the “favored or exempt category” of receiving admissions tips.⁹⁵

To properly situate this point, it is important to note that “the free exercise of religion is essentially a dignitary right,” a “right of self-determination and fulfillment.”⁹⁶ “It enables people to define themselves in critical ways rather than have the state determine these essential aspects of a person’s identity and sense of self.”⁹⁷ Thus, the kind of “religious hardship,” or obstacles to self-definition and dignity, against which the First Amendment protects under an MFN approach includes the government selectively disadvantaging people who are affected by government regulation of activity, or rejected for a particular benefit, because sincerely held religious reasons underlie their behavior or circumstances rather than comparable secular reasons.⁹⁸ As noted above,

94. Even though Harvard is not a state actor, the analogy still works in this context because Harvard, as a recipient of federal funding, is subject to Title VI and therefore “subject to the same limitations on its use of race in admissions as state-run institutions” are under the Equal Protection Clause. *SFFA II*, 980 F.3d at 184–85.

95. Justice Kavanaugh confusingly states in his *Calvary Chapel* opinion that the MFN approach applies to laws “that supply *no* criteria for government benefits or action, but *rather* divvy up organizations into a favored or exempt category and a disfavored or non-exempt category.” 140 S. Ct. at 2611–12 (emphases added). But this does not make sense. Any “divvying up” must take place according to some selection criteria—for example, size or type of use of a given property in Justice Kavanaugh’s zoning example—even if they might remain unstated on the face of the law. Indeed, Justice Kavanaugh’s point itself seems to be that *religion*, to the extent it influences a particular person’s, organization’s, or property’s position vis-à-vis the law at issue, *see supra* note 34, must be *one of the* selection criteria and must be applied in a particular way—to provide MFN status as appropriate under the circumstances. This is further made clear by the fact that in support of his analysis, Justice Kavanaugh cites the rule from the unemployment cases that “a system of individual exemptions” must be extended “to cases of religious hardship.” *See id.* at 2612 (quoting *Smith*, 494 U.S. at 884). Of course, those cases had “selection criteria”—at the broadest level, the “good cause” requirement, and then the criteria used to determine which reasons counted as good cause and which did not. *See Duncan, supra* note 40, at 1186. Under an MFN reading of those cases, *religion* and how it affected people’s situation vis-à-vis unemployment compensation had to be included in those selection criteria. *See, e.g., id.* at 1185–87.

96. Brownstein, *supra* note 44, at 95; *see also id.* at 96 n.30 (“Religion serves a self-identification function in two important respects; in terms of the individual’s personal quest for meaning, comfort in adversity and ethical standards to live by, and in terms of one’s relationship to other persons and groups.”).

97. *Id.* at 96.

98. *See, e.g., Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2277 (2020) (Gorsuch, J., concurring) (“[A]s we have long explained, the government ‘penalizes religious activity’ whenever it denies to religious persons an ‘equal share of the rights, benefits, and privileges enjoyed by other citizens.’” (alteration omitted) (quoting *Lyng v. Nw. Indian Cemetery Prot. Ass’n*, 485 U.S. 439, 449 (1988))). A serious form of such devaluing involves forcing people to choose between “following the precepts of [their] religion” and receiving government benefits, such as unemployment compensation, when people with certain secular reasons for rejecting work are not held to this choice. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). A less extreme example is

the idea behind this is that such selective negative treatment of religious reasons is thought to “devalue” those religious reasons—and thus religion as a source of dignity, self-definition, and self-determination—which amounts to discrimination against the specially protected constitutional status of religion.⁹⁹

The Constitution’s racial equality protections of the Fourteenth Amendment, of course, also include as significant components the protection of dignity, self-definition, and self-determination without being devalued on the basis of race. This much has been recognized at the very least since *Brown v. Board of Education* declared racial segregation unconstitutional because it denied this dignity and instead implied racial inferiority and imposed demeaning and stigmatizing negative effects on the community status, self-definition, and opportunities of Black Americans for personal self-development “in a way unlikely ever to be undone.”¹⁰⁰ And an admissions regime that does not consider applicants’ race is highly likely to inflict on many applicants “racial hardships” that ignore these dignitary aspects of their equality rights analogous to the religious hardships that the MFN approach protects against. Devon Carbado and Cheryl Harris have provided one vivid and in-depth illustration of this point in their analysis of the burdens that “colorblind” university admissions regimes impose on what they call “race-positive applicants,” that is, applicants “who wish to make race salient in formally race-free admissions processes” because of the deep and important ways in which it has shaped their lives.¹⁰¹ Focusing specifically on the implications of “colorblindness” for the personal statement, Carbado and Harris use real personal narratives to illustrate the costs and harms imposed on such applicants *both* in terms of how a colorblind regime burdens these applicants’ exercise of their personal agency, identity, and self-definition¹⁰² as compared to “race-negative appli-

illustrated by *Rader v. Johnston*, a lower court case often cited by MFN proponents. 924 F. Supp. 1540 (D. Neb. 1996); see Laycock & Collis, *supra* note 24, at 19–20 (describing *Rader* as “[o]ne of our favorite examples” of a general MFN approach). In *Rader*, the court upheld the free exercise claim of a student against a university that had refused to provide the student an exception to its requirement that freshman students must live in the university dormitories when the student requested the exception for the religious reason that due to his Christian upbringing and convictions he wanted to avoid the “immoral atmosphere” of the dorms and instead live in a Christian Student Fellowship facility next to campus. 924 F. Supp. at 1544–45. The court upheld the student’s claim under a general applicability analysis because the university refused the student’s request grounded in religious reasons even though it provided both individualized and categorical exemptions from its on-campus living requirement in a wide variety of secular circumstances. *Id.* at 1552–53.

99. See *supra* notes 43–46 and accompanying text.

100. 347 U.S. 483, 493–94 (1954).

101. Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1162 (2008).

102. See *id.* at 1152–73 (using narratives from Barack Obama and sociologist Dalton Conley to illustrate these costs and harms); see also *id.* at 1162–64 (explaining various costs imposed on race-positive applicants including requiring extra work to determine the precise restrictions

cants,” that is, applicants “for whom race is not a salient aspect of their identity,”¹⁰³ and in terms of distortions that attempts to be “colorblind” introduce into universities’ institutional evaluation of such applicants’ files.¹⁰⁴ As Carbado and Harris note, “requiring [such] applicants . . . to excise race from their applications at best distorts their lives or renders their experiences incomplete” and “[a]t worst[, through] discursive racial cleansing[,] makes their life story impossible to understand.”¹⁰⁵ Moreover, these costs are unavoidable when race is ignored and thus illustrate “the problem of formally removing race from an admissions process against a social backdrop in which race both matters and is cognizable.”¹⁰⁶ These are also not the only racial hardships that an admissions process that selectively ignores race tends to impose.¹⁰⁷

It should go without saying that these “racial hardships” should be considered a serious constitutional problem by a Court that has described the goal of the Fourteenth Amendment as “a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement.”¹⁰⁸ But they are even more of an equality problem when evaluated within an MFN framework. Because Harvard’s admissions process provides the analog of “a system of individual exemptions”¹⁰⁹ or of creating a “favored or exempt category”¹¹⁰ based on the ALDC criteria, under an MFN analysis, Harvard should be required to extend its system of priority consideration to the criterion of race as well. In

of a given “colorblind” regime, forcing applicants to “struggle with whether they can represent themselves without reference to their race,” requiring “serious intellectual and emotional work” of rewriting statements if a statement that is racially specific constitutes the applicant’s “true” sense of himself,” having to accept “that within . . . ostensibly colorblind institutional settings, [the applicant’s] race conscious identity is quasi-illegal—something that must remain undocumented,” and causing worries about the applicant’s “ability to establish identity-specific communities”).

103. *Id.* at 1163.

104. *See id.* at 1173–93 (using narratives of Justice Clarence Thomas and legal scholar Margaret Montoya to illustrate these distortions and costs).

105. *Id.* at 1173.

106. *Id.* at 1186. The reality of this “complex and socially embedded character of race” as a ubiquitous dimension of social life has accordingly led Neil Gotanda to propose the idea of “free exercise of race” as a more useful way of conceptualizing constitutional racial equality questions compared to a “colorblindness” approach. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 66–67 (1991).

107. Carbado, *supra* note 72, at 1122. For instance, the consideration of race may often be necessary to fairly evaluate formally “race-neutral” aspects of the general admissions process, such as a candidate’s academic potential. As Devon Carbado has argued, for example, given the robust evidence of the many ways in which standard measures of “academic merit,” such as standardized test scores and grades, are often racially biased and “particularly ‘untrustworthy’ with respect to African Americans,” a university’s consideration of race may be required as a “countermeasure” to avoid the admissions process turning into a vehicle for racial discrimination against African Americans. *Id.* at 1121–22. I return to this point below in my discussion of the intracategory dimensions of racial equality. *See infra* note 133 and accompanying text.

108. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–06 (1989).

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

110. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612 (2020).

other words, to the extent that Harvard accepts some special life circumstances of candidates as a reason to provide them with a benefit that is otherwise not available, it should also accept an applicant's race or race-related life circumstances to the extent that they are relevant to the consideration of their potential as an applicant¹¹¹—that is, to the extent that not considering race as a factor for such applicants would impose “racial hardships.” *Not* doing so would devalue the interests of those applicants for whom race is a critical aspect of their life circumstances to have their application fairly considered vis-à-vis the ALDC applicants who do receive such consideration for *non*-race-based aspects of their lives. Such a choice by Harvard would require a compelling justification under an MFN approach.¹¹²

Within an MFN framework, the consideration of race would certainly be “comparable” to the consideration of the ALDC factors, in the sense that it would undermine, to a similar or lesser degree, the university's overall interest in using the admissions system to admit the most “compelling candidates”¹¹³ for fulfilling its mission “to educate the citizenry and citizen leaders for our society.”¹¹⁴ To take legacy admits as a clear example, Harvard justifies the use of this special criterion for tips because it “helps to cement strong bonds between the university and its alumni, fosters community-building, and encourages alumni to donate their time and money to support Harvard.”¹¹⁵ While this is arguably related to the school's educational mission, giving a boost in admissions to legacy admits over candidates who are otherwise more “compelling” on the school's general admissions criteria does seem to detract from its stated academic interests and mission. By contrast, taking into consideration the way in which an applicant has negotiated, and has been affected by, the ever-present dynamics of race in a multiracial democracy with the dark racial past and present of the United States, and having such candidates benefit from and enrich the learning environment at the school, seems to affirmatively *contribute* to the school's educational mission.

And indeed, this is in part why Harvard *actually does* consider race as part of its tips system.¹¹⁶ My point in this example is not to criticize Harvard's current admissions systems for not considering race. Instead, it is to point out the

111. Cf. *supra* note 34 (describing how, in the religion context, the relevant question appears to be whether different actors find themselves in the situation that exposes them to governmental regulation for reasons related to their religious circumstances and convictions).

112. See *supra* note 39 and accompanying text.

113. *Students for Fair Admissions, Inc. v. Harvard Coll. (SFFA II)*, 980 F.3d 157, 165 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.).

114. *Id.* at 173.

115. *Id.* at 178 (internal quotation marks omitted).

116. See *id.* at 173–75 (noting that one of the university's justifications for taking race into account in the admissions system is because “Harvard's graduates enter a society where negative life experiences attributable to differences in racial and ethnic heritage are still commonplace” and thus “Harvard would fail in a foundational aspect of its mission if it disregarded that fact as it prepares its students for such a complex and heterogeneous society” (internal quotation marks omitted)).

flaws of current equal protection doctrine under which Harvard's choice to *consider* race—the choice that an MFN understanding of racial equality would seem to *require* from Harvard—treacherously exposes the university to a ruling that it is engaged in unconstitutional race discrimination. As noted above, under current equal protection rules, Harvard has to justify *the consideration* of race under strict scrutiny. Under the MFN approach, if one accepts the above discussion as an at least plausible analogy to the MFN analysis that the Court is moving toward in the context of religion, Harvard would have to justify *not considering* race under strict scrutiny.¹¹⁷ This is a massive gap in constitutional principles that suggests selective solicitude for comparable constitutionally protected equality rights. And as discussed below, the way that the Court implements this selective solicitude illustrates the Court's participation in a racial project to superordinate whiteness through constitutional interpretation.

For similar reasons, the current rule that race may only be considered if there are no workable race-neutral alternatives¹¹⁸ is also flawed. To the extent that an MFN approach would often seem to *require* race to be considered to avoid devaluing a constitutionally specially protected aspect of social life, such a requirement would seem deeply counterproductive to ensuring racial equality, properly conceived. Indeed, it seems fair to describe the Court's current equal protection rules regarding race consciousness as implementing something akin to a “*least favored nation*” equality theory for race and race consciousness. That is, the Court's approach to narrow tailoring requires government actors to prioritize *all other* non-racial categories and aspects of life in achieving its educational interests over race consciousness.¹¹⁹ This doctrinal incentive structure encourages universities to significantly devalue the interests of those for whom race is a significant force in determining their life circumstances as they relate to university admissions compared to those

117. My point here is limited. I am not suggesting that the approach in the religion context to apply strict scrutiny in all MFN scenarios is necessarily correct. Such a strict standard creates potential problems of its own that are important to consider. For example, especially when “comparability” is broadly construed, it may put undue pressure on regulations with exceptions to which the underlying concerns of MFN do not cleanly apply, thus putting the very approach that grew out of *Smith* in tension with *Smith*'s own reasoning and making it seemingly determinative in contexts where this appears normatively questionable. See, e.g., James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 730–39 (2019). There are also certain internal tensions and ambiguities that justify caution in applying overly aggressive versions of the MFN principle. See Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 193–203 (2002). My point in this Article is instead to focus on the vast gap between the MFN approach, even acknowledging its potential problems, and the polar opposite standard in the race context to suggest that this gap is not conceptually justified, and to evaluate what the existence of the gap tells us about problematic aspects of the Court's race jurisprudence and the Court's pursuit of a racial project of superordinating whiteness.

118. See *supra* notes 76–77 and accompanying text.

119. Girardeau Spann has accordingly argued that the Court's approach arguably “discriminat[es] against racial classifications.” Spann, *supra* note 14, at 72 n.348.

whose other exceptional life circumstances universities are permitted to consider and do consider. In other words, the Court through its own race-consciousness jurisprudence is constitutionally *encouraging* and incentivizing, perhaps even forcing state actors to do precisely the kind of thing that it is *faulting* them for doing in the religion context: to be insensitive to the constitutionally protected equality interests that attach to certain significant aspects of people's social life, such as religion and race, and to not at least equally value them compared to less protected interests when implementing their overall policy interests.¹²⁰

As discussed earlier with respect to religion consciousness, this analysis of the propriety of race consciousness as an aspect of government decisionmaking is analytically prior to, and does not predetermine any particular answer to, the question of *how* race should be considered in terms of *intracategory* distinctions that might be drawn once race is considered.¹²¹ Consistent with my intercategory versus intracategory distinction, Carbado and Harris make clear, for example, that applicants of any race can be "race-positive."¹²² Thus, considering race to ensure that race-positive candidates are not devalued on the basis of the fact that race has shaped their life experience in indelible ways relating to the strength of their application for admission is not, as such, an *intracategory* "racial preference" for candidates of one race over another.¹²³ Indeed, whether "any given process is race neutral or a racial preference is unavoidably contingent on a mixed question of fact and normativity: our characterization of the social context in which the racial decision-making occurs."¹²⁴ That is, whether taking race into account is a "preference" that violates the requirement of equality to treat similarly situated people equally is highly context specific because "[w]hat it means to be similarly situated depends on why we are asking"¹²⁵ and requires a normative judgment about "the proper baseline for determining entitlement to a societal resource under some

120. The Court's decision in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014), which upheld a state-level constitutional amendment that was designed to take the discretion to engage in race-conscious university admissions and employment decisions away from state university leaders and employers, can be critiqued on similar terms. For a critique of *Schuette* on slightly different terms, see Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 215–26 (2016).

121. See *supra* notes 65–67 and accompanying text.

122. Carbado & Harris, *supra* note 101, at 1164. Indeed, one of the personal narratives that they use to demonstrate the costs that "colorblind" admissions regimes impose on "race-positive" applicants is specifically designed to illustrate how those costs could play out for a hypothetical white applicant. See *id.* at 1165–72.

123. That is, just like ignoring race in admissions "is not a preference for a racial category *per se*," neither is considering it. Carbado & Harris, *supra* note 101, at 1149.

124. *Id.* at 1211.

125. Laycock, *supra* note 66, at 996.

‘natural’ state of affairs, before any artificial distortion of that natural state has occurred” via a “preference.”¹²⁶

Thus, even if in a particular context race is considered in a way that benefits predominantly, or perhaps even only, members of some racial groups, this does not by itself mean that there is a “racial preference,” so long as the beneficiary groups are not similarly situated with the groups that do not benefit—for example, because they are disadvantaged by an unequal status quo baseline with respect to the purposes being pursued by the relevant program. For example, a program that considers race to ensure that race-positive applicants are not disadvantaged in being able to demonstrate in their applications all of the attributes, contributions, and experiences that they would bring to a university’s educational environment¹²⁷ would likely predominantly (though not exclusively)¹²⁸ benefit non-white applicants “[b]ecause it is reasonable to assume that non-whites are more likely to have a race-positive sense of identity.”¹²⁹ But it would not be a racial preference for that reason. If anything, it would be a necessary countermeasure to prevent a colorblind process from disadvantaging “people of color who live their lives negotiating the fact that they are *not* in fact white”¹³⁰ by erasing a significant aspect of their lives and identities (based on the social-psychological phenomenon “that in the absence of an indication that a person is not white, the default presumption is that the person is white”¹³¹).

That race consciousness, even if it predominantly benefits members of only certain groups, need not be, and often is not, a racial preference could be demonstrated in many other contexts as well. If the purpose of race consciousness is racial integration of previously segregated spaces (proceeding from the assumption that the Constitution requires a baseline of integration), for example, and previous segregation has exclusively negatively affected communities of color, it is not a racial preference to consider race as a positive factor for only these communities.¹³² Similarly, if the purpose of race consciousness

126. Spann, *supra* note 14, at 72–73; see also Carbado & Harris, *supra* note 101, at 1200; Laycock, *supra* note 66, at 997.

127. Through its admissions process, Harvard, for example, “seeks students who are not only academically excellent but also compelling candidates on many dimensions.” Students for Fair Admissions, Inc. v. Harvard Coll. (*SFFA II*), 980 F.3d 157, 165 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.).

128. Carbado & Harris, *supra* note 101, at 1164.

129. *Id.* at 1184. This is in part because of what Barbara Flagg has called the “*transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific” because “[w]hiteness is the racial norm” and “whites’ social dominance allows us to relegate our own racial specificity to the realm of the subconscious.” Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957, 971 (1993). That is, white transparency “exemplifies the structural aspect of white supremacy.” *Id.* at 959.

130. Carbado & Harris, *supra* note 101, at 1192.

131. *Id.* at 1181.

132. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1207 (2002).

is to ensure that universities accurately measure the academic potential of applicants of different racial groups (proceeding from the baseline that applicants with equal potential should have equal chances of admission) and widely-used measurement tools for such potential, including standardized tests, grades, and letters of recommendation, often are infected by racial bias that predominantly disadvantages applicants of color because of their race, then taking race into account predominantly for applicants of color to counteract such bias is not a racial preference.¹³³ And if the purpose of race consciousness is to provide appropriate remedies for previous instances of racial discrimination, then taking race into account only for members of groups against which there has been discrimination is not a racial preference.¹³⁴ The point here is not that race consciousness can *never* lead to racial preferences, properly understood. It is that the two questions pertain to two different levels of racial equality analysis and do not predetermine each other, and that equating race consciousness with racial preferences improperly taints the often necessary and appropriate consideration of race with the accusation that it inherently involves racial discrimination.¹³⁵

133. Carbado, *supra* note 72, at 1122; *see also, e.g.*, Carbado & Harris, *supra* note 101, at 1200–01 (describing multiple ways in which “formally taking race into account helps to offset the fact that current admissions practices are already stacked in ways that prefer whites and disadvantage blacks” including as a non-exhaustive list: “(1) biased standardized tests, (2) stereotype threat depressing performance on standardized tests, (3) class and wealth disparities that track race, (4) racially unequal K–12 education, (5) negative racial experiences (microaggressions) non-whites experience in predominantly white schools, (6) social capital about how to navigate admissions systems, (7) the extent to which the notion and operationalization of merit has been racialized, and (8) the creation of toxic or high stakes racial environments through ongoing debates about whether blacks have the intellectual capacity or credentials to perform successfully”); Devon W. Carbado, Kate M. Turetsky & Valerie Purdie-Vaughns, *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174 (2016) (describing ways in which race-conscious affirmative action programs are not racial preferences for many class-advantaged African Americans).

134. *See Feingold, supra* note 71, at 731–32 (noting that in such circumstances “more, not less, race-consciousness” may be the right response).

135. A different form of this conflation also seems to have led religion scholars to overlook or sidestep the potential application of the MFN approach to the context of race-conscious affirmative action even when they have addressed the relationship between the MFN approach and questions of racial equality in general. While such discussions have been comparatively rare and brief, they often conclude that the MFN approach is similar to the disparate treatment analysis that is used to determine whether a particular actor engaged in race discrimination *between members of different racial groups*—that is, whether there is *intracategory* discrimination. *See, e.g.*, Tebbe, *supra* note 17, at 2454 n.303; Laycock & Collis, *supra* note 24, at 26 (framing the comparable racial equality question as “whether an employee of a different race was similarly situated with the plaintiff”); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL’Y 627, 638–39 (2003) (framing the comparable racial equality inquiry as “looking for instances where employees of one race are treated better than those of another”). This leads these scholars to generally conclude that the MFN approach is more appropriate in the religion context because of the greater complexity of the possible comparisons involved. But as I have argued above, this applies the MFN approach to the wrong level of equality analysis for race. The more analogous question

While the Court's approach to the subject of denominational preferences in the religion context is far from clear¹³⁶ and not necessarily substantively satisfying in all respects,¹³⁷ the Court has at least neither conflated an MFN approach to religion with denominational preferences¹³⁸ nor conflated the explicit consideration of religion and distinctions among groups of people based on their religious beliefs with denominational preferences as such.¹³⁹ By contrast, the Court seems poised to move further in the direction of accepting the false equation of race consciousness *as such* with the granting of illegitimate racial preferences for members of racial minority groups—a view that too many liberals share¹⁴⁰—and toward underwriting the claim “that all identity-conscious policies constitute forms of preferential treatment and discrimination.”¹⁴¹ If this claim is not rejected and properly countered, “the ever broadening category of ‘preference’ will eventually grow to include every race sensitive policy including the conscious objective of achieving a fully diverse and integrated society.”¹⁴² This, too, would be consistent with the Court's participation in a “Second Redemption.”

would be whether race as a category should be considered in a particular decisionmaking process when other comparable categories of social experience are taken into account in specific ways.

136. See generally Patrick-Justice, *supra* note 66 (explaining that despite widespread consensus on the point that denominational preferences are generally forbidden and subject to heightened review, the jurisprudence remains unclear about what precisely qualifies as a denominational preference).

137. See Brownstein, *supra* note 117, at 203–10.

138. See *supra* note 67 and accompanying text.

139. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 604–05 n.30 (1983); *Gillette v. United States*, 401 U.S. 437, 449–54 (1971); cf. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (“The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.”).

140. See, e.g., Carbado, *supra* note 72, at 1120–21, 1129.

141. Kimberlé W. Crenshaw, “Framing Affirmative Action,” 105 MICH. L. REV. FIRST IMPRESSIONS 123, 126 (2006). As Crenshaw notes, the “colorblind ideal” that underlies this facile conflation usually “is fueled by racial stereotypes and group-based explanations for the marginalization of certain racial minorities.” *Id.* at 128. Girardeau Spann has similarly suggested that it is hard to avoid the conclusion, from the Court's rejection of race-conscious affirmative action programs despite the fact that the continuing and “stark racial disparity . . . in the allocation of societal resources” and opportunities suggests the need for them and their propriety, “that a majority of the justices on the Supreme Court believe that racial minorities are inherently inferior to whites.” Spann, *supra* note 14, at 92–93.

142. Crenshaw, *supra* note 141, at 133. The ongoing agitation against (inaccurate portrayals of so-called) “Critical Race Theory” ideas that originated in the former Trump administration's Executive Order on Combating Race and Sex Stereotyping and has since inspired copycat legislation at the state level shows that we are closer to this point than many people may be willing to admit. For an analysis and determined opposition to this anti-Critical Race Theory state legislation, see *Welcome to the #TruthBeTold Campaign*, AFR. AM. POL'Y F., <https://www.aapf.org/truthbetold> [perma.cc/LBD9-A4WX].

B. *Race and Religion Are Sufficiently Comparable*

Of course, the analogy that I am proposing between race and religion here is not perfect. While space does not permit a full discussion of possible objections,¹⁴³ I want to address briefly what I consider to perhaps be the strongest one: even if race and religion are equally “special” categories of social life for purposes of constitutional equality protections as I suggest, they are special *in different ways* that undermine the claim that an MFN approach should apply to race and allow for greater race consciousness.¹⁴⁴ Specifically, the Religion Clauses in general, and the Free Exercise Clause in particular, treat religion as a special category of social life that is “in significant respects ‘difference-regarding’”¹⁴⁵ and “counter-assimilationist” in that they “strive[] to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform.”¹⁴⁶ The Equal Protection Clause with respect to race, on the other hand, is said to be predominantly “difference-denying” in that “race is a characteristic that ultimately should not matter to the government.”¹⁴⁷ In other words, “the ideal of racial nondiscrimination is that individuals are fundamentally equal and must be treated as such; differences

143. For example, scholars have argued that a significant distinction between race and religion is that with respect to race, the Constitution’s protections are solely focused on status, whereas in the religion context they are focused on both status and conduct—and it is the conduct dimension of religion that justifies religion consciousness. See, e.g., Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 115 (1996); Brownstein, *supra* note 44, at 141. However, this distinction may not in fact be so determinative of the relevant questions in light of at least some justices questioning a sharp distinction along these lines in the religion context, see *supra* note 34, and the fact that the distinction is not as clear in the context of race either—at least when race is understood as a complicated social construction that also has a performative dimension. See generally, e.g., DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?* (2013); Devon W. Carbado & Mitu Gulati, *The Intersectional Fifth Black Woman*, 10 DU BOIS REV. 527 (2013). More generally, this point is typically raised in the context of evaluating whether religion or race can be singled out for benefits, and its implications are more complex in that context. In the context of MFN, I believe that conceptualizing the relevant equality question as I have in this Article—whether a constitutionally specially protected aspect of a person’s life circumstances should be considered when other less protected life circumstances are considered—renders race and religion appropriately comparable. However, I do plan to analyze both this question as well as others related to the comparability of race and religion in more detail in future work.

144. Of course, many scholars agree that race and religion are also *similar* in many ways that do justify comparing constitutional approaches to them. For example, they are important dimensions of identity and community. See Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119 (1997). They have often exposed people to discrimination, stereotyping, and stigma. See, e.g., Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 99 (2000). In addition, both areas of constitutional law deal with similar questions of minority protection and the prevention of majority entrenchment. Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393 (2012).

145. Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. 433, 493 (1995).

146. *Id.* at 494 (quoting McConnell, *supra* note 29, at 1139).

147. *Id.* at 493.

based on race are irrelevant and must be overcome.”¹⁴⁸ As a result, “color-blindness” in the sense of *ignoring race as a category of analysis* is said to be the best way of ensuring that the fundamental equality of people of all racial groups is respected—“for constitutional purposes, all persons are similarly situated without regard to their race or national ancestry. To treat these groups equally the government simply has to ignore their suspect differences.”¹⁴⁹ Such a difference-denying conception, of course, suggests that applying the MFN approach to race is not appropriate because it would involve, and indeed encourage, much more race consciousness than current doctrine.

The most important problem with this argument is that it would seem to be implicitly based on a simplistic, formalistic, and thus highly problematic definition of race as “merely ‘skin color,’” or what Neil Gotanda calls “formal-race.”¹⁵⁰ Such a definition of race is disconnected from both the historical contingencies and context,¹⁵¹ as well as the cultural,¹⁵² structural, and ideological dimensions¹⁵³ that the complex social construct of race in reality entails.¹⁵⁴ After all, only if race is stripped of its various substantive meanings and dimensions does it make sense to predict that ignoring people’s race will lead to equal treatment.¹⁵⁵ But disregarding these substantive meanings and dimensions of race defies both the history and the lived reality of race in America.¹⁵⁶

148. McConnell, *supra* note 29, at 1139; *see also* Thomas C. Berg, *Religion, Race, Segregation, and Districting: Comparing Kiryas Joel with Shaw/Miller*, 26 CUMB. L. REV. 365, 373 (1996) (“Maintaining racial difference is not the fundamental goal.”).

149. Brownstein, *supra* note 44, at 141; *see also, e.g.*, Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243, 261 (1999). To be sure, the argument is not always stated this categorically. *See, e.g.*, Berg, *supra* note 145, at 490 (“[T]here are reasons why neither ‘race-blindness’ nor ‘religion-blindness’ is a sound constitutional ideal, reasons that are common to both subjects.”). But it does generally proceed with suspicion toward the question of race consciousness as such. *See, e.g., id.* at 493 (“‘Race blindness’ may . . . ultimately be too simplistic a standard for the equal protection guarantee, but there is at least an arguable concept of equal protection that points to it.”).

150. Gotanda, *supra* note 106, at 4.

151. Gotanda calls this “historical-race” and notes that such an understanding of race “does assign substance to racial categories.” *Id.*

152. Gotanda calls this “culture-race” and notes that such an understanding refers to the culture, community, and consciousness of different racial groups. *Id.*

153. *See* Carbado & Harris, *supra* note 101, at 1198 (contrasting notions of race as skin color with “the notion that race is a structural and ideological force that employs social categories to allocate benefits and burdens”).

154. *See* Gotanda, *supra* note 106, at 4 (“This ‘unconnectedness’ is the defining characteristic of formal-race.”). Taking those dimensions seriously more appropriately reflects the fact that race is neither “an illusion we can somehow ‘get beyond,’” nor something essentialist, “objective and fixed, a biological given” but rather a complex “element of social structure.” OMI & WINANT, *supra* note 9, at 112.

155. *See* Brownstein, *supra* note 117, at 178–79 (describing race purely as “physical characteristics”).

156. To give just one example, as Russell Robinson has explained, in part because of the deep substantive influence of race on people’s lived reality throughout American history, Black

A difference-denying approach, moreover, “neglects the positive aspects of race, particularly the cultural components that distinguish us from one another.”¹⁵⁷ Indeed, because of the structural dynamics of white supremacy that make whiteness the unspoken norm in most contexts, ignoring people’s racial differences tends to turn into an “assimilationist vision” that “would require abolishing the distinctiveness that we attribute” to the “community, culture, and consciousness” of non-white racial groups.¹⁵⁸ “This is neither a race-neutral nor a colorblind position”¹⁵⁹ but instead generally reflects the preferences of whites.¹⁶⁰

A more multifaceted understanding of race would recognize that “the complex and socially embedded character of race” often calls for a highly contextually situated difference-regarding approach—an approach that would respect what Gotanda calls the “free exercise of race,” along with its corresponding “establishment” limit that the government may not establish racial subordination and white supremacy.¹⁶¹ If such an approach were taken, wouldn’t the following paragraph, taken from an author who has distinguished race and religion in the ways suggested above, also ring true if race were substituted for religion?

Often, however, liberty and equality in law require that people of one faith should be treated differently than people of another religion. Religious people who are not similarly situated in their beliefs and practices should not be treated as if they were fungible clones. In aspects of life in which religion matters for particular faith communities, government rules that ignore religious distinctions coerce a false homogeneity among individuals who are different in fundamental ways. Religious liberty does not exist when the burden of a law that interferes with the practice of one’s faith is ignored because the law does not interfere with the majority of people who practice a different faith. Religious equality is sacrificed when laws are tailored to accommodate the needs of majoritarian or favored religions, but not minority or disfavored faiths. A legal regime grounded on formal neutrality is inconsistent with this core principle.¹⁶²

A main benefit of taking an MFN approach in the context of racial equality would be that it would sharpen both government actors’ and courts’ analytical focus on the right questions. For government actors, the questions would be: (1) “Am I treating certain social interests more favorably than oth-

and white Americans have very different conceptualizations and perceptions of racial discrimination in society, a phenomenon Robinson calls “perceptual segregation.” Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

157. Gotanda, *supra* note 106, at 56.

158. *Id.* at 59. As Gotanda notes, such an approach trends dangerously toward “cultural genocide.” *Id.* at 60.

159. Carbado & Harris, *supra* note 101, at 1198.

160. Flagg, *supra* note 129, at 957–59.

161. Gotanda, *supra* note 106, at 66–67.

162. Brownstein, *supra* note 117, at 186–87 (footnote omitted).

ers in my decisionmaking? In other words, am I willing to live with underinclusion? If so, I have to make sure, given the importance of race in structuring people's lives, that I consider it as well." (2) "How is race structuring different people's lives in relation to my decisionmaking, and how can I make sure that I *don't* create a racial preference as a result of this?" The second question is highly context specific and may well justify taking race into account *differently* for different groups of people because race structures their life experiences differently in ways that matter to the specific government program at issue. The fact that it would push constitutional jurisprudence more firmly toward asking these important questions with more nuance would be a major benefit of adopting an MFN approach with regard to race and not just with regard to religion. Race and religion are surely not *identical* concepts.¹⁶³ But to use Chris Lund's term in a slightly different context, I believe that they are "similar enough"¹⁶⁴ in *this* context to allow for the conclusion that if the Supreme Court's goal were to treat constitutionally special aspects of life consistently, it would have many good reasons to implement an MFN approach in the context of race as well.¹⁶⁵

Moreover, the general justifications offered for the MFN theory in the religion context¹⁶⁶ also apply to the race context. As discussed above, ignoring race but taking into consideration other life aspects, for example one's legacy status in the context of university admissions, implicitly devalues people for whom race has shaped their position in relation to broad race-neutral university admissions standards and for whom ignoring race will disadvantage them.¹⁶⁷ There are also at least some situations in which *race consciousness* arguably requires vicarious political protection. Precisely because it has the potential to interfere with entrenched social hierarchies, the very idea of race consciousness triggers deep racial resentment among many white Americans, as evidenced by the dynamics of state constitutional initiatives that have outlawed it in some states.¹⁶⁸ Provisions for considering legacy or donor or athletic status generally do not trigger the same reaction, so categorical opponents of race consciousness might have to reconsider their stance if constitutional doctrine were to tie their availability to each other. And similarly, the complexity of possible comparisons of the kinds of aspects of social life that processes like university admissions could consider also justifies putting

163. See, e.g., Case, *supra* note 80, at 330.

164. Cf. Lund, *supra* note 44, at 486 (arguing that while religion "may not be uniquely special," it is "special enough" to receive heightened constitutional protection).

165. For a comparison of constitutional caselaw regarding race and religion outside of the context of the MFN approach that properly distinguishes between intercategory and intracategory questions and also homes in on the highly problematic nature of the Court's approach to racial equality that becomes visible when this comparison is made, see Spann, *supra* note 14, at 72–94.

166. See *supra* notes 43–51 and accompanying text.

167. See *supra* notes 100–112 and accompanying text.

168. See, e.g., Samuel Weiss & Donald Kinder, *Schuetz and Antibalkanization*, 26 WM. & MARY BILL RTS. J. 693 (2018).

race into an MFN category to ensure that the constitutionally special considerations of racial equality are at the forefront of decisionmakers' minds.

To sum up the above, the Court has come to conclude in the religion context that the devaluing of religion, a constitutionally special aspect of social experience, is an affront to constitutionally required dimensions of equality and that an assertive approach, the "most favored nation" approach, is necessary to protect this equality. If the Court was interested in the consistent application of constitutional principles of equality, one would expect the Court to apply a similar approach to racial equality. The fact that the Court is not only *not* doing so but seems poised to push its jurisprudence in these two contexts conceptually further and further apart from each other is telling.

C. *The Superordination of Whiteness*

The main beneficiary of this constitutional inversion of approaches to equality is whiteness. That is, through implementing this inversion into its constitutional doctrine, the Court is contributing to the racial project of superordinating whiteness by setting the interests of white Americans as the normative baseline for what kinds of constitutional rights the Court will protect and how in both contexts. With respect to race consciousness in university admissions, the Court's restrictive approach benefits whiteness because it puts extremely high doctrinal obstacles in the path of efforts whose goal is to intervene in, and undo manifestations of, racial hierarchy in access to the institutions that provide the pathways to political power and economic success. The doctrine pushes universities toward eliminating the consideration of race in admissions, which often significantly reduces the representation of non-white students.¹⁶⁹ Moreover, by restricting the ways in which race can be considered, it imposes costs on applicants for whom race is a particularly meaningful dimension of social experience, which also predominantly affects people of color.¹⁷⁰ By contrast, existing constitutional rules make it more easily justifiable for universities to consider categories of social life in admissions, such as legacy status or relationships to donors, that, at least at universities like Harvard but also more generally, predominantly benefit white applicants.¹⁷¹

In the religion context, the Court protects the interests of white Americans as the normative constitutional baseline, not through its choice of whether to apply the MFN approach *as such*, but through its selectiveness of *when* it applies the approach. As Nelson Tebbe has explored at some length, in recent years, the Court has overwhelmingly used the MFN approach in

169. *Students for Fair Admissions, Inc. v. Harvard Coll. (SFFA II)*, 980 F.3d 157, 180 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.) (noting the district court's finding "that eliminating race as a factor in admissions, without taking any remedial measures, would reduce African American representation at Harvard from 14% to 6% and Hispanic representation from 14% to 9%").

170. See *supra* Section II.A.

171. See *supra* note 89.

cases in which it benefitted the interests of “mainstream religious denominations—including the United States’ largest Christian groups, Roman Catholics and Protestant Evangelicals.”¹⁷² To the extent that those denominations cover the vast majority of religious white Americans,¹⁷³ constitutional doctrine protects their religious equality interests as normative. More telling, however, is that the approach “was conspicuously absent”¹⁷⁴ from the Court’s toolkit where it would have benefitted the religious equality interests of a predominantly non-white group, namely those of Muslims in the “travel ban case” of *Trump v. Hawaii*.¹⁷⁵ As Tebbe explores, separate from the fact that the Court ignored clear evidence of anti-Muslim discriminatory intent in ways that it has not ignored when the rights of white Christians are at stake,¹⁷⁶ the Court also refused to apply the MFN approach in *Trump* when doing so would have significantly complicated the Court’s facile dismissal of the legal challenges to the travel ban.¹⁷⁷ The Court chose instead to provide deference to the political branches based on doctrines in immigration law¹⁷⁸ that themselves are grounded in a long history of racism against non-white immigrants.¹⁷⁹

On the whole, the Court’s approach to equality in both the religion and race contexts superordinates the interests of whiteness in a cumulative and cross-contextual fashion. This is not the result of the consistent application of constitutional principles. Even if arguments can be made to justify the Court’s approach in each context in isolation, a critical doctrinal comparison across contexts illuminates the novel ways in which the Court participates in the racial project of superordinating whiteness and thus contributes to the perpetuation of a basic social system structured by white supremacy.

172. Tebbe, *supra* note 17, at 2473.

173. See PEW RSCH. CTR., AMERICA’S CHANGING RELIGIOUS LANDSCAPE (2015), <https://www.pewforum.org/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf> [perma.cc/UN2Y-VLWJ].

174. Tebbe, *supra* note 17, at 2463.

175. 138 S. Ct. 2392 (2018).

176. For an analysis illustrating this point, see Robinson, *supra* note 16, at 1064–71.

177. See Tebbe, *supra* note 17, at 2464–69.

178. 138 S. Ct. at 2418–19.

179. See, e.g., Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998). My point here is not meant to be an overly crude or simplistic one that the Court as currently constituted will always rule against the interests of non-white claimants, religious or otherwise. It is rather that when the interests of white Americans are at stake, it is more likely that those interests will shape how the Court will choose to apply doctrinal principles, both within individual contexts as well as across them. By contrast, where the normative interests of whiteness are not as strongly implicated, the interests of non-white claimants may well prevail. For example, while an appellate judge on the Third Circuit, Justice Alito wrote an opinion that has since become well-known for implementing the MFN approach, and which benefitted Muslim claimants by allowing them to wear beards when other officers with medical exemptions were allowed to do so. *Fraternal Ord. of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

CONCLUSION

“The interpretation of particular constitutional provisions . . . must adapt to changes that occur elsewhere in the constitutional matrix. At a minimum, collateral changes raise important questions of interpretation.”¹⁸⁰ The main purpose of this Article was to point out the troubling direction for racial equality progress that the Supreme Court’s constitutional jurisprudence is taking with respect to the intersection of two deeply important aspects of social life in the United States—race and religion. From the standpoint of those who believe that racial equality continues to be more aspiration than reality—as evidenced by the dual pandemics of the COVID-19 virus that has exacerbated many pre-existing racial inequalities and of police brutality that continues to dehumanize communities of color, in particular the Black community¹⁸¹—it does seem hard to avoid the conclusion that we are in the middle of what is at least an attempted “Second Redemption.”¹⁸² The Supreme Court is contributing to this Second Redemption through a practice of constitutional interpretation in the contexts of race and religion that this Article has described as the superordination of whiteness. This approach prioritizes the interests of whiteness, establishes them as the normative baseline that the Constitution ought to and will protect, and thereby contributes to the perpetuation of a racial hierarchy that is grounded in an ideology of white supremacy. We should reject this trajectory, and forcefully so.

Just as the rise of the MFN approach in the context of constitutional religious equality rights but not in the context of racial equality rights illustrates novel ways in which the superordination of whiteness and the process of preservation-through-transformation proceed,¹⁸³ it might also help to point toward new ways in which we might attempt to challenge this trajectory. One such way might be to intensify the conversations and collaborations between scholars of race and religion who agree that the Court’s current trajectory, when viewed cross-contextually across the areas of *both* race *and* religion, is illegitimate. Religion scholars currently appear to have an increasing intellectual influence on a majority of the Court, and the Court has cited them in implementing the MFN approach discussed in Part I. Those same religion scholars tend to not discuss, or to tentatively reject, that the MFN approach also supports a more affirmative stance toward race-conscious approaches to racial equality, as long proposed by racial equality scholars, who the Supreme Court very much does not cite. If scholars were willing to coalesce around scholarship that, through doctrinal intersectionality, aims to uncover the egalitarian potential of both lines of constitutional jurisprudence, might it make a difference? Might it convince the Court that, properly conceived, an MFN ap-

180. Brownstein, *supra* note 44, at 91–92.

181. Simson, *supra* note 18, at 4–5, 5 n.3.

182. See *supra* note 1.

183. See *supra* notes 4–6 and accompanying text.

proach to questions of racial equality is appropriate and calls for a more context-sensitive approach to the question of race consciousness as well? Perhaps, and I believe this should be attempted.

Separately, President Biden created a commission on the study of the Supreme Court, some members of which have sharply criticized the Supreme Court for being an institution that predominantly protects dominant interests through its exercise of judicial review.¹⁸⁴ The fact that the Court is engaging in the superordination of whiteness in various contexts can and should strengthen such critiques of the current practices of the Court and flow into proposals for how to reform the institution.

Finally, from the standpoint of public opposition to the Court's problematic practices, one goal of exposing the Court's superordination of whiteness is to show that the fates of constitutionally protected groups and interests are linked in important ways. Especially for white Christians, who have long been accustomed to setting the standard for moral authority in the United States, it will be important not to take a myopic view that is focused on legal victories for narrowly defined religious interests. Instead, white Christians ought to focus on the overarching principles of equality and liberty that underwrite constitutional protections for their own interests and that are constitutionally due not just to them but also to those groups who are subordinated on the basis of both race and religion. Anthea Butler puts the question bluntly in her recent book: "Whom will you serve?"¹⁸⁵ She notes that even if evangelicals get everything they currently say they want, racism will not be addressed. She thus calls on evangelicals to take a broader view of their social obligations.¹⁸⁶ Perhaps exposing the Court's racial project of superordinating whiteness, as illustrated by the Court refusing to provide the same equality protections to those who are disadvantaged as a function of race as it provides to those who would otherwise be disadvantaged as a function of their religion, will help convince some to speak out and act against structural racism in whichever way might be accessible to them. If the painful lessons of the First Redemption tell us anything, those of us who oppose the Second Redemption will need all the help we can get.

184. See Written Statement, Nikolas Bowie, *The Contemporary Debate Over Supreme Court Reform: Origins and Perspectives* (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [perma.cc/5JSJ-JHB8].

185. ANTHEA BUTLER, *WHITE EVANGELICAL RACISM* 137 (2021).

186. *Id.* at 145–48.

