Black Souls Matter: An Originalist Framework for Individual Constitutional Protection Against Theologically-Justified White Supremacy within Christian Institutions

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INTRODUCTION

The First Amendment promises freedom of religion for all,[1] including those who incorporate white supremacy into their Christian theology.[2] Between the 1850s and 1978, the Church of Jesus Christ of Latter-day Saints ("the Church"), otherwise known as the Mormon Church, excluded members of African heritage from receiving full religious rites, privileges, and spiritual advancement ("the Anti-Black Ban").[3] Although the Church rescinded the Anti-Black Ban in 1978,[4] the pressure to do so

1. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

2. Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1023 (E.D. Wis. 2002) (holding that a belief system heavily infused with white supremacist beliefs is a religion).

3. JOANNA BROOKS, MORMONISM AND WHITE SUPREMACY: AMERICAN RELIGION AND THE PROBLEM OF RACIAL INNOCENCE 11 (2020).

4. *Id.*

was generally social rather than legal or doctrinal.[5] Over the last several decades, the increasingly conservative Supreme Court has demonstrated that in battles between its religious freedom and anti-discrimination jurisprudence, it will almost always side with the former.[6] The Court's conservatism has left little to no recourse for individuals whose personal worship is the target of theologically-justified institutional white supremacy. Nor is there an apparent solution for Black people facing racism from other church members—racism that could have been addressed by the law if the law prevented acts of institutional white supremacy like the Anti-Black Ban in the first place. Is privileging institutional religious freedom above all else, including individual religious freedom, essential to preserving true religious liberty? What about the religious liberty of racial and ethnic minorities to worship as they see fit without being subjected to institutional white supremacy? Should Christian institutions be able to racially subjugate people in the name of religious liberty? How can we prevent religious freedom from being weaponized against people of color in bad faith? In exploring the answer to the tension between the constitutional religious freedom of institutions and the individual religious freedom of the members of such institutions, I offer the Church's Anti-Black Ban as a historical and profoundly compelling example of a religious institution imposing theologically-justified white supremacy on its Black members.

This Article argues that jurists should view the prevention of theologically-justified institutional white supremacy as a clash between two robust religious freedoms, requiring the Court to favor one over the other, rather than as a question of whether the Court is infringing upon freedom of religion at all. Because the Supreme Court currently leans so far towards originalism,[7] this Article puts forward an originalist argument that individual freedoms should prevail. Specifically, this Article argues that Jack Balkin's principle-based originalism supports an interpretation of the First Amendment's religion clauses that would prioritize protecting an individual worshiper's right to exercise their religious convictions, free from racial discrimination, over a religious institution's right to racially discriminate against said worshiper in the name of religion, such as in the case of the Church's Anti-Black Ban.

Part I of this Article outlines the current state of religious freedom jurisprudence, in regards to both institutional, and individual religious freedom. In Part II, I explain the nature of clashes within a religion between an institution and its individual members and discuss the Church's Anti-Black Ban as an example of such a clash that facilitated white supremacy. Finally, in Part III, I lay out my main argument, offering Balkin's originalism as a valid and effective way to empower individual victims to

5. *Id.* (explaining that it was public protests and internal pressure tied to the Church's growth in Brazil where Blackness was viewed differently to how it is viewed in North America).

6. *See e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000) (holding that discrimination based on sexual orientation is not a compelling enough government interest to prevent a religious institution from withholding membership from certain people); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987) (holding that religious organizations can discriminate in their employment practices as long as doing so serves their religious goals).

7. Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, Harv. L. Today (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation.

constitutionally challenge theologically-justified white supremacy within Christian institutions.

I. GENERAL, INSTITUTIONAL, AND INDIVIDUAL RELIGIOUS FREEDOM

The right to religious freedom has been a fundamental part of the American experiment since its inception.[8] As this Note shows, the Court has cemented decades of religious freedom jurisprudence upon this right enshrined in the text of the First Amendment to the U.S. Constitution. This Part lays out the current state of constitutional religious freedom to contextualize my argument and potential solution to the apparent lack of legal recourse for victims of institutional religious white supremacy: to strengthen the individual constitutional right to religious autonomy when it conflicts with the thus far much more robust institutional right. Section A summarizes current religious freedom doctrine generally, and Section B explains how this doctrine protects the religious freedom of institutions. Section C discusses how individual religious freedom ties into the doctrine.

A. Religious Freedom Generally

American religious freedom largely stems from the two short religion clauses in the U.S. Constitution's First Amendment: the Establishment and Free Exercise Clauses.[9] The Establishment Clause, which states that "Congress shall make no law respecting the establishment of religion,"[10] theoretically prevents government action that would taint its ideologically neutral role in American theology.[11] Some read the clause narrowly, interpreting the clause to mean that the government cannot endorse an official state religion.[12] Others read it more broadly, holding that the clause prohibits laws with the purpose or effect of favoring a particular faith or even religion in general over secularism.[13] The Court in *Lemon v. Kurtzman* provided a longstanding test for whether a law is valid under the Establishment Clause, holding that a statute affecting a religious practice must have a "secular legislative purpose," its "principal or primary effect must be one that neither advances nor inhibits religion," and it must not "foster an excessive government entanglement with religion."[14] In 2022, in *Kennedy v. Bremerton School District*, the Court signaled its intention to strengthen religious liberty protections, effectively all but killing the *Lemon* test, and requiring courts to assess potential Establishment Clause violations according to whether they "reference to historical practices and understandings."[15]

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8. *See* Wesley J. Campbell, *Religious Neutrality in the Early Republic,* 24 REGENT U. L. REV. 311, 318-20 (2012).

9. U.S. CONST. amend. I.

10. *Id.*

11. *See* Robert A. Sedler, *Understanding the Establishment Clause: A Revisit*, 59 WAYNE L. REV. 589, 596 (2013).

12. Campbell, *supra* note 8.

13. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

14. *See id.* at 612-13.

15. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2411 (2022) (citing Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

As for the Free Exercise Clause, jurists traditionally interpret the clause to empower and require Congress to protect the ability of religious institutions and individuals to believe and practice their respective spiritual convictions.[16] The Court has often supported this by upholding legal accommodations or exemptions from otherwise generally applicable laws.[17] Some members of the Court have narrowly interpreted the Free Exercise Clause, holding that the government should provide such accommodations only when a particular law targets a religion or religious practices.[18] Justice Scalia's majority opinion in *Employment Division v. Smith* is the Court's current measuring stick for the Free Exercise Clause.[19] The *Smith* test states that facially neutral, generally applicable laws that incidentally affect a religious practice are only subject to the Court's rational basis analysis, rather than the much higher bar of strict scrutiny.[20] However, given past efforts by Justice Gorsuch to overturn *Smith*,[21] the Court's recent cementing of its 6-3 conservative majority likely signals the current test's imminent demise.[22]

Courts have built constitutional religious freedom upon their interpretations of the Establishment and Free Exercise Clauses, often privileging a religion's internal ecclesiastical law over secular laws.[23] Courts have protected religious animal sacrifice,[24] the right of private business to refuse service to persons identifying as LGBTQIA+,[25] and the right to publicly pray while working for a public school in the name of religious freedom.[26] Courts have upheld religious exemptions in many groundbreaking laws, such as Title VII of the Civil Rights Act of 1964 and the Affordable Care Act.[27]

16. *See* Mark Strasser, *Neutrality, Accommodation, and Conscience Clause Legislation*, 8 ALA. C.R. & C.L.L. REV. 197, 200-01 (2017).

17. *See e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (holding that Amish families refusing to send their children to school past eighth grade were entitled to an exemption from a compulsory education law); Sherbert v. Verner, 374 U.S. 398, 423 (1963) (holding that it is unconstitutional to deny unemployment benefits to an applicant who refused to work on Saturdays for religious reasons); *see also* Frank S. Ravitch, *The Unbearable Lightness of Free Exercise Under Smith: Exemptions, Dasein, and the More Nuanced Approach of the Japanese Supreme Court*, 44 Tex. Tech L. Rev. 259, 265 (2011).

18. *See* Emp. Div., Dep't of Hum. Res. of O. v. Smith, 494 U.S. 872, 882 (1990).

19. *Smith*, 494 U.S. at 872.

20. *Id.*

21. *See e.g.,* Fulton v. City of Philadelphia 141 S. Ct. 1868 (2021).

22. *See* Ian Huyett, *How to Overturn Employment Division v. Smith: A Historical Approach*, 32 REGENT U. L. REV. 295, 296-97 (2020).

23. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (holding that secular law could not interfere with a religion's internal ecclesiastical law).

24. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (striking down an anti-animal sacrifice law written specifically to target Santeria practices).

25. *See* Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (holding a law aimed at preventing private businesses from refusing service to LGBTQIA+ patrons violated the Court's holding in *City of Hialeah* by targeting specific religiously-justified discrimination rather than being neutral and generally applicable).

26. *See* Kennedy, 142 S. Ct. 2407 (holding that a public school football coach was allowed to pray with his players on the playing field).

27. *See e.g.,* Amos, 483 U.S. 327 (holding that religious institutions are exempt from Title VII's religious discrimination prohibition in hiring); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding that religious institutions can be exempted from the Affordable Care Act's contraception coverage requirement).

Occasionally, past Courts have upheld the criminalization of activities in which some religions actively participate, like polygamy.[28] But on the whole, American religious freedom rests upon a highly robust jurisprudence that vigorously protects the rights of religious institutions and individuals alike to follow the spiritual dictates of their consciences.

B. Institutional Christian Religious Freedom

Of course, there are exceptions, but generally the Court vigorously protects Christian institutions by applying the First Amendment's religion clauses. The following only provide a few examples of the many instances in which American courts view the theological autonomy of Christian churches and their affiliated organizations as sacrosanct.

First, government entities are not free to end relationships with religious organizations in favor of secular groups, despite religious organizations' potential theological influence on government matters.[29] In *Fulton v. City of Philadelphia*, the Court dealt with the issue of whether a city government could discretionarily terminate its relationship with a Catholic charity that refused to put foster children in homes with LGBTQIA+ parents.[30] Instead of exploring whether the city was mistreating the charity due to its Catholic ideals, the case turned on whether the city had implemented a mechanism for deciding which organizations to work with.[31] The mere existence of such a mechanism without a compelling reason meant that the city's actions were not generally applicable because it could treat secular and religious institutions differently in similar situations.[32] The Court accordingly held the city's action to be unconstitutional.[33]

Second, the government cannot discriminate between different religious groups (thus, favoring some over others), for instance, by requiring strict financial reporting requirements for specific religious organizations but not others.[34] In *Larsen v. Valente,* the Court considered such government-mandated requirements for religious organizations.[35] Specifically, certain financial reporting requirements found in the Minnesota Charitable Solicitation Act ("MCSA") only applied to religious organizations that solicit over half of their funds from non-members.[36] Although the MCSA did not facially single out any particular religion, the Court looked beyond the law's facial neutrality and discerned a religiously discriminatory practice.[37] The Court held that the statute was unconstitutional, reasoning that the solicitation rule burdened

28. *See* Reynolds v. United States, 98 U.S. 145 (1878) (holding that a law criminalizing polygamy did not violate constitutionally protected religious freedom).
29. *See* Fulton, 141 S. Ct. 1868.
30. *Id.* at 1871.
31. *Id.*
32. *Id.*
33. *Id.*
34. *See* Larson v. Valente, 456 U.S. 228 (1982).
35. *Id.*
36. *Id.* at 228.
37. *Id.* at 229.

the religious practices of particular churches and limited those churches from practicing their beliefs.[38]

Next, under Title VII, religious institutions can implement discriminatory hiring practices based on age, race, sex, or disability when filling ministerial positions.[39] In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court ruled that teachers working for religious schools have no discrimination claim as long as the school justifies their actions theologically.[40]

One area of successful government pushback against religious institutions stems from the Court's decision in *Bob Jones University v. United States*.[41] Here, the Court held that under federal tax law, an educational organization that violates official public policy (for example, through promoting racial discrimination in educational settings) cannot qualify for charitable tax-exempt status.[42] This case, however, stands as a rare example of the Court endangering Christian institutions' ability to exert Christian beliefs upon those within their purview.

C. Individual Christian Religious Freedom

Just as the Court broadly protects the autonomy of churches and other religious institutions at almost every turn, American religious freedom jurisprudence frequently defends religious individuals. In fact, in 1981, the Court protected a highly individualistic interpretation of religious belief in *Thomas v. Review Board*.[43] Orthodox Jehovah's Witnesses (many of whom are pacifists) do not typically have a religious doctrinal problem working for entities such as the defendant in *Thomas*, a foundry and machinery company that made weapons.[44] Here, the defendant denied the plaintiff, a Jehovah's Witness, employment benefits after the plaintiff cited his individual interpretation of his religion's doctrine as a reason for quitting his employment.[45] The Court in *Thomas* ruled that under the Free Exercise Clause, the state could not withhold the plaintiff's unemployment benefits for quitting a job due to a clash in religious beliefs, even if those beliefs were individualized and unorthodox.[46] The ruling echoed *West Virginia State Board of Education v. Barnette*, a religious freedom case brought by Jehovah's Witnesses who felt religiously compelled to not salute the American flag.[47] Regardless of the canonical position of flag saluting amongst Jehovah's Witnesses, the *Barnette* Court, in siding with the religious adherents, reasoned that there is no mandate on what qualifies as orthodoxy.[48]

38. *Id.*
39. *See* Our Lady of Guad. Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020).
40. *Id.*
41. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
42. *Id.* at 575.
43. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981).
44. *Id.* at 708.
45. *Id.* at 707.
46. *Id.* at 708.
47. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
48. *Id.* at 642.

Religious business owners can also use their religion as justification for refusing to serve LGBTQIA+ individuals.[49] Perhaps the most widely publicized and recent individual religious freedom case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, dealt with a wedding cake baker who refused to bake cakes for LGBTQIA+ weddings, despite a local anti-discrimination law appearing to prevent such refusals.[50] In *Masterpiece Cakeshop*, the Court avoided the issue of whether the baker was entitled to a religious exemption from the anti-discrimination law.[51] Instead, the Justices found that the law violated the Free Exercise clause because instead of being neutral, the government commission responsible for applying the anti-discrimination law demonstrated hostility towards anti-LGBTQIA+ discrimination carried out on religious grounds.[52] The Court reasoned that such hostility prevented the *Masterpiece Cakeshop* baker from conducting business according to his spiritual convictions. In other words, he was not free to exercise his religion.[53]

Religious individuals may not always have the same access to legal resources that religious institutions do. Still, the Court frequently protects and strengthens the individual right to follow one's spiritual convictions and, given the current makeup of the Court, is likely to continue doing so for some time.

II. WHEN INSTITUTIONAL RELIGIOUS FREEDOM CLASHES WITH THE INDIVIDUAL RELIGIOUS FREEDOM OF AN INSTITUTION'S MEMBERS

Religious institutions and individuals may each have substantial religious autonomy rights, but what happens when institutional religious freedom conflicts with the religious freedom of an individual member of the same institution? Rather than being cases of state actors infringing on private citizen's First Amendment rights, or state endorsement of religion, this note is concerned with instances when Christian institutions' freedom to discriminate directly conflicts with Christian individuals' liberty not to be discriminated against in the exercise of their religion. Hence, my argument centers on Free Exercise Clause jurisprudence rather than that of the Establishment Clause.

Many of these cases fall under Title VII's ministerial exemption because they concern discriminatory workplace actions like hiring, firing, salary decisions, or workplace treatment of clergy or religious teachers.[54] The exemption essentially solidifies religious entities' autonomy in filling religious positions.[55] Although named the "ministerial" exemption, the Court has interpreted this term to extend as far as teachers or any positions involving a small amount of doctrinal or pastoral responsibility.[56] Beyond the ministerial exception, Title VII § 702 further exempts religious entities

49. *See* Masterpiece Cakeshop, 138 S. Ct. 1719.
50. *Id.*
51. *Id.* at 1727.
52. *Id.* at 1724.
53. *Id.* at 1732.
54. *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1968 (2007).
55. *Id.*
56. *Id.* at 1976.

from the Act's prohibition on religious discrimination in hiring.[57] The Court in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos* considered whether § 702 applied to the Church's policy of firing an employee for not complying with the institution's standard of religious adherence.[58] The Court held that the exemption did apply, meaning the Church could discriminate based on whether the Church deemed its employees of the same religion are "spiritually worthy" enough for the position.[59] Common law and statutory remedies exist for individuals facing discrimination from their religious employers for non-theological reasons.[60] But religious institutions are empowered to structure clergy and teaching positions according to the institutions' spiritual convictions, even when doing so discriminates against individuals.[61]

Not all institutional, spiritually-justified discrimination happens in the hiring and employment space, and the law currently offers little recourse for such victims. For almost a century and a half, the Mormon Church instituted a racially discriminatory practice of banning members of African descent from spiritual advancement in the Church.[62] Significantly, the Anti-Black Ban prohibited access to the full range of religious rites and rituals that members of the Church believe are necessary to partake in to achieve complete spiritual salvation.[63] As the infringement of constitutional religious freedom has become closely tied to the autonomy of religious institutions, current approaches to the issue may erroneously assume that protecting individual church members from religious white supremacy lies outside the realm of religious freedom jurisprudence. Instead, I offer that as outlined in Part I, the Court and Constitution hold religious freedom for individuals as well as institutions sacred. Theologically-justified discrimination boils down to a choice between the religious freedom of the institution and the religious freedom of its members, rather than religious freedom versus encroachment on religion.

This Part offers the Anti-Black Ban as an example of theologically-justified white supremacy committed by a Christian organization, which presented a conflict between an institution's religious freedom and that of its individual members. Section A discusses the relationship American Christianity shares with white supremacy. Section B provides the history of the Anti-Black Ban's implementation and justification as an example of religiously-justified institutional Christian white supremacy. Finally, before proceeding with my proposed solution to this problem, Section C lays out why providing legal recourse for individual victims of religiously-justified institutional white supremacy matters despite the official end of the Church's ban being forty-two years ago.

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57. 42 U.S.C. § 2000e-1(a).

58. Amos, 483 U.S. 327.

59. *Id.* at 327-28.

60. *See* Corbin, *supra* note 54, (the religious institutional cannon uses the ministerial exemption when not filling a ministerial position).

61. *See id.* at 1976.

62. BROOKS, *supra* note 3.

63. *Id.*

A. American Christianity and White Supremacy

American Christianity and white supremacy are old friends. Since the country's founding, U.S. governance has been overwhelmingly dictated, by white Anglo-Saxon Protestants.[64] Religion, and religious freedom jurisprudence, has played a role both in justifying white supremacy and turning a blind eye to it.[65]

For some, white supremacy evolved into a religious doctrine. The belief that God had ordained America to be a white nation caused some Christians to believe they were justified in defending and preserving sustained white supremacy.[66] In 1893, prominent Methodist Bishop Atticus G. Haywood, an advocate for white supremacy and an apologist for lynching, remarked that "nowadays, it seems the killing of Negroes is not so extraordinary an occurrence as to need explanation."[67] Philip Schaff, a church historian for Union Theological Seminary in New York, offered that "the Anglo-Saxon and Anglo-American, of all modern races, possess the strongest national character and the one best fitted for universal domination."[68] South Carolina Senator Cole Blease once declared that lynching was a "divine right."[69] Contemporaneously, influential figures like Congresswoman Marjorie Taylor Greene and acclaimed musician Kanye West frequently evoke white supremacist talking points while asserting their Christianity.[70] While not all religions or theists sustain white supremacy, such hateful ideology has become intertwined with a significant segment of American Christian theology.

On the other hand, Christianity has played a sustained role for those for those white supremacy oppresses. Black Americans, saddled with the legacies of slavery, Jim Crow, and lynching, have long found solace in turning to God.[71] Scholar James H. Cone writes of Black Americans finding peace in Christianity especially; Black Americans viewed the symbolism of the Christian cross through a lens of hope, juxtaposed against the fear projected by the symbolic and literal lynching tree.[72] Cone writes that even as for Black people "nothing was more terrifying than the lynching tree,"[73] the cross "represented both death and the promise of redemption, judgment

64. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 259 (2002).

65. *See* JAMES H. CONE, THE CROSS AND THE LYNCHING TREE 7 (2011) (citing WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968)); *see also* BROOKS, *supra* note 3, at 24.

66. *See* CONE, *supra* note 65.

67. *Id.* at 6.

68. *Id.* at 7.

69. *Id.*

70. *See* Nikki McCann Ramirez, *Kanye West Says 'White Lives Matter' Shirts Inspired By His 'Connection To God'*, ROLLING STONE, (Oct. 6, 2022), https://www.rollingstone.com/music/music-news/kanye-west-tucker-carlson-white-lives-matter-shirts-god-1234606799/; Robert Draper, *The Problem of Marjorie Taylor Greene*, THE NEW YORK TIMES MAGAZINE, (Oct. 17, 2022), https://www.nytimes.com/2022/10/17/magazine/marjorie-taylor-greene.html.

71. *See* CONE, *supra* note 65, at 2-3.

72. *Id.*

73. *Id.* at xix.

and the offer of mercy, suffering and the power of hope."[74] As the State allowed white people to commit horrific acts against Black people, many victims clung to their freedom of religion as the only hint of a potential end to their suffering.[75] Yet Cone powerfully reminds us that even the cross can be "enslaving and oppressing" as a weapon of white supremacy.[76]

B. The Church of Jesus Christ of Latter-day Saints' Anti-Black Ban on Participation in Doctrinally-Essential Religious Rites as an Example of Religiously-Justified Institutional White Supremacy

Like much of the rest of American Christian theology, Mormonism is no stranger to being on both sides of the country's centuries-old dance with white supremacy.[77] The very question in this Article stems from the Church attempting and succeeding to incorporate white supremacist principles into its theology, despite the doctrine's bad faith origins.[78] In this Section, I will discuss (1) Mormonism's relationship with white supremacy, (2) the specifics and nuances of what the Anti-Black Ban meant for Black members of the Church, (3) how the ban came about, including its transition from policy to doctrine, and (4) why there was no apparent legal solution to the ban at the time.

1. White Supremacy and Mormonism

White supremacy was the driving force behind the national outlawing of polygamy,[79]which in turn impacted the Church. Polygamy had been a doctrinally mandated practice for some members of the Church, including every early Church President, since its founding.[80] In more modern times, some have hypothesized that the most logical reasons to ban plural marriage were protecting women and children who were pressured or forced into the practice.[81] But Martha Ertman's excellent scholarship on the issue illustrates how white supremacy was a prominent cause in the initial effort to outlaw the practice.[82] White non-Mormon Christian Americans saw polygamy as being beneath white people, an institution only suitable for who mainstream white Americans considered to be less civilized races of color.[83] In waging war to solidify the public's angst against polygamy, its opponents used rhetoric and political cartoons designed to portray members of the Church (the vast majority

74. *Id.* at 2-3.
75. *See id.* at 18.
76. *Id.* at xix.
77. *See* BROOKS, *supra* note 3, at 10-13.
78. *See id.*
79. *See* Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 288-89 (2010).
80. *See* Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 741 (2003).
81. Ertman, *supra* note 79, at 289 (citing Frances Raday, *Secular Constitutionalism Vindicated*, 30 CARDOZO L. REV. 2769, 2780-81 (2009); Dennis Wagner, *After Raid, Other Polygamists Fear They're Next*, ARIZ. REPUB., June 1, 2008, at 1).
82. Ertman, *supra* note 79.
83. *See id.* at 288.

of whom were phenotypically white) as a group of "others" similar to Black people.[84] The goal of such a campaign was to frame polygamy as a practice that the Constitution should not protect because its patrons fell among those individuals and groups the country already chose not to protect or enfranchise, like Black people.[85] Despite the Free Exercise Clause pleadings of the Church, a federal anti-polygamy was upheld in *Reynolds*, indicating the pervasive impact of white supremacy.[86] The Church shortly after that discontinued polygamous civil marriages as a required doctrine.[87]

Although this is an instance where the Church was impacted by white supremacy, it was not always on the receiving end, and instead perpetuated racism. In 1833, when the main body of the Church resided in Missouri, prominent leader W. W. Phelps printed a statement essentially warning Black converts wanting to join them that the Church had no actual position other than supporting the local laws of the then slave-holding state.[88] Later, after moving to what would become Utah, Church Apostle Orson Hyde clarified that the Church had no desire to oppose slavery.[89] Eliza R. Snow, one of Church President Brigham Young's wives, wrote against the anti-slavery movement, arguing that such a reform was unnecessary because they already had God's government.[90]

Young declared himself a "firm believer" in slavery.[91] He supported legalizing a type of slavery in the territory[92] and personally aided in slave transactions amongst members of the Church.[93] Young based his opinions on theology, writing that Black members of the Church were "not to be integrated into the material family of God."[94] Referring to Black people as the lineage of Cain (the biblical murderous son of Adam and Eve), Young declared that those of African descent are "subjects and eternal servants" and that he would "not consent for a moment to have the children of Cain rule [him]."[95] In his view as the Church's spiritual chief, white people were to rule over Black people in the kingdom of God.[96] Though the Church's official policy remained undefined, when the President of the Church (who active members of the Church sincerely believe is also a prophet) speaks, the large majority of believing members consider that "the debate is over."[97]

84. *See id.* at 288.
85. *See id.* at 290.
86. Reynolds v. United States, 98 U.S. 145 (1878).
87. *See* Ertman, *supra* note 79, at 295.
88. *See* BROOKS, *supra* note 3, at 27-29.
89. *Id.* at 30-31.
90. *Id.* at 32-34.
91. *Id.* at 30.
92. *Id.* at 24, 30.
93. *See id.* at 43.
94. *Id.* at 32.
95. *Id.* at 38.
96. *See id.* at 31.
97. *See* N. Eldon Tanner, *"The Debate Is Over,"* ENSIGN, Aug. 1979 (declaring the commonly taught principle of Mormonism that the president of the Church has the unquestionable final say on all doctrinal matters); BROOKS, *supra* note 3, at 78 (quoting Church President Wilford Woodruff: "The Lord will never permit me or any other man who stands as President of this Church to lead you astray.").

After slavery ended, many prominent Church leaders remained staunchly against interracial marriage and integration. One of the Church's most famous legal practitioners and onetime Apostle J. Reuben Clark argued for segregating blood in Utah's hospital blood banks to prevent the spiritual contamination of white members of the Church.[98] Along with eventual Church President George Albert Smith and Apostle Mark E. Peterson, he advocated for local laws to prevent Black people from moving into white neighborhoods.[99] Apostle and future Church President Ezra Taft Benson implored members of the Church to oppose the civil rights movement of the 1960s[100] and later considered becoming segregationist George Wallace's running mate in the 1968 presidential election.[101] Church president Harold B. Lee threatened to hold Church-owned Brigham Young University president Ernest Wilkinson personally responsible if Lee's granddaughter "met and got engaged to a colored boy there."[102] With such an abundance of racist views held by high-ranking church officials, one can hardly be surprised that white supremacy crept into mainstream Church Doctrine.

2. Mormonism's Anti-Black Ban on Participation in Doctrinally Essential Religious Rites

The Church's Anti-Black Ban affecting members of the Church of African descent was not merely a ban on appointing Black clergy but a prohibition on complete spiritual advancement for all Black members. It can be easy to conflate the Anti-Black Ban with discriminatory hiring practices of other Christian denominations. If this were simply a clergy racial discrimination case, it is likely that the Court's Title VII ministerial exception would apply. But the Anti-Black Ban instead meant that Church leaders blocked regular members of the Church from individual spiritual advancement.[103] Church doctrine holds that it is the only entirely true church and the only church authorized by God to perform the correct rites and rituals (also called "ordinances" within the Church) one needs to gain salvation.[104] Accordingly, to achieve complete salvation after this life, all persons must complete the entire series of essential ordinances performed by the Church.[105] First, one must undergo baptism and confirmation into the Church.[106] Next, one must complete a set of sacredly held higher ordinances in the Church's temples.[107] One must then be married, not just

98. BROOKS, *supra* note 3, at 80.
99. *Id.*
100. *Id.*
101. *Id.* at 167.
102. *Id.* at 81.
103. *Id.* at 11.
104. *See Priesthood*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/manual/gospel-topics/priesthood?lang=eng (last visited Nov 9, 2022).
105. *See Ordinances*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/manual/gospel-topics/ordinances?lang=eng (last visited Nov 9, 2022) (explaining the essential nature of the rites to gain exaltation, Mormonism's highest form of salvation).
106. *Id.*
107. *Id.* These higher rites include an ordinance called the temple endowment.

legally, but through a ceremony performed exclusively inside the Church's temples.[108] Additionally, all male members must receive the Church's priesthood, which does not refer to clergy status but is a bestowal of authority and spiritual advancement.[109] The Church's doctrine unequivocally teaches that full participation in these steps is essential to receive complete salvation.[110]

The Church's Anti-Black Ban prohibited all male members of African descent from advancing spiritually by receiving the priesthood and all members of African descent from participating in temple rites.[111] Although the Church's doctrine on the necessity of the higher temple rites is clear, Church leaders restricted Black members of the Church to only participating in the rites of baptism and confirmation.[112] This was not a discriminatory hiring practice protected by Title VII's ministerial exemption. Instead, it prevented Black members of the Church from following their religious convictions by participating in the entire process that all believing members of the Church hold that salvation demands.

3. The Anti-Black Ban's History, and Transition from Policy to Doctrine

Knowing the history of the Church's Anti-Black Ban is essential for understanding why such policies consist of a choice between two parties' freedom of religion rather than freedom of religion vs. encroachment on religion. Moreover, understanding the evolution of the ban from an arbitrary policy to official doctrine adds clarity to potential solutions that may require both identifying bad faith dogma used to subjugate people and weighing the religious freedom interests of both parties.

Leaders of the Church claim that God's laws and doctrines (as accurately interpreted only by them) are eternal, natural, and never change and that the president of the Church is a literal modern-day prophet with uniquely complete access to God's will. Hypocritically, the Church's ban on Black members receiving total spiritual advancement was not part of a founding concept of the Church.[113] Joseph Smith Jr., founder and first president of the Church of Jesus Christ of Latter-day Saints, permitted Black male members to receive the priesthood.[114] Even though in Church's early days, its temple ordinances as we know them today were still in development, it is clear that any willing participant could receive complete spiritual advancement through Church rites and rituals.[115]

The beginning of a change to Church policy on Black participation from permissible to prohibited happened sometime after Smith's assassination in 1844. After roaming from state to state, members of the Church established a permanent home

108. *Id.*
109. *Id.*
110. BROOKS, *supra* note 3, at 11.
111. *See id.*
112. *See id.* at 25-26.
113. *See id.* at 11 ("Church founder Joseph Smith Jr. had permitted ordination of Black Men-Elijah Abel or Ables, Kwaku Walker Lewis-to the priesthood in the 1830s and 1840s.").
114. *Id.*
115. *Id.*

and the territory of Utah in the Rocky Mountains.[116] General attitudes of the Mormon people and their leaders towards Black people began falling in line with the white supremacist views held by much of the rest of the country, as assimilating into traditional white America became beneficial to Utah's quest for permanence and statehood within the still-expanding Union.[117] Then Church President Brigham Young, himself a slavery apologist and facilitator of slave transactions, along with other prominent Church leaders like slavery sympathizer Abraham Smoot[118] began denying Black members of the Church the priesthood.[119] This included denying the validity of Elijah Abel's priesthood.[120] Abel was a Black member of the Church who was given the priesthood before Joseph Smith's death in front of witnesses and preserved documentary evidence of that fact.[121] With him no longer around to clarify, Church leaders began claiming that Smith never intended to give priesthood access to Black members, that any so doing on his part was merely to humor the recipient, and therefore was not valid.[122]

As witnesses to Black members of the Church receiving the priesthood passed away, the Church began changing its messaging, claiming that the Anti-Black Ban originated with Smith's founding of the Church.[123] Nelson Holder Ritchie, who had been enslaved from birth, and his wife Annie Cowan Russell converted to the Church.[124] They were denied access to the Church's temple rites because of their "negro blood," yet their white-passing children were not.[125] George F. Gibbs, the Church's secretary told the enthusiastic Elijah A. Banks, a Black convert to the Church, that he and others of his race were "barred from receiving ordinances of the temple."[126] The frequently repeated claim soon became erroneously thought of, not as an arbitrary racist policy, but as a fundamental, unchangeable doctrine.[127] Accordingly, government intervention would seemingly have less justification if the policy reflected doctrine instead of discretionary non-theological racism.[128]

Leaders of the Church soon began explicitly preaching the ban as doctrine, not just in apocryphal writings but also in official Church preaching and Church-

116. *See* Ertman, *supra* note 79, at 298.
117. *See* BROOKS, *supra* note 3, at 26, 29.
118. *Id.* at 41.
119. *Id.* at 11, 44-47.
120. *Id.* at 47.
121. *Id.* at 45.
122. *Id.* at 44-45.
123. *See e.g., id.* at 76, 78 (quoting Church Apostle Joseph Fielding Smith: "The negro race is barred from holding the Priesthood, and this has always been the case. The Prophet Joseph Smith taught this doctrine.").
124. W. Paul Reeve, *Making Sense of the Church's History on Race*, Faith Matters (Jun. 30, 2020), https://faithmatters.org/making-sense-of-the-churchs-history-on-race/.
125. *Id.*
126. *Century of Black Mormons*, UNIV. OF UTAH J. WILLARD MARRIOTT LIBR., https://exhibits.lib.utah.edu/s/century-of-black-mormons/page/banks-elijah-a (last visited Feb. 19, 2023).
127. *See* BROOKS, *supra* note 3, at 79.
128. *See* United States v. Ballard, 322 U.S. 78 (1944) (holding that legal invocations of religious freedom have to be made in good faith).

sanctioned media.[129] In 1863, while serving as the Church's president and prophet, Brigham Young publicly taught that even marriage between Black and white people "was forbidden of God on penalty of blood atonement—death."[130] In the years that followed, some anti-Black violence in Utah seemed to reflect Young's doctrine.[131] This included the murder of Thomas Coleman, a Black man who was killed in a manner that closely resembled the violent symbolic penalties found within the Church's early rites and rituals.[132] In April 1924, in an official Church publication, Apostle and future Church President Joseph Fielding Smith declared that the Black race had always been prohibited from full Church rites.[133] When discussing his fear that ending the ban would lead to a proliferation of interracial marriage, Church President David O. McKay proclaimed that it "bother[ed] [him] more than anything."[134] In 1947 Church officials debated whether it was appropriate to even proselytize in Cuba, given that some leaders claimed that the country's lack of segregation in rural areas would make it "difficult to find, with any degree of certainty, groups of pure white people."[135] In the 1960s, Apostle Bruce R. McConkie instructed members that it was God's will for Black Americans to be divinely cursed in his book *Mormon Doctrine*.[136] Members of the Church widely considered McConkie's book to be authoritative.[137] The Church so heavily enforced the ban as an essential ecclesiastical doctrine that even white Church members who gave the priesthood to Black men could themselves be excommunicated from the organization.[138]

In attempts to theologically explain the Anti-Black Ban's status as an "eternal" doctrine of the Church in the face of accusations of racism, members and leaders of the Church soon began hypothesizing doctrinal theories to explain what they characterized as God's will. Some of these theories were that Black people descended from the biblical figure Cain, whose lineage was cursed, or that their spirits were less righteous than non-Black spirits in Mormonism's doctrinal premortal life.[139] The Church further clarified that all people with even "one drop" of African heritage would remain prohibited from the Church's full scope of rites and rituals.[140]

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129. *E.g.*, BROOKS, *supra* note 3, at 67, 76 (Church leader B. H. Roberts prolifically published claims of the ban being doctrine through Church channels, including authoring books and contributing as editor of The Contributor, a Church magazine).

130. *Id.* at 49.

131. *Id.*

132. *Id.*

133. *Id.* at 76.

134. Newell G. Bringhurst, *David O. McKay's 1954 Confrontation with Mormonism's Black Priesthood Ban*, 37 JOHN WHITMER HIST. ASS'N J. 9 (2017).

135. BROOKS, *supra* note 3, at 118 (quoting Letter from Herbert Meeks, President of the Church's Southern States Mission, to Lowry Nelson, (Jun. 20, 1947) (on file with the Special Collection & Archives, Merrill-Cazier Library, Utah State University).

136. BROOKS, *supra* note 3, at 80-81.

137. *Id.*

138. BROOKS, *supra* note 3, at 143.

139. *See id.* at 73-74; *id.* at 12, 129.

140. *See* Bringhurst, *supra* note 134, at 1.

Church President Spencer W. Kimball announced that the Church had officially rescinded the Anti-Black Ban in June of 1978.[141] Kimball presented the change as a divine revelation from God in his role as the Church's prophet, seer, and revelator.[142] The Church no longer claims that restricting people of African descent from full participation in its salvation rites and rituals was God's will.[143] However, only in 2013 did the Church quietly release a statement merely disavowing rumored reasons for the ban.[144] Even with this statement disavowing speculative reasons for the ban, however, the Church did not and never has officially apologized for or disavowed the actual ban itself. McConkie's book remained in print until 2010.[145] Satirists Trey Parker and Matt Stone immortalized the Church's current position on the ban's apology-less reversal in their musical *The Book of Mormon*, as their Church missionary protagonist proclaims that "in 1978 God changed His mind about Black people."[146]

4. No Apparent Legal Solutions

The Church ended its Anti-Black Ban as a result of social rather than legal pressure against the practice. Members of the University of Wyoming football team[147] and Stanford's Athletics department boycotted sporting contests against Brigham Young University.[148] Activists planned protests against the policy during the Church's semi-annual general conference.[149] Yet the law seemingly offered no recourse.

No members of the Church brought any lawsuits over the policy. While never canonized in Church scripture, the Anti-Black Ban's status as Church doctrine was so rock-solid that high-ranking Church officials began dismissing and disciplining members who spoke against the ban. In 1947, the First Presidency of the Church responded to Church member Lowry Nelson's multiple pleas to reconsider the doctrine.[150] Church President George Albert Smith and his counselors repeatedly rebuffed and rebuked Nelson, stating that "[f]rom the days of the Prophet Joseph even until now, it has been the doctrine of the Church, never questioned by any of the Church leaders, that the Negros are not entitled to the full blessings of the

141. BROOKS, *supra* note 3, at 11.

142. *See Official Declaration 2*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/scriptures/dc-testament/od/2?lang=eng (last visited Nov 9, 2022).

143. *See id.*

144. *See Race and the Priesthood*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/manual/gospel-topics-essays/race-and-the-priesthood?lang=eng (last visited Nov 9, 2022).

145. *See* BROOKS, *supra* note 3, at 81.

146. ANDREW RANNELLS, JOSH GAD, RORY O'MALLEY, NIKKI M. JAMES, AND ORIGINAL BROADWAY CAST, THE BOOK OF MORMON: ORIGINAL BROADWAY CAST RECORDING (Ghostlight Records 2011).

147. Wesley Lowery & Jacob Bogage, *Fifty years after the 'Black 14' were banished, Wyoming football reckons with the past*, THE WASHINGTON POST, (Nov. 30, 2019), https://www.washingtonpost.com/national/fifty-years-after-the-black-14-were-banished-wyoming-football-reckons-with-the-past/2019/11/30/fb7e9286-e93d-11e9-9c6d-436a0df4f31d_story.html.

148. *See* BROOKS, *supra* note 3, at 99.

149. *Id.* at 145.

150. *See id.* at 121-23.

Gospel."[151] They went on to say that Nelson's ideas "contemplate the intermarriage of the Negro and White races, a concept which has heretofore been most repugnant to most normal-minded people."[152] Finally, they firmly declared that the "breaking down of race barriers" in this manner "is contrary to Church doctrine," and in a subsequent letter, urged Nelson to "reorient [his] thinking" to "bring it in line with the revealed word of God."[153] Nelson continued to push back in writing, later having his membership in the Church threatened by the First Presidency's secretary.[154] In 1977, just a year before the doctrine was rescinded, Byron Marchant stood in the Church's Tabernacle.[155] He raised his hand to signal his disapproval of the Anti-Black Ban during a televised session of the Church's general conference.[156] Less than two weeks later, Church leaders excommunicated Marchant from the Church.[157] The Church's disciplining of outspoken members complaining about the ban certainly would not have inspired much confidence that filing a lawsuit would end positively for a believing member, no matter the legal merits.

Moreover, religious freedom jurisprudence, at the time, indicated that the Church, as an institution, would likely come out on top in a legal battle against individual religious freedom. Even if the Court's holding in *Bob Jones University* had existed at the time of the Anti-Black Ban, it likely would not have provided any relief by revoking the tax-exempt status of the Church. To do so, the IRS would have had to have deemed the Church's specific religious practice to violate public policy.[158] Additionally, the Court could likely only have applied *Bob Jones* to Brigham Young University, not the Church at large, given that the Church is not primarily an educational institution.

Regarding Title VII, although the Anti-Black Ban did concern the bestowal of the Church's priesthood authority, it is improbable that the Court would view the discrimination as employment-based because the Church's priesthood is not restricted to the clergy. Instead, the priesthood is part of the religion's salvation rites intended for all members. Hence, even if one could successfully argue that neither Title VII's ministerial exception nor Section 702 religious discrimination exemption applied, it's unlikely that the remainder of Title VII would provide relief. Looking to the Equal Protection Clause of the Fourteenth Amendment would likely not provide a remedy, seeing as its jurisprudence requires that equal protection infringers be state actors, which of course, the private Church is not.[159]

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151. *Id.*
152. *Id.*
153. *Id.* at 121-23, 127.
154. *Id.* at 128-29.
155. *Id.* at 145.
156. *Id.*
157. *Id.*
158. Bob Jones Univ., 461 U.S. 574.
159. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (explaining that equal protection cases under the Fourteenth Amendment require state action); Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (clarifying that a state merely permitting certain behavior does not trigger the state action requirement).

C. Why Finding a Legal Solution to Theologically-Justified White Supremacy within Christian Institutions Still Matters

Given the current jurisprudence of the Court, the Anti-Black Ban could happen again. The Church of Jesus Christ of Latter-day Saints may have voluntarily chosen to end its Anti-Black Ban, but who is to say another "revelation" will not lead to other anti-Black religious restrictions? Social outcry can be a powerful weapon against white supremacy, but legal tools provide a more profound assurance and protection for potential victims. Before laying out the legal theory that I propose gives a constitutional justification to such legal tools in Part III, in this section, I will discuss why finding a legal solution to religiously-justified white supremacy is essential because doing so can help (1) prevent the damaging and lasting effects of anti-Black religious restrictions like the Anti-Black Ban, (2) combat extreme power imbalances between religious institutions and their racial minority members, (3) fight the bad faith invocation of religious freedom law, and (4) ensure that religious freedom jurisprudence envelops the perspectives of religious, racial minorities in addition to white religious voices.

1. Institutional Religiously Justified White Supremacy's Lasting and Damaging Effects

The Church's Anti-Black Ban ended forty-two years ago, but its damaging effects are still felt today. While Church leaders disavowed some of the racist theories offered to explain the ban, not disavowing or apologizing for the ban itself means that even today, racist justifications for the Anti-Black Ban abound.[160] As recently as February 6, 2022, Brad Wilcox, a high-ranking Church official and religion professor at Brigham Young University, made a series of racist remarks in the context of the ban to a public audience of teenage members of the Church and their families.[161] In arguing for the ban having a divine origin, Wilcox compared Black spiritual suffering during the ban to the experience of white people generally before the Church's founding.[162] In addition to dismissing those inside the Church who disagreed with the doctrine as being "uptight," many of whom were the Black members that the Church discriminated against, he stated:

> How come the Blacks didn't get the priesthood until 1978? Brigham Young was a jerk? Members of the Church were prejudiced? Maybe we're asking the wrong questions. Maybe instead of saying, why did the Blacks have to wait until 1978, maybe what we should be asking is, why did the whites, and other races, have to wait until 1829?[163]

160. *See* BROOKS, *supra* note 3, at 174.

161. Peggy Fletcher Stack & Tamarra Kemsley, *LDS leader Brad Wilcox apologizes for remarks about Black members; BYU 'deeply concerned'*, THE SALT LAKE TRIBUNE, (Feb. 8, 2022), https://www.sltrib.com/religion/2022/02/08/lds-leader-brad-wilcox/.

162. *Id.*

163. *Id.*

Such facially racist statements from Church leaders are rare these days. Still, apologizing for the insensitivity of his comments,[164] both Wilcox and the Church remain publicly unapologetic about the ban itself and committed to maintaining that it was the will of God.

Although the Church officially maintains a position of political neutrality, many prominent church members publicly embrace Donald Trump despite his use of racist tropes. Julie Beck, the former president of the entire Church's women's organization, publicly prayed at a Trump rally.[165] The Tabernacle Choir (then known as the Mormon Tabernacle Choir), the Church's official musical ambassadors, sang at Trump's inauguration.[166] Mike Lee, U.S. Senator for Utah, even infamously publicly compared Trump to Captain Moroni, a reputationally righteous and divinely-inspired character in *The Book of Mormon*, the Church's canonical scriptural companion to the Bible, while trying to court Latter-day Saint votes for Trump.[167] White supremacist alt-right Mormon social media influencers used Trumpian rhetoric to attack anti-racist members of the Church online. Is it any wonder that racism in the Church, including the continual rehashing of racist theories behind the Anti-Black Ban, persists when prominent white members publicly endorse individuals with a history of anti-Black racism?

Despite the Anti-Black Ban ending, the Church's scriptural canon still contains racist language. Very recent official Church instruction has tried to alter how these passages are taught, now teaching that racist language is a symbolic illustration of goodness and evil and not talking about literal race.[168] But this argument is hard to justify after more than a century of preaching racial hierarchy. *The Book of Mormon* primarily tells the story of a group of Christians on the American continent before and immediately after Christ's birth and death.[169] The author of *The Book of Mormon* describes the followers of God as "white and delightsome" (the word "white" later changed to "pure")[170] and "white, and exceedingly fair and beautiful."[171] The author declares the book's darker-skinned antagonists as being cursed

164. *Id.*

165. @tvheidihatch, TWITTER (Oct. 26, 2016, 4:50 PM), https://twitter.com/tvheidihatch/status/791381395436285952?lang=en.

166. Katie Rogers, Andrew R. Chow, Joe Coscarelli & Sopan Deb, *Who Is Performing at Donald Trump's Inauguration?,* N.Y. TIMES, (Jan. 11, 2017), https://www.nytimes.com/2017/01/11/arts/music/donald-trump-inauguration-performers.html.

167. See José Ignacio Castañeda Perez, In Arizona, *Sen. Mike Lee compares Trump to Captain Moroni, is criticized by LDS members*, AZ CENTRAL, (Oct. 30, 2020), https://www.azcentral.com/story/news/politics/arizona/2020/10/30/sen-mike-lee-compares-trump-to-captain-moroni-draws-criticism-lds-community/6078062002/.

168. *See e.g.*, *He Denieth None That Come unto Him*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://history.churchofjesuschrist.org/content/perspectives-on-church-history/he-denieth-none-that-come-unto-him?lang=eng (last visited Nov 9, 2022).

169. *See* Introduction, *Book of Mormon*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/scriptures/bofm/introduction?lang=eng (last visited Nov 9, 2022).

170. *See* Peggy Fletcher Stack, *Church removes racial references in Book of Mormon headings*, THE SALT LAKE TRIBUNE, (Dec. 20, 2010), https://archive.sltrib.com/article.php?id=50882900&itype=CMSID.

171. 1 Nephi 13:15.

with black skin because of their apparently unrighteous ways.[172] At one point, a group of protagonists converted to the antagonists' religion, and "their curse was taken from them, and their skin became white."[173] But is it any wonder that racism in the Church has persisted since the ban's end, given the Church's scriptural language?

In recent years Church leaders at the highest levels have officially called on its members to "root out racism" and treat others with respect.[174] The Church has released statements condemning white supremacy,[175] has formed a relationship with the NAACP, and has slowly started changing its official interpretation of facially racist scripture to more metaphorical colorblind meanings.[176] Yet, the Church preaches that criticizing the actions of Church leaders (including past measures like implementing the Anti-Black Ban) is categorically against the will of God.[177] Dallin H. Oaks, a high-ranking member of the Church's top leadership body and next in line to become President of the Church, claimed that it is wrong to criticize the Church or its leaders, even when the criticism is correct.[178] The Church also actively discourages members from researching the institution's history,[179] pressures members to not trust or consume any media on Church issues outside of official Church channels,[180] and pressures members from speaking out in support of social change within the organization.[181] Accordingly, many members still propagate the idea that the anti-Black doctrine, and its end, were justified and divinely mandated, and Church leaders still publicly support that claim.[182]

Preventing the Anti-Black Ban in the first place or ending it much sooner may not have completely solved the problem of racism within the Church, but it could have helped. The civil rights movement of the 1960s did not end racism but produced

172. 2 Nephi 5:21.

173. 3 Nephi 2:15.

174. *See* Peggy Fletcher Stack, *In blunt language, Nelson denounces racism, urges Latter-day Saints to 'lead out' against prejudice*, THE SALT LAKE TRIBUNE, (Oct. 4, 2020), https://www.sltrib.com/religion/2020/10/04/blunt-language-nelson/.

175. *See Church Releases Statement Condemning White Supremacist Attitudes*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, (Aug. 15, 2017), https://www.churchofjesuschrist.org/church/news/church-releases-statement-condemning-white-supremacist-attitudes?lang=eng.

176. *See First Presidency and NAACP Leaders Announce a Shared Vision to "Learn from and Serve One Another"*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, (June. 41, 2021), https://newsroom.churchofjesuschrist.org/article/first-presidency-naacp-shared-vision.

177. *See* Dallin H. Oaks, *Criticism*, ENSIGN, Feb. 1987.

178. *Id.*

179. *See* Jacob Swenson, *President Oaks' advice to young married couples in Chicago on how to tackle faith-threatening questions*, THE CHURCH NEWS, (Fed. 4, 2019), https://www.thechurchnews.com/2019/2/4/23214708/president-oaks-advice-to-young-married-couples-in-chicago-on-how-to-tackle-faith-threatening-questio (referring to "Matters of Church history and doctrinal issues. . .research is not the answer.").

180. *See* BROOKS, *supra* note 3, at 171.

181. *See* Trent Toone, *Brother Ahmad S. Corbitt: How activism against the Church can blind, mislead 'valiant' souls*, THE CHURCH NEWS, (Nov. 1, 2022), https://www.thechurchnews.com/leaders/2022/11/1/23424931/brother-ahmad-s-corbit-activism-discipleship ("When activism or advocacy is directed at the kingdom of God on earth or its leaders, especially prophets and apostles, it is the wrong tool for the wrong job in the wrong place.").

182. *See* BROOKS, *supra* note 3, at 174.

legal tools to fight it, like Title VII.[183] The Church holds a doctrinal belief in following the laws of the land and being subject to governmental authority.[184] After the Supreme Court upheld Congress' federal criminalization of polygamy in *Reynolds*, the Church changed its doctrine on marital practice.[185] While Church members still believe spiritual polygamy will exist in heaven, the Church strongly disavows the civil practice within its ranks, even going as far as excommunicating members engaging in it.[186] Social pressure may dictate otherwise, but given the Court's strong tendency to side with religious institutions over individuals and given the reasons for the law's failure to stop the Church's Anti-Black Ban, such a ban and resulting lasting damage could happen again. But changing the law to prevent certain practices can change cultures, even within a religion.[187] The real question, in this case, is not whether it would work, but *should* and *can* the law restrict theologically-justified white supremacist practices?

2. Greater Equity Can be Achieved Through Reducing the Immense Power Imbalances Between Institutions and Individuals

Before arguing that the law can restrict theologically-justified white supremacist practices, I contend that it should. The Court abstaining from deciding which party to privilege in the presence of a massive power imbalance is essentially still unavoidably a discretionary choice that currently empowers the more powerful—the Church as an institution—party by default. Pushing back against a religious Anti-Black Ban is not a battle between religious freedom and the loss thereof. Instead, it is a battle between the right of an institution and individuals to be religiously autonomous. More specifically, it is a battle between a religious institution's right to use theology as a justification to discriminate based on race and a religious individual's right to practice their spiritual beliefs within their Church without being victims of discrimination. Some religious institutions are, of course, small, but in many instances, such as in the case of the Anti-Black Ban, the power imbalance between the church at issue and its individual members is immense.

With its vast resources and large and influential leadership, the Church can likely fight for and sustain its place in the American religious landscape with relative ease. The Church is a multi-billion dollar institution.[188] Throughout its history, the Church's leadership has been littered with powerful white American men, from a

183. 2 U.S.C.A. § 1311 (West).

184. *See Articles of Faith 12*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/scriptures/pgp/a-of-f/1?lang=eng (last visited Nov 9, 2022).

185. *See* Ertman, *supra* note 79, at 295.

186. *See Polygamy*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://newsroom.churchofjesuschrist.org/topic/polygamy (last visited Nov 9, 2022).

187. *See* Naomi Mezey, *Law As Culture*, 13 YALE J.L. & HUMAN. 35, 57 (2001) (outlining the symbiosis of law and culture).

188. *See* Ian Lovett & Rachael Levy, *The Mormon Church Amassed $100 Billion. It Was the Best-Kept Secret in the Investment World*, THE WALL STREET JOURNAL, (Feb. 8, 2020), https://www.wsj.com/articles/the-mormon-church-amassed-100-billion-it-was-the-best-kept-secret-in-the-investment-world-11581138011.

former presidential cabinet member[189] and prominent lawyers[190] to governors[191] and legislators.[192] While maintaining a public veil of partisan neutrality,[193] it has always been political influential, from its bloc voting impacting the balance of power between Whigs and Democrats in 1840s Illinois,[194] to successfully fighting the Equal Rights Amendment[195] and championing California's infamous anti-marriage equality Proposition 8.[196] Today, the organization's highest leadership bodies, the Quorum of the Twelve Apostles and the First Presidency (the very bodies with entire control over the implementation and rescinding of the Ban) contain a former State Supreme Court justice,[197] a former law clerk for the Watergate proceedings,[198] four former university presidents,[199] former lawyers, professors, and high-ranking

189. *See* John Dart, *Ezra Taft Benson, Leader of Mormons, Dies at 94: Religion: The church's president-prophet also served in Eisenhower's Cabinet as secretary of agriculture and was once known for his conservative politics*, LOS ANGELES TIMES, (May 31, 1994), https://www.latimes.com/archives/la-xpm-1994-05-31-mn-64245-story.html.

190. For example, Latter-day Saint Apostle J. Reuben Clark, former Undersecretary of State and in whose honor Brigham Young University's Law School is named. *See e.g., Mormon Legal History 1900-1960: J. Reuben Clark era: About & By J. Reuben Clark Jr.*, BYU L. LIBR. https://guides.law.byu.edu/JReubenClark (last visited Feb. 19, 2023).

191. For example, Brigham Young, who became the governor of the Utah Territory in 1850. *Brigham Young (1801-1877)*, PBS, https://www.pbs.org/wgbh/americanexperience/features/mormons-young/.

192. At one point former Church presidents John Taylor, Wilford Woodruff, Lorenzo Snow, and Joseph F. Smith were all members of the Utah legislature. *See* Paul Thomas Smith, *Taylor, John*, UTAH HISTORY ENCYCLOPEDIA, https://www.uen.org/utah_history_encyclopedia/t/TAYLOR_JOHN.shtml; Dean Jesse, *Woodruff, Wilford*, UTAH HISTORY ENCYCLOPEDIA, https://www.uen.org/utah_history_encyclopedia/w/WOODRUFF_WILFORD.shtml; Heidi Swinton, *Snow, Lorenzo*, UTAH HISTORY ENCYCLOPEDIA, https://www.uen.org/utah_history_encyclopedia/s/SNOW_LORENZO.shtml; Scott Kenney, *Smith, Joseph F.*, UTAH HISTORY ENCYCLOPEDIA, https://www.uen.org/utah_history_encyclopedia/s/SMITH_JOSEPH_F.shtml. Apostle Willard Richards served as the president of Utah's Senate. *See Our History*, UTAH SENATE, https://senate.utah.gov/about-the-senate/ ldschurchstanceonera (last visited Feb. 19, 2023).

193. *See Political Neutrality*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS NEWSROOM, https://newsroom.churchofjesuschrist.org/official-statement/political-neutrality/ ldschurchstanceonera (last visited Feb. 19, 2023).

194. *See* FAWN BRODIE, NO MAN KNOWS MY HISTORY: THE LIFE OF JOSEPH SMITH 267-68 (1945).

195. *LDS Church Stance on ERA*, UTAH STATE UNIV. LIBR., http://exhibits.usu.edu/exhibits/show/mormonsforera/ldschurchstanceonera (last visited Feb. 19, 2023).

196. *See* Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage,* THE NEW YORK TIMES, (Nov. 14, 2008), https://www.nytimes.com/2008/11/15/us/politics/15marriage.html.

197. Dallin H. Oaks, current First Counselor in the Church's First Presidency and next in line to be the prophet. *Oaks, Dallin H.*, BYU LIBR. http://archives.lib.byu.edu/agents/people/637 (last visited Feb. 19, 2023).

198. Apostle D. Todd Christofferson. *Elder D. Todd Christofferson*, ENSIGN COLL. https://www.ensign.edu/elder-d-todd-christofferson-june-2021 (last visited Feb. 19, 2023).

199. Apostle Jeffrey R. Holland and First Presidency member Dallin H. Oaks are both former presidents of Brigham Young University. *See Holland, Jeffrey R.*, BYU LIBR. https://archives.lib.byu.edu/agents/people/3065 (last visited Feb. 19, 2023); *Oaks, Dallin H.*, *supra* note 197. Apostle David A. Bednar and First Presidency member Henry B. Eyring are both former presidents of Brigham Young University-Idaho (formerly Ricks College). *See* Church News Archives, *David A. Bednar biography,* CHURCH NEWS, (Oct. 23, 2004), https://www.thechurchnews.com/2004/10/23/23237512/david-a-bednar-biography; *Henry B. Eyring*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/learn/henry-b-eyring?lang=eng (last visited Feb. 19, 2023).

business executives.[200] Beneath these leaders rank many other lawyers and business executives in leadership positions.[201] Outside of official Church leadership, loyal Church members hold congressional seats, governorships, senate seats, and federal judgeships. As of 2021, 86% of Utah's state lawmakers are members of the Church, while the state's Latter-day Saint population is only 60%.[202]

On the other hand, the individuals affected by the Ban were far less powerful. While some collective movements made powerful statements against the Ban,[203] no individual or even small group could compete with the Church's finances. No one individual challenging the ban held even close to as much political or social influence. None held any ecclesiastical power to make a difference, as no Black person has ever served in the Church's Quorum of the Twelve Apostles and the First Presidency. Without legal recourse, they were left to wait, hope, and pray for the Church to change its mind. This would likely be the case in the event of a similar future ban or other religiously-justified act of white supremacy.

3. Religious Freedom is Highly Vulnerable to Bad Faith Abuse

While later leaders of the Church may have naively yet sincerely believed that the Anti-Black Ban had divine origins, its history indicates a reasonable likelihood that those who initiated the Ban did so in bad faith. The Court has declared that invoking religious freedom in bad faith as a defense is legally impermissible.[204] But establishing intent and malintent is hard to prove, especially when the Court gives so much deference to church autonomy over its adoption of doctrine. Until this year, the Church used the Affordable Care Act's religious exemption not to have to cover birth control for all employees,[205]

200. Apostle Quentin L. Cook is a former attorney with a JD from Stanford Law School. *See Quentin L. Cook*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/learn/quentin-l-cook?lang=eng (last visited Feb. 19, 2023). First Presidency member Henry B. Eyring is a former Stanford Business School professor. *See Henry B. Eyring*, *supra* note 199. Apostles Ronald A. Rasband, Neil L. Andersen and Gary E. Stevenson are all former corporate Vice-Presidents or Chief Operating Officers. *See Ronald A. Rasband*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/learn/ronald-a-rasband?lang=eng (last visited Feb. 19, 2023); *Gary E. Stevenson*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/learn/gary-e-stevenson?lang=eng (last visited Feb. 19, 2023). There has never been a Black member of these leadership bodies, and only two have been persons of color. The other 97 have all been white men.

201. For links to each leader's biographical information, *see General Authority Seventies*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/learn/quorum-of-the-seventy?lang=eng (last visited Feb. 19, 2023).

202. *See* Lee Davidson, *Latter-day Saints are overrepresented in Utah's Legislature, holding 9 of every 10 seats,* THE SALT LAKE TRIBUNE, (Jan. 14, 2021), https://www.sltrib.com/news/politics/2021/01/14/latter-day-saints-are/.

203. *See e.g.,* Lowery & Bogage, *supra* note 147; *see also* BROOKS, *supra* note 3, at 99, 145.

204. *See* Ballard, 322 U.S. 78.

205. *See* Universe Staff, *Instagram page sparks outcry on DMBA's birth control coverage*, THE DAILY UNIVERSE, (Apr. 7, 2022), https://universe.byu.edu/2022/04/07/church-insurances-failure-to-cover-birth-control-even-as-a-medical-necessity-sparks-outcry-calls-for-change; Megan Zaugg, *DMBA expands policy to include birth control coverage*, THE DAILY UNIVERSE, (Jan. 26, 2023), https://universe.byu.edu/2023/01/26/dmba-expands-policy-to-include-birth-control-coverage/.

despite it doctrinally accepting contraception.[206] The Church has also recently joined the Catholic Church in lobbying lawmakers to strengthen clergy-penitent confession exemptions to mandatory abuse reporting laws, despite clergy-penitent confidentiality being a policy but not a doctrinal requirement for members of the Church.[207] The invocation of religious freedom is currently highly vulnerable to bad faith abuse, and such abuse harms religion's standing in American culture.

4. A Critical Race View of Individual Black Religious Freedom Demands Greater Equity

It is time for American religious freedom jurisprudence to do more to protect Black Christians instead of upholding traditional white religious norms at their expense. A typical response to the Anti-Black Ban is that churches should be allowed to do anything they want theologically, and if people do not like that, they should find a different religion. Specifically, such a response seems to mean that Black members of the Church who believe they should be entitled to prohibited Church rites and rituals should have gone and started a similar movement where they are allowed to participate, or simply trust that they can still receive salvation after death without completing the prohibited rites. But this argument ignores the reality of religious freedom. Faithful members of the Church believe that the Church of Jesus Christ of Latter-day Saints is the only authorized church of God on the earth.[208] This belief is inseparable from the corresponding belief that it is only by participating in the complete set of Church rites and rituals that one achieves salvation.[209] Believing members of the Church hold these concepts deeply in their souls. Giving believing Black members of the Church no alternative but to change religions would force such individuals to renounce their beliefs, or at least to ignore them, and pursue a religious practice that they deeply feel is not the true path to salvation.

Moreover, asking that Black members of the Church to simply trust that they can still receive salvation after death despite not receiving the rites at issue is equivalent to the government prescribing religious beliefs. But per my discussion of Establishment Clause jurisprudence in Part I, that is not the government's role. Both of these options for Black members interfere with their individual right to follow their spiritual convictions and thus is the very definition of encroachment on religious freedom.

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206. *See Birth Control*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/learn/first-presidency?lang=eng (last visited Nov 9, 2022); *Quorum of the Twelve Apostles*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/manual/gospel-topics/birth-control?lang=eng (last visited Nov 9, 2022).

207. *See* Jason Dearen & Michael Rezendes, *Churches defend clergy loophole in child sex abuse reporting*, AP NEWS, (Apr. 7, 2022), https://apnews.com/article/sex-abuse-catholic-church-mormon-5d78129a2fe666159a22ce71323f6da3; *Reporting to Government Authorities*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/manual/general-handbook/32-repentance-and-membership-councils?lang=eng&para=title_number13-p448#title_number13 (last visited Nov 9, 2022).

208. *See Priesthood*, *supra* note 104.

209. *See Ordinances*, *supra* note 105.

Further, the Church's First Presidency and Apostles control official doctrine and related policies.[210] Since the Church's founding in 1830, all of the apostles who led the Church have been men, only two have been men of color, and none have been Black.[211] The Church has never stopped Black members of the Church from donating their time, talents, and money.[212] But for a significant portion of its history, the Church prevented them from freely exercising their spiritual beliefs.[213] As author and scholar James H. Cone offers: "White theologians do not normally turn to the black experience to learn about theology," and this was the case during the Anti-Black Ban. Legally sustaining or ignoring instances of institutional Christian white supremacy like the Ban normalizes religious decision-making forcibly staying out of the hands of Black Christians.

III. A MODERN ORIGINALIST SOLUTION: CONSTITUTIONALLY STRENGTHENING INDIVIDUAL OVER INSTITUTIONAL RELIGIOUS FREEDOM

The lens of living constitutionalism could quickly provide a remedy for solving constitutional questions of victims of a religious institution's policy like the Church's Anti-Black Ban. The living constitutionalist anti-subordination theory[214] of the Equal Protection Clause employed by the Warren Court[215] was more amenable to providing a means of assistance to racially persecuted minorities in private disputes. In recent decades, the Court has steered away from this approach in favor of a robust requirement that Fourteenth Amendment intervention is only appropriate to prevent the state (as opposed to private actors) from discriminatory action.[216] The flexibility embodied in living constitutionalism would allow a Court adopting this theory to attack the Fourteenth Amendment's state action requirement. Attacking the state action requirement would also let private parties, like racially victimized church members, turn to the Court for help against their private church institutions. There has been significant scholarship discussing the potential breakdown of the Fourteenth Amendment's state action requirement,[217] but such a shift happening any time soon is highly unrealistic because we currently have a staunch originalist, not living constitutionalist, Court.[218]

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210. *See* Tanner, *supra* note 97.

211. *See* Josh Furlong, *Elder Ulisses Soares called to serve as first Latin American apostle in LDS Church*, KSL.COM, (Mar. 31, 2018), https://www.ksl.com/article/46291472/elder-ulisses-soares-called-to-serve-as-first-latin-american-apostle-in-lds-church.

212. *See e.g.,* MY LORD, HE CALLS ME: STORIES OF FAITH BY BLACK AMERICAN LATTER-DAY SAINTS 173 (Alice Faulkner Burch eds., 2022).

213. *See* BROOKS, *supra* note 3.

214. *See generally* Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUBLIC AFFAIRS 107 (1976).

215. *See e.g.*, Hernandez v. State of Tex., 347 U.S. 475, 478 (1954).

216. *See* Flagg Bros., 436 U.S., at 149.

217. *See e.g.,* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 342 (1949); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 9-44 (1994).

218. *See* Harvard Law School, The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes, YouTube (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg?t=510.

This Part of the Article proposes that supporting the religious freedom of individuals in situations like the Anti-Black Ban is achievable. Section A contains the core of my argument, explaining how originalism can theoretically and constitutionally provide a solution. In Section B, I address several remaining administrative questions.

A. Modern Originalism's Solution

In this Section, I will offer an originalist framework that could provide a theoretical recourse for victims of institutional religious discrimination. I will (1) begin with a brief look at the basics of originalism and its modern evolution and (2) lay out how Professor Jack Balkin's originalism could theoretically solve the problem at issue.

1. Modern Originalism

Originalism, the legal interpretation theory which posits that interpreters of the Constitution's text are bound by the meaning of a legal text fixed at the time of its ratification, comes in several different flavors. Still, today the most commonly used is original public meaning originalism.[219] Originalists are deeply concerned with constraining constitutional interpreters from bending the text to mean whatever they want it to mean.[220] Public meaning originalists hold that the semantic meaning most generally understood by the public at the time of a text's ratification should be the controlling meaning of the text as applied to current cases.[221] According to its adherents, this process provides the best evidence of the original intent of a text's drafter.[222] It depoliticizes the judiciary's actions, as those democratically appointed to the legislature have the final say on a law's meaning through their choice of textual language.[223]

In weighing a hypothetical case regarding the Anti-Black Ban, the current originalist Court would likely reason that the original public meaning of the Free Exercise Clause referred to religious institutions like churches and, thus, would cite religious freedom in ruling against victims of the ban. Some originalists purport that democracy is in danger if religious institutions disintegrate.[224] Hence, mainstream originalism is unlikely to provide an answer for individuals looking for recourse against their church for racially discriminating against them in the name of theology.

But modern originalism has evolved. There is immense difficulty in determining a singular original public meaning using the many different dictionaries, historical commentaries, and other sources that abound.[225] Were there multiple public

219. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1965 (2021).

220. *See id.* at 1964.

221. *See id.* at 1991.

222. *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1285 (2020).

223. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 52 (2006).

224. *See e.g.*, William P. Barr, U.S. Attorney General, Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame (Oct. 11, 2019) ("The Framers' view, free government was only suitable and sustainable for a religious people.").

225. *See* Saul Cornell, *New Originalism: A Constitutional Scam*, DISSENT, (May 3, 2011), https://www.dissentmagazine.org/online_articles/new-originalism-a-constitutional-scam.

meanings of the text at the time of the Constitution's ratification? Regardless, only a very small portion of the population was even allowed a say.[226] Thus, originalists make just as many discretionary choices in what they use to determine a text's original public meaning as living constitutionalists use to determine how the text matches current needs. Some scholars have also shown that the Supreme Court's originalists regularly pick and choose their interpretive tools and textual selections to justify the outcome they want.[227] Although many originalists may traditionally be thought of as being strictly favorable of religious institutions, modern originalism has become more flexible than its ancestor. Even renowned originalist Justice Scalia self-identified as a "faint-heart" originalist, allowing some flexibility of interpretation when necessary.[228] Scalia respected longstanding precedent even when it conflicted with originalist reasoning and was skeptical of absurd and impractical originalist interpretation.[229] The under-determinacy of the Constitution's textual meaning requires that interpreters make discretionary choices when applying it to actual cases. Hence, even under the umbrella of originalism, a more modern and flexible originalist approach is available.

2. Constitutionally Privileging Individual over Institutional Religious Freedom Through Balkin's Originalism

Yale Law School's Professor Jack Balkin offers a more flexible originalist framework while crucially still honoring originalism's two most fundamental principles—the original public meaning of the Constitution's text and judicial restraint.[230] Balkin argues that through the lens of originalism, one can see that the document's text and its original public meaning indicate that its authors used language to establish either concrete rules, legal standards, or general principles.[231] He argues that it is the text itself, not some living constitutionalist distortion, that indicates when the framers wanted to convey a fixed, determinate rule, a standard to help decision-makers in choosing between a limited set of options, or principles to guide interpreters to applying the Constitution to new situations.[232]

In this sense, an example of the text spelling out a concrete rule would be Article II's requirement that the President is at least 35 years old.[233] A living constitutionalist might argue the framers were trying to indicate that the president is mature and that since Americans' average life expectancy has dramatically increased since the 1790s, the meaning behind the number 35 is more important. Originalists would reject this idea, and Balkin's originalism would argue that given the relative clarity of the text, it is doubtful that the framers meant this simple clause to be anything but a concrete

226. *See* Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 518 (2011).
227. *See* Krishnakumar, supra note 222, at 1291.
228. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 12 (2006).
229. *See id.*
230. JACK M. BALKIN, LIVING ORIGINALISM 3 (2011).
231. *See id.* at 6.
232. *See id.* at 6-7.
233. *Id.* at 6.

rule. Accordingly, Balkin's originalism would constrain judges to rule against any attempts to circumvent it.

Balkin's originalism holds that the Constitution at times uses more vague textual standards rather than concrete rules.[234] He offers the Sixth Amendment right to a speedy trial as an example.[235] The text does not define what "speedy" means.[236] But judges are constrained from straying outside the range of original public meanings of the word, so most interpretations will likely resemble each other. Principles found in the text of the Constitution are far more abstract.[237] Whereas rules and standards anticipate a fixed meaning or range of meanings, principles are deliberately open to apply to a wide range of options, including those not yet encountered by the framers.[238]

Principles of this kind do not have to be explicit in the text. [239] The principle of separation of powers provides an example of this. Nowhere in the text does the term "separation of powers" Appear. However, the text spells out concrete rules and offers some vague standards to establish and accomplish the principle.[240] Balkin's idea is not to be confused with living constitutionalism; it is still the text that indicates whether something is a rule, standard, or principle.

Per Balkin's originalism, does the text of the Free Exercise Clause indicate whether religious freedom is a rule, a standard, or a principle? A religious freedom rule would be concrete and relatively straightforward. If it were a rule, it would likely say something more like "Congress shall make no law limiting the theological autonomy of religious institutions." If it were a standard, it would likely say something to the effect of "the right of the religious institutions to be free from unreasonable religious abridgment," indicating the direction judges should take the jurisprudence but implying a sort of range limited to the various meanings of abridgment. Congress has tried to supplement religious freedom law with a standard, through RFRA's requirement that laws do not "substantially burden" religious practices.[241] But the text of the Free Exercise Clause is neither a rule, nor a standard under Balkin's originalism.

The Free Exercise Clause is a textual *principle* and should therefore be interpreted and applied as such. Jurists have supposed what it means, but as outlined in Part I, the range of meaning is wide. The text does not define the free exercise of religion in the context of institutional versus individual freedom. Courts have resorted to trying to parse the words of the clause as if it were a concrete rule with definite terms, but the wording is so vague that it falls more appropriately into the principle category. Scholars like Ryan Doerfler posit that one can derive the meaning of a given

234. *See id.* at 6-7.
235. *Id.*
236. U.S. CONST. amend. VI.
237. *See* BALKIN, *supra* note 230, at 7.
238. *See id.* at 6-7.
239. *See id.* at 24.
240. *See* Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 352 (2016).
241. 42 U.S.C. § 2000bb-1 (West).

legal text according to its context.[242] But how is one to know how much information, textual or otherwise, to include when evaluating a text's context and what to leave out? One must draw the line at some point, and interpreters must choose how to derive the text's context.

Let us explore the under-determinacy and, thus, the *principle*-like nature of the Free Exercise Clause a little more. It follows from the Free Exercise Clause's under-determinate text that deciding whether to privilege an institution's religious freedom to discriminate or an individual's religious freedom to worship without discrimination requires guiding principles. While most jurists might agree that there are some "easy" cases to decide, the text does not tell us how to handle different cases explicitly, so even seemingly straightforward cases still merely consist of widespread agreement concerning which discretionary interpretive choice should be made. The clause does not define a religious belief.[243] The Court has done that through its own discretionary choices of how to interpret a vague textual principle.[244] Does a constitutionally protected religious belief have to fall within a tax-exempt church's canonical scripture? Does it have to be steeped in tradition, or are people and institutions free to evolve and explore new religious ideas? If non-theistic movements like Buddhism count, do others like astrology? Do interpreters have to verse themselves on a religion's official texts? If someone starts a diverging movement within an already established and recognized religion, at what point should the law no longer hold members of the new entity to the doctrines of the old? And what if a mother religion does not officially outlaw breakoff cells, meaning clashing religious doctrines coexist within the same entity? The clause does not offer any guidance here, nor should we expect it to, because it is a Balkin constitutional principle, not a concrete rule or semi-vague standard.

Accordingly, what principles of religious freedom does the Constitution enshrine, explicit or implicit? As I discussed in Part I, the principles offered in the text of the Establishment and Free Exercise Clauses are that the government should not generally be in the business of running a state religion. Citizens should generally be protected from the government curtailing their religious practices and beliefs. But what principles govern the battle between individual and institutional First Amendment religious freedom in the private sphere? Making this determination requires evaluating the following broadly appropriate constitutional principles (i) the protection of individual rights and (ii) the prevention of government interference with private interests.

242. *See generally* Ryan D. Doerfler, *Late-Stage Textualism*, 2021 Sup. Ct. Rev. 267 (2021).

243. U.S. CONST. amend. I.

244. *See e.g.*, United States v. Seeger, 380 U.S. 163, 166 (1965) (defining a religious belief as "sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God. . . . Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in relation to a Supreme Being' and the other is not.").

a. The Constitutional Principle of Protecting of Individual Rights

The protection of individual rights is a principle that is deeply embedded in the Constitution and, thus, is reflected in the Free Exercise Clause. While traditional First Amendment jurisprudence favors institutions, mirroring a more hierarchal mode of determining doctrine within organized religion, from the preachers down to the congregants, the Constitution does not mention churches or religious organizations. Still, its authors included more than enough principles of individual protection to support an interpretation of the Constitution that prioritizes individual religious autonomy. The Free Exercise Clause is too vague and principle-like to be appropriately read as empowering the government to favor the more hierarchal model over a more individual model (still within organized religion), where personal doctrinal determinations are made by individual congregants. Thus, a key principle of constitutional religious freedom is that designating the church as the sole dictator of doctrine, over individual members of the Church, is inappropriate. Much of the rest of the Constitution can apply to organizations, like freedom of speech[245] and the right against unreasonable searches,[246] and some institutions, like the press, are specifically named.[247] But of what actual use are constitutional rights if not to protect the country's individual citizens? What use are protections against unreasonable seizures, the right to a jury trial, and protections from cruel and unusual punishment if not to keep individuals safe from government tyranny? What use is the Fourteenth Amendment's equal protection clause if not to promote equality for all individual citizens, not just white people or majority white churches? Even Scalia's reasoning in *Heller* outlines a particular originalist view that the Second Amendment confers a right to bear arms that is deeply individual.[248] Given the framers' consistent choice to bestow power to "the people," instead of explicitly referencing churches or other institutions, individual protection is a principle deeply rooted in the Constitution.[249]

The modern originalist Court also seems to read the principle of individualism in the Constitution's Free Exercise Clause. In *Employment Division v. Smith*, the Court held that a law affecting two Native Americans' religious practices did not have to contain a religious exemption carve-out.[250] *Smith* cuts against supporting the individuality of a religious case, as the Court reasoned that individual religious beliefs could not supersede generally applicable neutral laws.[251] Going forward, religious individuals would be required to meet a higher the burden of proof to show that a religious practice should be allowed despite a law limiting it. But in the wake of *Smith*, Congress nearly unanimously passed the Religious Freedom Restoration Act, which requires strict scrutiny when evaluating Free Exercise Clause issues.[252] The Supreme

245. U.S. CONST. amend. I.
246. U.S. CONST. amend. IV.
247. U.S. CONST. amend. I.
248. *See* D.C. v. Heller, 554 U.S. 570, 595 (2008).
249. *See e.g.*, U.S. CONST. amend. I; U.S. CONST. amend. II.
250. *See* Smith, 494 U.S., at 872-73.
251. *See id.*
252. 42 U.S.C.A. § 2000bb-1 (West).

Court upheld RFRA as applicable to the federal government,[253] and its current originalist-leaning iteration appears likely to overturn *Smith* when faced with a suitable case.[254]

b. The Constitutional Principle of Preventing Government Interference with Private Interests

The constitutional principle of preventing governmental interference with private rights is broader than merely limiting interference by Congress. This is true when considering the First Amendment, especially in the context of its aforementioned under-determinacy. For example, the principle holds that it is the government as a whole, not just Congress itself, that cannot punish people for speaking out against it.[255] It follows that the same principle applies to the First Amendment's religious protections, meaning the Constitution shields an individual's religious freedom from interference by the government as a whole.

But is the application of the more significant principle of preventing governmental interference with private rights, such as First Amendment religious freedom rights, dictated by the contributory principle of governmental action only? This principle, taken alone, would appear to provide an easy way for an uninterested Court to dismiss situations like an Anti-Black Ban, which facially seems to be a dispute between private entities only, void of governmental action. However, to do so would be to ignore the other contributory principle of similarly preventing governmental *inaction.* The Fourth Amendment demands that government officials seek a warrant, in most cases, before performing a search or seizure.[256] The Fifth and Fourteenth Amendments require the government to provide citizens with due process of law proactively.[257] The Sixth Amendment requires the government to provide many criminal defendants with a speedy, public, jury trial and assistance of counsel.[258] Generally, it is government inaction rather than action that violates these amendments.[259]

Of course, taking this or other constitutional principles to the extreme to justify combatting any and all government inaction would be inappropriate and potentially dangerous. But one can reasonably read the principle behind the Free Exercise Clause's as giving Congress the responsibility to preserve the right of individuals to practice their respective spiritual convictions, by preventing interference by governmental action or inaction alike.

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253. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 419-20 (2006).

254. *See* Ian Huyett, *How to Overturn Employment Division v. Smith: A Historical Approach*, 32 REGENT U. L. REV. 295, 296-97 (2020).

255. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 53-54 (2010).

256. *See* U.S. CONST., amend. IV.

257. *See* U.S. CONST. amends. V, XIV.

258. *See* U.S. CONST., amend. VI.

259. For purposes of the respective amendments, constitutional violations stem from failing to seek a warrant or to provide notice and a hearing, etc., when required to do so.

Balkin's originalist theory provides that the framers wrote flexibility into the Constitution by textually designating certain doctrines as principles rather than concrete rules.[260] The First Amendment's right to the free exercise of religion is such a principle, as are the solid constitutional principles of protecting individual rights and preventing government interference through non-feasance with private interests. Combining these principles allows an originalist interpreter to uphold constitutional freedom of religion by favoring an individual's right to religious freedom over that of the institution to which they belong. In the case of religiously-justified acts of institutional white supremacy, such as the Anti-Black Ban, this would mean privileging Black members' right to worship without being discriminated against over the Church's right to discriminate in the name of religion.

B. The Administrability of Balkin's Originalism as Potential Recourse for Victims of Religious White Supremacy

Can traditional Free Exercise Clause jurisprudence swing in favor of individual worshipers? Decades of jurisprudence can be incorrectly seen as sacred and unchangeable. Whether or not textualists and purposivists acknowledge the Constitution's inherent under-determinacy, those who openly admit that their preferred flavor of legal interpretation requires discretionary choice-making often claim that their way is better or the right way to interpret the law. In this context, I use the word "discretionary" not to indicate a lack of reasoning but rather to signify that these choices are made by the interpreter when other reasonable options that the interpreter is free to make, and that are not predetermined by a higher law or rule are available. Strict textualists and purposivists use their chosen interpretive theories because they believe their way best encapsulates how the Court should interpret and apply the Constitution. Traditional constitutional jurisprudence can help us forget that even textual interpretations are just products of discretionary choices. Those who feel harmed by the prevailing chosen interpretation can feel powerless to improve their position through the courts, as the issue seems determinate. The merits of *stare decisis* aside, the nature of discretionary choice-making is that other valid options are available. So constitutional issues are only "settled" when future jurists choose not to apply different interpretations. The current Court has not been shy about citing originalism and tradition as justification for overturning long-held precedents.[261] Originalism presents a path to improved legal protections for individual minority worshipers.

Could my proposed solution of using Balkin's originalism lead to a slippery slope toward rendering religious institutions redundant? If the institutions are weakened in favor of individuals, does that weaken freedom of religion for individuals who want to follow the institution? Or would Balkin's originalism threaten institutions too much, making them unrecognizable and religiously irrelevant? Freedom of religion issues can be complicated and emotionally charged for those involved. Slippery slope arguments usually abound. Deciding such cases can be complex, and there might be

260. *See* BALKIN, *supra* note 230, at 6.
261. *See e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

other reasons, policy or otherwise, to side with an institution's freedom of religion over an individual's. But institutional religious freedom is already not absolute. Religious institutions are not free to commit crimes in the name of religion.[262] They are theoretically not free to use bad faith justifications to qualify for exemptions.[263] And per *Bob Jones University*, religious educational institutions can lose their tax-exempt status for going against generally applicable public policy.[264] Limiting a religious institution's right to harm its members through white supremacy is not dissimilar, and a detailed balancing test helps reduce the possibility of a slippery slope.

How should installing such a balancing test help restrain courts from falling down a slippery slope toward religious institutional redundancy? First, it gives courts a framework to consider the potential implications to affected parties, including religious institutions. Second, it offers a route for jurists to reason, in written opinions, how limited their holdings in favor of individuals should be. Third, the balancing test allows courts to focus on targeting bad faith religiously-justified policies or doctrines while protecting many religious doctrines offered in good faith. Finally, religious institutions are often in a far better financial and political position to remain stable in the wake of unfavorable court decisions. My solution offers courts an opportunity to consider when a religious institution is potentially less stable.

How could the Court practically approach this issue with Balkin's originalism as its backing? My argument does not mean that an individual's right to religious freedom should always trump that of the institution to which they belong. My argument is not that an originalist interpretation of the Free Exercise Clause should ignore religious institutions and always focus on individual freedom of worship. Instead, such an interpretation could empower the Court to protect individuals at least as much as it protects their institutions. The Court could use this originalist framework to justify creating a balancing test. Thus, it could appropriately strike down instances of religiously-justified white supremacy without disintegrating the role of institutional religion in society (another originalist tenet).[265] Such a test could require courts to balance the following factors: the free religion interests of the individual, the free religion interests of the individual, the power imbalance between the two parties, the potential for bad faith justifications, and the harm caused to interested parties by favoring one side over another.

CONCLUSION

For the foregoing reasons, the First Amendment Free Exercise Clause's underdeterminacy supports the use of Balkin's originalism as a robust, constitutionally valid framework for strengthening an individual's right to exercise their religion without being subjected to theologically-justified white supremacy by any religious institutions they belong to, such as in the case of the Anti-Black Ban.

262. *E.g.,* Reynolds v. United States, 98 U.S. 145 (1878).
263. *See* United States v. Ballard, 322 U.S. 78 (1944).
264. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
265. *See* Barr, *supra* note 224.