

# Michigan Law Review

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Volume 121 | Issue 1

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2022

## Disparate Discrimination

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### Recommended Citation

Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1 (2022).

Available at: <https://repository.law.umich.edu/mlr/vol121/iss1/2>

<https://doi.org/10.36644/mlr.121.1.disparate>

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# DISPARATE DISCRIMINATION

Leah M. Litman\*

*This Article explains and analyzes a recent trend in the Supreme Court's cases regarding unintentional discrimination, where the argument is that a law has the effect of producing a disadvantage on members of a particular group. In religious discrimination cases, the Court has held that a law is presumptively unconstitutional if the law results in a comparable secular activity being treated more favorably than religious activity. Yet in racial discrimination cases, the Court has said the mere fact that a law more severely disadvantages racial minorities as a group does not suffice to establish unlawful discrimination.*

*The two tracks for unintentional discrimination claims can be understood through the lens of political process theory. One part of political process theory maintains that courts should be skeptical of laws that negatively affect discrete and insular minorities who may be politically powerless and face prejudice. One reason the Court more carefully scrutinizes laws that burden conservative, (often) Christian religious groups may be that the Court views those groups as socially powerless because their views no longer command majority support and because their views are not treated with the respect the Court thinks they deserve. And the Court's decisions have the effect of redistributing power to or reinforcing power in the groups the Court believes to be socially powerless.*

*Identifying the jurisprudential worldview that may plausibly drive these trends helps to identify the potential implications and assess the merits of the new doctrinal approach that the Court has taken in (some) antidiscrimination cases. The Court's new approach to religious discrimination claims has some virtues; in particular, the Court is probably right to consider facts from the private sphere, such as a group's economic or social power, in deciding the appropriate scope of judicial review. But the selectivity with which the Court has applied this approach, as well as the Court's odd assessments of various groups' power, has resulted in a problematic jurisprudence of conservative victimization that judicially protects backlash against advances in equality and antidiscrimination law.*

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## INTRODUCTION

There are currently two tracks for unintentional discrimination claims.<sup>1</sup> Say a plaintiff brings a constitutional religious discrimination claim. That plaintiff would succeed if they showed that a law had the effect of treating a comparable secular entity more favorably than the law treated the plaintiff's religious exercise. But a racial minority who brings a race discrimination claim must show more. The plaintiff bringing a race discrimination claim would not win even if a law resulted in greater burdens on racial minorities as a group; nor would the plaintiff win if a law resulted in a comparable white individual being treated more favorably than a person of color.

These are the two tracks for so-called unintentional discrimination claims—claims that do not allege a government decisionmaker intentionally sought to disadvantage a particular group. The two tracks appeared in the Supreme Court's October 2020 Term. In *Brnovich v. Democratic National Committee*, the Court held that laws resulting in racially discriminatory effects do not necessarily violate the Voting Rights Act.<sup>2</sup> (The Court had previously held such laws do not violate the Constitution.)<sup>3</sup> The Court went out of its way to say that, in addition to showing that a law results in a significant disparity between different racial groups (that is, a disparity between all Black voters on the one hand and all white voters on the other), the plaintiffs had to show that the burden imposed by the law was severe, that the law “departs from . . . standard practice,” and that the law does not serve a legitimate, valid state interest.<sup>4</sup> Yet a little more than a week before *Brnovich*, the Court concluded that even where a religious entity has not shown that a law results in religious groups being treated worse than nonreligious groups, the law is still subject to the most exacting judicial scrutiny and, as a result, likely unconstitutional—in part because the law has the potential to produce discriminatory effects on religious entities, even if it has not actually done so.<sup>5</sup>

The dichotomy between the Court's racial discrimination and religious discrimination cases is even more stark with respect to the coronavirus cases the Court decided on the shadow docket during its October 2020 Term. (The shadow docket refers to the set of orders and occasional opinions that the justices issue without full briefing and oral argument, often disposing of requests

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1. See David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. 1629 (2022); cf. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (outlining two tracks of sentencing for life-or-death sentences).

2. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

3. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

4. *Brnovich*, 141 S. Ct. at 2338–40.

5. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878–79 (2021).

for extraordinary relief, such as stays of lower court opinions or injunctions.)<sup>6</sup> Many of these cases fell into two categories—the first were religious liberty challenges to public health measures designed to contain the spread of COVID-19,<sup>7</sup> and the second were voting rights challenges to restrictions that allegedly increased voters' risk of exposure to the virus.<sup>8</sup>

In the cases on religious liberty, the Court adopted a standard that is more favorable to plaintiffs. The Court held that a plaintiff makes out a presumptive case of unconstitutional discrimination if a law or policy results in “any comparable secular activity” being treated “more favorably than religious exercise.”<sup>9</sup> Under this standard, plaintiffs do not have to show that a law or policy treats religious entities as a group worse than secular entities or that a law or policy results in greater burdens on religious activities than nonreligious ones. All plaintiffs must establish is that a law or policy leads to a comparable secular activity being treated more favorably than religious activity.<sup>10</sup> Part of what makes this new standard so striking is how broadly the Court has defined “comparable” or “similarly situated” secular activities. It has equated, among other things, outdoor “camp grounds” with in-home gatherings for religious exercise, asserting that the government cannot permit people to gather at camp grounds if it prohibits in-home religious gatherings because the two activities pose a similar risk of COVID-19 transmission.<sup>11</sup> But if outdoor camping and indoor at-home gatherings are comparable for purposes of COVID-19 transmission, then the universe of secular activities that courts would treat as comparable to religious activity is very large and includes many activities

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6. See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124–25 (2019); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

7. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (mem.); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (mem.); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (mem.); *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020) (mem.).

8. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (mem.); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (mem.).

9. *Tandon*, 141 S. Ct. at 1296 (emphasis omitted).

10. *Cf. id.* at 1297 (“California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time.”); *id.* at 1298 (Kagan, J., dissenting) (accusing the Court of requiring “that the State equally treat apples and watermelons”); *Roman Cath. Diocese*, 141 S. Ct. at 66 (“[T]he list of ‘essential’ businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.”).

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

that may not be all that comparable. And if a law cannot regulate religious activity if it fails to regulate not-all-that comparable secular activity, then many laws will be vulnerable to constitutional challenges.

The Court does not use anything like that standard in racial discrimination cases. In racial discrimination cases, plaintiffs must show, among other things, that a law results in racial minorities, as a group, being treated worse than whites as a group—not that people of color are treated worse than a particular subset of comparable white individuals.<sup>12</sup> And in constitutional cases, plaintiffs must show that government officials intended to disadvantage racial minorities, in addition to showing that a law results in greater disadvantages on racial minorities.<sup>13</sup>

Were the Court to use the standard from religious discrimination cases in racial discrimination cases, the voters who sought expanded access to absentee voting during COVID-19 would likely have prevailed.<sup>14</sup> All they would have needed to show was that a state allowed some white voters (such as elderly voters or voters with certain health conditions) to vote absentee but did not provide the same opportunity to racial minorities, who were comparably situated with respect to the state's interest in the prevention of fraud.<sup>15</sup> In part because of the low incidence of fraud in absentee voting, as well as how broadly the Court has defined “comparable” groups in the religious discrimination cases, that showing would not have been particularly difficult to make.<sup>16</sup> Or consider how the new religious discrimination standard would work in the employment or housing context, two areas of law that prohibit some instances of unintentional discrimination.<sup>17</sup> Using the religious discrimination standard, a plaintiff would be able to succeed on an employment discrimination or fair housing claim if they could show that a single, somewhat-comparable white employee or a single, somewhat-comparable white tenant was treated better than a racial minority (even if unintentionally).<sup>18</sup>

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12. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339, 2344–45 (2021); *see also infra* Section II.A.2 (discussing coronavirus voting rights cases where the Court ignored district court findings that voting restrictions would have an adverse effect on racial minorities).

13. *Washington v. Davis*, 426 U.S. 229, 239, 244–45 (1976); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

14. *See* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2451–53, 2458 (2021).

15. *See infra* text accompanying notes 103–107 (questioning whether the Court actually applies this part of the standard in religious discrimination cases).

16. BRENNAN CTR. FOR JUST., *DEBUNKING THE VOTER FRAUD MYTH* (2017), [https://www.brennancenter.org/sites/default/files/analysis/Briefing\\_Memo\\_Debunking\\_Voter\\_Fraud\\_Myth.pdf](https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf) [perma.cc/K2SK-HHRG].

17. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1570 (2019).

18. While some doctrines in antidiscrimination law turn on plaintiffs identifying a comparator, they largely do so in order to ascertain whether there was intentional discrimination. *See infra* text accompanying notes 92–93, 126–128.

This Article offers one theory that can explain the Court's differential treatment of religious discrimination and racial discrimination claims. It does so not to make a definitive claim about what is actually psychologically motivating the justices. Instead, it offers an account that can plausibly explain the trajectory of the Court's cases and predict where they may be headed. It tries to understand the two tracks of unintentional discrimination claims by way of a comparison and contrast to political process theory, the influential theory that was supposed to provide a blueprint for judicial review. Political process theory generally recommends that courts adopt a deferential form of judicial review except in certain cases, including those in which a law affects a disfavored minority.<sup>19</sup> From its origins, courts and scholars understood the theory to call for especially close judicial scrutiny of laws and policies that negatively affect racial minorities.<sup>20</sup> After all, racial minorities have historically been excluded and disadvantaged by the political process, and for various reasons, they have found it difficult to form successful coalitions in the political process and to enact their preferred policies into law.<sup>21</sup>

It has become passé to note that the modern Court does not follow that aspect of political process theory.<sup>22</sup> The Court affords the same degree of judicial scrutiny to laws disadvantaging white individuals as it does to laws disadvantaging racial minorities.<sup>23</sup> Based on these cases and others, scholars have surmised that the Court has not just rejected political process theory but perhaps even inverted it by providing greater protection to majoritarian groups, or groups that are politically powerful, than to historically disadvantaged minority groups.<sup>24</sup>

But there is another, albeit related, way of understanding the dynamic in the Court's treatment of unintentional religious discrimination claims in particular. One theory that could explain these cases would be that at least some of the justices believe certain religious groups, specifically conservative, (often) Christian groups, are socially powerless and subject to rampant discrimination, particularly in the private sphere. That is, the Court might believe that

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19. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 747 (1991).

20. See, e.g., ELY, *supra* note 19, at 135 (pointing to “how our society has treated its black minority (even after that minority had gained every official attribute of access to the process)”).

21. *Id.*

22. See, e.g., Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013); Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427 (2017); Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111.

23. Siegel, *supra* note 22, at 31–38.

24. *Id.* at 9 (“Today, courts reviewing equal protection challenges to facially neutral laws brought by members of minority groups proceed under law that directs judges to defer to representative government, while courts reviewing equal protection claims brought by members of majority groups strictly scrutinize challenges to affirmative action.”); Tang, *supra* note 22, at 1430–31 (arguing that the Court has “afford[ed] special protections via underdetermined constitutional provisions to politically powerful entities that are able to advance their interests full well in the democratic arena” (emphasis omitted)).

conservative Christians face a greater risk of social exclusion and subordination than racial minorities do. That belief could explain why the Court would adopt a presumption that laws resulting in some disadvantage on some religious groups are the product of unconstitutional discrimination, but laws that result in greater burdens on racial minorities are not—because prejudice and discrimination against conservative religious groups are more common.

Understood in that light, the Court is not affording heightened judicial protection to majoritarian groups or the politically powerful as such; it is affording heightened protection to groups that it perceives as either or both socially powerless and subject to widespread discrimination in the present day. And one indicium that it uses to assess a group's power seems to be whether the group's views are sufficiently well-represented and respected in elite cultural spaces (such as institutions of higher education), popular culture, or on social media.

This Article makes three contributions. First, it spells out the contours of the Court's new religious liberty and religious discrimination jurisprudence by comparing and contrasting it to recent cases on racial discrimination in voting. Other scholars have previously argued that the Court has made it easier for plaintiffs in religious discrimination cases (at least religious discrimination cases involving conservative religious groups) to establish discrimination than for racial minorities to do so. But these pieces, by Jessica Clarke and Aziz Huq, have largely focused on claims of *intentional* discrimination.<sup>25</sup> As the cases discussed in this Article show, the trend is the same for claims of *unintentional* discrimination.<sup>26</sup> Particularly given the potentially far-reaching reach of a regime that imposed liability for unintentional discrimination, it is important to understand the contours of the new unintentional discrimination regime.<sup>27</sup>

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25. Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018); Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211 (2018) [hereinafter Huq, *Discriminatory Intent*]; Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47 (2019).

26. In Nelson Tebbe's recent article, *The Principle and Politics of Equal Value*, Tebbe frames the new religious liberty cases in terms of a theory of equal value. He defends the theory but questions the Court's application of it. Tebbe, *supra* note 14. This Article focuses more on identifying and evaluating the premises that may be motivating the Court's selective and peculiar application of its new theory, and how those premises ultimately make the current theory unjustifiable. It also argues that the Court's application of the theory is focused more on effects than the state's rationale, and that a focus on effects may be endemic to the theory itself. See *infra* text accompanying notes 98–102, 126–143. Steve Vladeck has also argued the Court has refashioned the law of free exercise through opaque and inconsistent procedures on the shadow docket. Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699 (2022). And in a forthcoming paper, Laura Portuondo agrees the law on free exercise has shifted but argues that equal protection doctrine should change to match it. Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. (forthcoming 2023). This Article, however, argues that this new theory is unsustainable and unjustified in the free exercise context. See *infra* Section III.B.2.

27. See *infra* text accompanying notes 104–133 (discussing implications of a disparate impact liability regime in religious liberty); *Washington v. Davis*, 426 U.S. 229, 248 (1976) (expressing concern that a disparate impact regime for race would be too “far reaching”).



Second, unpacking the new frontier of unintentional discrimination claims destabilizes the boundary between intentional and unintentional discrimination claims. To date, antidiscrimination law has often been framed as a choice between intentional discrimination claims (where the government intentionally disadvantages a particular group) and disparate impact claims (where a law results in unfair or unequal burdens on different groups, but that was not the purpose or intent behind the law). This Article suggests that is a false choice and an unnecessary one; there can be different shades of discrimination that blur the boundaries between those two categories. The Court has not adopted a pure disparate impact standard in the new religious discrimination cases despite the similarities between the new standard for religious discrimination claims and disparate impact liability. But the Court has also disavowed the idea that the new standard in religious discrimination cases is an intentional discrimination standard.

Third, this Article presents a striking jurisprudential worldview that could plausibly explain the trajectory of the Court's religious discrimination cases. Based on the Court's opinions, individual justices' writings, as well as statements the justices have made outside of the Court, this Article suggests that the justices may be assessing antidiscrimination claims based on an intuition that conservative (often) Christian groups lack certain kinds of social capital or economic power, which makes them socially powerless, and that conservative Christian groups face rampant societal discrimination because their views no longer garner majority popular support, but once did.<sup>28</sup>

Identifying this as a potential through line in the Court's cases helps to evaluate the cases, understand their potential implications, and assess the premises of the new antidiscrimination law. Intriguingly, the Court's new approach to religious liberty and religious discrimination claims reflects some of the key scholarly criticisms of the Court's free speech and equal protection doctrine, where the Court has, incorrectly in many scholars' views, steadfastly refused to consider things like social context or economic power in deciding whether to vary the scope of judicial review.<sup>29</sup>

Yet the Court's new antidiscrimination theory for religious liberty claims is ultimately unjustified for reasons related both to the theory itself and to the

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28. See, e.g., Transcript of Oral Argument at 107, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307) (“Chief Justice Roberts: I suppose the sea change has a lot to do with the political force and effectiveness of people representing, supporting your side of the case?”).

29. E.g., Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1245 (2020) (“[I]n recent decades the Supreme Court has embraced a highly academic conception of freedom of speech—one that largely fails (and in some contexts, adamantly refuses) to consider the economic and social forces that as a practical matter shape the exercise of First Amendment rights.”); see also Jedediah Britton-Purdy, David Singh Grewal, Amy Kaczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020) (critiquing doctrine for failure to review private economic or social arrangements).

Court's application of it. The Court mistakenly focuses on a very limited definition of social power and societal discrimination rather than incorporating these assessments into a broader and more robust inquiry into power and prejudice. Equally important, the Court's application of the theory is, at best, selective, and the selectivity uniformly favors Republican-favored causes.

Part of what makes this potential explanation for the Court's cases so striking is that one premise of the Court's jurisprudential outlook, the idea that conservative Christians are a group that faces considerable risks of discrimination and exclusion, shares important similarities with a narrative of victimization that Republican politicians and conservative commentators have occasionally embraced.<sup>30</sup> The idea is that conservatives, who enjoy substantial political power and various electoral advantages, are a persecuted minority who face societal discrimination and exclusion, at least in certain

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30. Republican politicians frequently claim they are targets of censorship on social media. See, e.g., Mark Moore, *Ted Cruz Rips 'Dangerous' Google, 'Brazen' Twitter over Censorship, Elections*, N.Y. POST (Jan. 4, 2021, 4:09 PM), <https://nypost.com/2021/01/04/ted-cruz-twitter-most-brazen-and-google-most-dangerous> [perma.cc/N92K-HRQF]; Elizabeth A. Harris & Alexandra Alter, *Simon & Schuster Cancels Plans for Senator Hawley's Book*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/07/books/simon-schuster-josh-hawley-book.html> [perma.cc/YSU3-SFWV]. Republican commentators make similar claims about censorship on university campuses as well as in society more broadly. See, e.g., Susan Svrluga & Brian Murphy, *Trump Lashes Back at Berkeley After Violent Protests Block Speech by Breitbart Writer Milo Yiannopoulos*, WASH. POST (Feb. 2, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/02/01/berkeley-cancels-speech-by-breitbart-writer-milo-amid-intense-protests> [perma.cc/KMY4-C6F2]; Alex M. Koller & Taylor C. Peterman, *IOP Removes U.S. Rep. Elise Stefanik '06 from Senior Advisory Committee*, HARV. CRIMSON (Jan. 12, 2021), <https://www.thecrimson.com/article/2021/1/12/iop-removes-stefanik> [perma.cc/N5H2-M6RV]. A *Fox & Friends* host said that racial justice advocates were "trying to take down . . . white culture" and had "marginalized" white voices. Harriet Sinclair, *Fox Host Rants Minorities Are Trying to 'Take Down' White Culture*, INDEPENDENT (June 9, 2021, 4:40 PM), <https://www.independent.co.uk/news/world/americas/fox-friends-critical-race-theory-b1862717.html> [perma.cc/8T3D-YXZM]. Another Fox News host suggested that discussions of racial justice would lead to the genocide of white Americans. *Tucker Carlson: Critical Race Theory Will Lead to the Genocide of White Americans*, MEDIA MATTERS (June 24, 2021, 8:40 PM), <https://www.mediamatters.org/fox-news/tucker-carlson-critical-race-theory-will-lead-genocide-white-americans> [perma.cc/33K3-H5A9]. This narrative of conservative victimization also has troubling historical parallels, including to the resistance to both Reconstruction and the abolition of slavery. As Lawrence Glickman has argued, the resistance to Reconstruction, like the resistance to new antidiscrimination norms, was also couched in terms of the victimization of white Americans. Lawrence Glickman, *3 Tropes of White Victimhood*, ATLANTIC (July 20, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/three-tropes-white-victimhood/619463> [perma.cc/E4SC-SG2B]; see also Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009) (documenting this trend). The resistance also suggested that white Americans had exchanged positions with previous objects of discrimination and were being treated like formerly enslaved Black persons. Glickman, *supra*.

circles.<sup>31</sup> This idea has featured prominently in Republican politicians' critiques of social media platforms and corporate advocacy, and it has also appeared in conservative commentators' discussions of elite institutions, particularly schools.<sup>32</sup> There is something odd about the idea that a group that controls one branch of the federal government, the Supreme Court, is a vulnerable group warranting judicial protection.<sup>33</sup> The premise seems to be that, despite their political power, conservatives are victims so long as society does not enthusiastically embrace their views or allow their views to prevail.<sup>34</sup>

Any doctrine premised on this worldview will have the effect of judicially reinforcing backlash against advances in equality and antidiscrimination law. Consider how some justices have suggested that when government actors, including courts, identify new forms of prohibited discrimination (such as discrimination against LGBTQ individuals), the very act of prohibiting discrimination leads to discrimination against the group who was engaged in the now-prohibited form of discrimination.<sup>35</sup> The Court treats the group that opposed new antidiscrimination protections as a group that warrants heightened judicial protection because their views have fallen out of favor. But that heightened judicial protection, and the resulting heightened judicial scrutiny of new antidiscrimination protections, threatens to undo or at least undermine the new antidiscrimination protections.

31. Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 282 (“They are making what amounts to a[] . . . claim that their traditional morals no longer hold sway in majoritarian culture, transforming them into minorities who face discrimination and subordination in public life.”).

32. E.g., Josh Hawley, *It’s Time to Stand Up Against the Muzzling of America*, N.Y. POST (Jan. 24, 2021, 8:22 PM), <https://nypost.com/2021/01/24/its-time-to-stand-up-against-the-muzzling-of-america> [perma.cc/TMG6-8BGS]; Eric Kaufmann, *Political Discrimination as Civil-Rights Struggle*, NAT’L REV. (June 24, 2021, 1:13 PM), <https://www.nationalreview.com/magazine/2021/07/12/political-discrimination-as-civil-rights-struggle> [perma.cc/KRR9-A9TP] (depicting “political discrimination as [a] civil-rights struggle” and arguing that “conservatives’ resistance to racial, gender, and sexual progressivism mark them as moral deviants . . . leading to pervasive discrimination against, and censorship of, conservative views” (cleaned up)).

33. See Murray, *supra* note 31, at 281–82 (“As an initial matter, it is not often that straight white Protestant men are the imagined subjects of animus. Indeed, in traditional antidiscrimination narratives, such individuals are quite literally ‘The Man’—an individual with significant social, political, and economic capital and unsurpassed privileges, opportunities, and access.”); Christopher Kang, Co-Founder and Chief Counsel, Demand Justice, Written Statement to the Presidential Commission on the Supreme Court of the United States (July 20, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Kang-Testimony.pdf> [perma.cc/FPQ4-R73C]; Michael J. Klarman, Professor, Harvard Law School, Written Statement to the Presidential Commission on the Supreme Court of the United States (July 15, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Klarman-Testimony.pdf> [perma.cc/TP6U-RXYV].

34. See Glickman, *supra* note 30 (“In the conservative world, the idea that white people in the United States are under siege has become doctrine.”).

35. See Murray, *supra* note 31 (identifying this implicit claim in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)).

The trends this Article identifies in the Court's treatment of religious discrimination claims under the Free Exercise Clause share two important parallels with trends that scholars have identified in the Court's treatment of racial discrimination claims under the Equal Protection Clause. One similarity is that the Court's equal protection cases have now made it easier for white plaintiffs to succeed on racial discrimination claims than for racial minorities to do so,<sup>36</sup> just as the Court's free exercise cases have made it easier for conservative Christian groups to succeed on religious discrimination claims than for other, more minority religions to do so. In both contexts, the Court has shifted the law in ways that invert which groups benefit from the law's protections. And in both contexts, the group benefiting from those changes is not the group that has been historically disadvantaged or excluded from obtaining or exercising political power. The other parallel between the two lines of cases lies in the reasons why courts have insisted on affording greater protections to once politically dominant majorities. In both racial discrimination cases and religious discrimination cases, the Court has suggested that greater judicial protection may be warranted because a group no longer possesses the kind of power or capital it once did.<sup>37</sup>

In this respect, both sets of cases reflect considerable sympathy and perhaps nostalgia for a not-so-distant past when white conservative Christians controlled the levers of political and social power to the exclusion of racial minorities and religious minorities. The Court views with skepticism departures from that past, including where legislatures enact statutes that seek to include racial minorities in formerly exclusionary institutions or where courts interpret constitutional guarantees to prohibit the exclusion or subordination of sexual minorities.<sup>38</sup> Courts treat legislative and judicial efforts that address historical exclusions as reasons for courts to reinforce the historical exclusions: they view remedial policies or antidiscrimination measures as evidence that white people, or conservative Christian groups, are now groups in need of judicial protection from laws that seek to include other groups in society

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36. Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016); Siegel, *supra* note 22.

37. On race discrimination claims, see *infra* text accompanying notes 256–258, 264–266, and 378–379. See also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting) (“Whether described as ‘benign discrimination’ or ‘affirmative action,’ the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another.”); *Johnson v. Transp. Agency*, 480 U.S. 616, 673 (1987) (Scalia, J., dissenting) (arguing opinion upholding affirmative action plan was “obviously designed to force promoting officials to prefer candidates from the favored racial and sexual classes”); *Ricci v. DeStefano*, 557 U.S. 557, 605 (2009) (Alito, J., concurring) (describing city’s decision to scrap employment promotion test that produced disparate racial effects as reflecting “a simple desire to please a politically important racial constituency”). On religious discrimination and sexual orientation discrimination claims, see *supra* note 28 and *infra* text accompanying notes 262–263 and 369–370.

38. See *infra* text accompanying notes 256–266, 369–375.

and democracy.<sup>39</sup> Surfacing that through line in the Court's cases helps to evaluate them.

This Article proceeds in three Parts. Part I outlines political process theory, scholarly criticisms of it, and scholarly accounts of the modern Court's rejection of political process theory. Part II explains how the Court's doctrine, particularly on unintentional discrimination, has adopted the view that conservative religious groups are a disfavored minority who face prejudice and lack social power and that courts should accordingly more carefully scrutinize laws affecting those groups. Part III then analyzes what the Court's approach to new antidiscrimination claims gets right, but also why it is ultimately unjustified.

One caveat before proceeding: The Court has not used the same, more plaintiff-friendly standard for all religious discrimination claims. As other commentators have noted, the Court used the very demanding standard that is more akin to the standard applicable to racial discrimination in the challenge to President Trump's order excluding nationals from several Muslim-majority countries.<sup>40</sup> The Court required the plaintiffs to show that the order intentionally sought to disparage or disadvantage Muslims, not merely that it had the effect of doing so.<sup>41</sup> That disparity, however, reinforces the descriptive claims in this Article, including those about the jurisprudential worldview that may be motivating the Court—namely, an apparent belief that white, Christian conservatives are now particularly at risk of discrimination in the United States. If that is a premise of the Court's new antidiscrimination doctrine, then that would explain why the Court does not view laws that burden less familiar, non-Christian religions with similar skepticism. If the Court believes that conservative Christians face the greatest risk of discrimination in particular social circles, then laws that burden those religious groups, but not others, would receive heightened scrutiny. And that fairly describes the set of cases where the Court has intervened.

## I. PROCESS THEORY OF JUDICIAL REVIEW

Political process theory represents one effort to minimize a key anxiety in constitutional law—the countermajoritarian difficulty, which describes the fact that the federal courts have the power to invalidate acts of the more democratic branches of government.<sup>42</sup> Developed most clearly in John Hart Ely's

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39. See *infra* text accompanying notes 256–266, 369–375.

40. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); Clarke, *supra* note 25; see Huq, *Discriminatory Intent*, *supra* note 25, at 1217.

41. *Trump*, 138 S. Ct. at 2419–21 (“[W]e may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”).

42. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962). Federal judges are not elected, nor are they democratically accountable to the people via elections. Frank I. Michelman, *Brennan and Democracy: The 1996–97 Brennan Center Symposium Lecture*, 86

book, *Democracy and Distrust*,<sup>43</sup> the theory maintains that the federal courts should invalidate legislative acts that either interfere with the political process or are the product of a skewed political process that reflects prejudice against a discrete and insular minority.<sup>44</sup> This Part explains the contours of political process theory and the scholarly challenges it has faced.

Of course, there are serious doubts about whether the Court has ever really followed political process theory.<sup>45</sup> At a minimum, well before the 2000s, the Court stopped relying on a general rule that courts should more carefully scrutinize laws affecting discrete and insular minorities. By that time, the Court had refused to apply heightened scrutiny to laws affecting the poor or the intellectually disabled despite plausible arguments that those groups are discrete and insular minorities whose interests are not reliably safeguarded by the political process.<sup>46</sup> Yet while the Court may never have completely embraced political process theory, it is worth understanding the contours of the theory and the critiques of it—in part because the theory helps to understand what may be animating the modern Court’s treatment of antidiscrimination claims.

#### A. Political Process Theory: Origins

The doctrinal origins of political process theory began as the *Lochner* era drew to a close and the New Deal Court began.<sup>47</sup> During the *Lochner* era, the Supreme Court invalidated various economic regulations.<sup>48</sup> As the era ended, the Supreme Court announced that it would adopt a more deferential approach toward legislation rather than second-guessing the political branches’ policies and weaponizing courts’ value judgments against the legislatures’.<sup>49</sup>

CALIF. L. REV. 399, 399–400 (1998); see BICKEL, *supra*, at 16–17 (“[W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives” and “exercises control, not in behalf of the prevailing majority, but against it.”).

43. ELY, *supra* note 19.

44. Klarman, *supra* note 19, at 747.

45. See *id.* at 748 (“[T]he post-*Carolene Products* Court initially generated results defensible under political process theory, yet subsequently transcended that theory’s limitations without nominating any successor.”); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 377 (2003).

46. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985).

47. See Jack M. Balkin, “*Wrong the Day It Was Decided: Lochner and Constitutional Historicism*,” 85 B.U. L. REV. 677, 686 (2005) (describing the understanding that “the New Deal revolution produced a new breed of Justices who believed in judicial restraint and appropriate respect for democratic processes in ordinary social and economic regulation”).

48. *Lochner v. New York*, 198 U.S. 45 (1905); see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380, 447 (2011).

49. *E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937) (invoking “the presumption of the constitutionality of a statute”); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN 177–78* (1995).

Yet the Court needed an account for when it would review legislation more closely, which *Carolene Products*' footnote four provided. Justice Stone's opinion for the Court first announced that courts should afford a presumption of constitutionality to "regulatory legislation affecting ordinary commercial transactions."<sup>50</sup> But then the opinion suggested that "[t]here may be narrower scope for operation of the presumption of constitutionality."<sup>51</sup> Specifically, "more searching judicial inquiry" would be appropriate for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and for "statutes directed at particular . . . minorities" where "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>52</sup>

Several decades later, John Hart Ely expanded this footnote into a more fully theorized account of judicial review.<sup>53</sup> In chapter five of *Democracy and Distrust*, Ely explained why courts should more closely scrutinize laws that restrict the political process.<sup>54</sup> There, Ely pointed to Warren Court decisions that protected the right to vote and argued that the right to vote was a precondition for democracy to function.<sup>55</sup> In chapter six, Ely expanded on why courts should more closely review laws that are "'directed at' religious, national, and racial minorities and [laws] infected by prejudice against them."<sup>56</sup> Ely argued that sometimes "[n]o matter how open the [political] process, those with most of the votes" still unduly "vote themselves advantages at the expense of the others."<sup>57</sup> As an example of this phenomenon, Ely pointed to "how our society has treated its black minority (even after that minority had gained every official attribute of access to the process)."<sup>58</sup> *Brown v. Board of Education* provides an example of this category of laws warranting heightened scrutiny—where a law targets a disfavored minority and would be suspect even if the political process was open to that minority group.<sup>59</sup> The Court has occasionally described this category as encompassing cases where a group has "experienced a

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50. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938). Aaron Tang found that after 1937, there was a "five-fold increase" in the number of times the Supreme Court relied on the presumption of constitutionality. Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CALIF. L. REV. 1755, 1770 n.93 (2018).

51. *Carolene Products*, 304 U.S. at 152 n.4.

52. *Id.*

53. See ELY, *supra* note 19.

54. *Id.* at 105–25.

55. *Id.*

56. *Id.* at 76, 135–79.

57. *Id.* at 135.

58. *Id.*

59. 347 U.S. 483, 489 (1954); Tang, *supra* note 22, at 1438–39 ("The prejudice prong . . . is built precisely for cases like *Brown* . . .").

‘history of purposeful unequal treatment,’” or has “been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of [its] abilities.”<sup>60</sup>

Ely maintained that these two kinds of interventions ensured that the democratic processes were actually democratic and worthy of the deference that federal courts would ordinarily afford them. Where “the [political] process is undeserving of trust,” however, courts need not defer to that process, Ely argued; instead, courts would intervene in order to make the political process fair and to correct for prejudices that may affect it.<sup>61</sup> Ely defended political process theory on the ground that it avoided the pitfalls of the *Lochner*-era style review because political process theory did not require judges to make value judgments.<sup>62</sup>

## B. Challenges

### 1. Political Process Theory Challenges

Political process theory was extremely influential,<sup>63</sup> although it also had its critics.<sup>64</sup> Many critics focused on the second element of judicial review described in chapter six of Ely’s *Democracy and Distrust*—the idea that courts should more carefully review legislation directed at minorities (particularly racial minorities) even where the political process was open and accessible to them.<sup>65</sup> Sometimes, this piece of political process theory is called the prejudice prong; the access prong, by contrast, refers to instances where the political process is not open or accessible to a particular group.<sup>66</sup>

Paul Brest, among others, argued that, despite Ely’s claims to neutrality, this species of judicial review “demand[ed] value judgments” by courts.<sup>67</sup> In particular, it required courts to assess how often groups should prevail in the

60. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

61. ELY, *supra* note 19, at 87, 103 (advocating for a “participation-oriented, representation-reinforcing approach to judicial review”).

62. *Id.* at 102–03.

63. Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 n.4 (1982) (declaring that the “influence of Footnote 4 cannot be measured accurately by simple enumeration of cases in which it has been cited” as the footnote has had a “pervasive influence” on equal protection doctrine in particular).

64. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 197–99 (1990); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 142 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

65. Klarman, *supra* note 19, at 773; Tang, *supra* note 22, at 1438.

66. Tang, *supra* note 22, at 1437–38.

67. Brest, *supra* note 64, at 131.



political process and when the outputs of the political process were (too) unfair to a particular group because they were the product of unfair prejudice against the group.<sup>68</sup> Some of the critiques of the prejudice prong questioned whether the prejudice prong was even coherent.<sup>69</sup> Bruce Ackerman argued that discrete and insular minorities actually possess some advantages in the political process given their smaller numbers (that lead to lower organization costs and fewer collective action problems).<sup>70</sup> Kenji Yoshino explained that, to some, the very idea of judicial solicitude for minority groups is inconsistent with a pluralist society that has considerable demographic diversity.<sup>71</sup>

In part for that reason, courts would have to select which groups would be entitled to heightened protection, which required an account of which groups are powerless or face prejudice and accordingly warrant heightened judicial review. Yet making that determination could involve the kind of value judgments that political process theory sought to avoid. Nicholas Stephanopoulos described how courts and scholars have applied several different and inconsistent definitions of political powerlessness to discern which groups might warrant additional judicial scrutiny.<sup>72</sup> Stephanopoulos proposed a standard that courts should use to measure powerlessness—“how responsive policy outcomes are to different groups’ preferences, controlling for the groups’ size and type.”<sup>73</sup> Bertrall Ross and Su Li, by contrast, argued that measures of political power should not only reflect whether laws advance a group’s interests but should be more holistic and consider a group’s lobbying activity, political responsiveness, voter turnout, and descriptive representation in politics.<sup>74</sup>

In part because of these critiques and the myriad accounts of powerlessness, Michael Klarman proposed jettisoning the prejudice prong of political process theory altogether.<sup>75</sup> By contrast, Stephanopoulos, Ross, and Li proposed different ways to measure groups’ political powerlessness to guide courts’ application of the prejudice prong.<sup>76</sup> Aaron Tang offered a modified

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68. Brest argued further that many of the cases that Ely described in terms of the outputs of the democratic process could be redescribed in terms of the democratic process itself. For example, Brest argued that abortion restrictions were (as Justice Ginsburg would later argue as well) restrictions based on gender (either beliefs about gender or restrictions that targeted or affected one gender). Brest, *supra* note 64, at 139.

69. Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015) (arguing against one element of the test).

70. Ackerman, *supra* note 64, at 724–31, 737.

71. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751, 758 (2011).

72. Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1536–45 (2015).

73. *Id.* at 1594.

74. Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323 (2016).

75. Klarman, *supra* note 19, at 748, 819.

76. Stephanopoulos, *supra* note 72, at 1594, 1598–99; Ross & Li, *supra* note 74.

version of political process theory, under which courts would review more deferentially legislation that burdens a politically powerful group, at least where the relevant constitutional provision is indeterminate, even if they did not more rigorously review legislation that burdens a powerless group.<sup>77</sup> And, more recently, Samuel Moyn and Ryan Doerfler have argued that Ely's entire theory of judicial review should be abandoned.<sup>78</sup>

## 2. Definition of Discrimination Challenge

Identifying a stable, coherent definition of powerlessness is one challenge with implementing political process theory. Another is developing an account of what it means for a law to be targeted at or discriminate against a group. Political process theory calls for heightened judicial scrutiny of laws that discriminate against discrete and insular minorities and laws that obstruct particular groups' access to the political process. For both strands of political process theory, there needs to be a working account of when a law is targeted at or discriminates against a particular group.<sup>79</sup>

One theory that emerged, and that the Supreme Court would later adopt, is that a law is targeted at and discriminates against a group if the law either explicitly mentions a particular group or if the law intentionally results in a disadvantage on that group.<sup>80</sup> In *Washington v. Davis*, the Court held that Washington, D.C. did not violate the Equal Protection Clause when it used a test for hiring and promoting police officers even though a greater proportion of Black applicants failed the exam.<sup>81</sup> D.C.'s use of the exam would violate equal protection principles, the Court explained, only if D.C. intentionally used the test to disadvantage Black applicants.<sup>82</sup>

The rule requiring intentional, purposeful discrimination has been criticized on several grounds. First is that it allows governments to reproduce inequalities and hierarchies, even knowingly.<sup>83</sup> Paul Brest accordingly proposed modifying the equal protection standard to prohibit instances where lawmak-

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77. Tang, *supra* note 50.

78. Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769 (2022).

79. See Leah M. Litman, *The Ethics of Structure* (2022) (unpublished manuscript) (on file with author).

80. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 259 (1979).

81. 426 U.S. 229 (1976). Because the case involved D.C., the claim was about the equal protection component of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the federal government is bound by an equal protection guarantee in the Fifth Amendment).

82. *Davis*, 426 U.S. at 238–48.

83. Litman, *supra* note 79, at 1–2.

ers failed to take into account the interests of particular groups or where law-makers did not show equal concern for a particular group.<sup>84</sup> Second, academics have criticized judicial doctrines that make it especially difficult to establish that government decisionmakers engaged in intentional discrimination.<sup>85</sup> Jessica Clarke, for example, raised concerns about the “stray remarks” doctrine, which allows courts to discount racist or sexist remarks.<sup>86</sup> Courts have also taken a divide-and-conquer approach to assess evidence of intentional discrimination. For example, in *Department of Homeland Security v. Regents of the University of California*, the Supreme Court held that the plaintiffs challenging President Trump’s rescission of the Deferred Action for Childhood Arrivals program had not even plausibly alleged that racial discrimination was a motivating factor for the rescission.<sup>87</sup> In its analysis, the Court separated out the three kinds of evidence the plaintiffs pointed to (the disparate impact of the law, statements made by policymakers, and procedural irregularities in the policy’s enactment) and explained why each piece of evidence, individually, did not establish that the rescission was motivated by discrimination.<sup>88</sup>

The second theory about what constitutes discrimination is sometimes known as the anticlassification theory.<sup>89</sup> Under an anticlassification theory, all laws that make an explicit reference to race—laws that are race conscious—amount to discrimination on the basis of race, no matter their motives.<sup>90</sup> This theory has featured in the Court’s affirmative action jurisprudence. There, the Court has equated efforts to integrate schools (that rely on race) with efforts to segregate schools (that rely on race) and subjected both to the same standard of review.<sup>91</sup>

So political process theory requires courts to make determinations about when a law discriminates against a particular group (either by obstructing their access to the political process or otherwise disadvantaging them). The Court has arrived at the conclusion that a law discriminates against an individual or group if the law either intentionally imposes disadvantages on an individual or group or the law explicitly mentions the disadvantaged group or group characteristic on the face of the law.

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84. Paul Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); see also David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

85. See, e.g., Litman, *supra* note 79.

86. Clarke, *supra* note 25, at 540–47.

87. 140 S. Ct. 1891 (2020).

88. *Id.* at 1915–16.

89. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1286–87 (2011) (describing theory).

90. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

91. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

## II. TWO TRACKS OF DISCRIMINATION CLAIMS

This Part explains how the Court has adopted different accounts of what constitutes discrimination (Section II.A) and different methods for determining whether discrimination exists (Section II.B) in equal protection cases involving race and First Amendment cases on religious liberty.

This Part compares and contrasts these two sets of claims for several reasons. One is that the Court's new method of analysis for First Amendment claims sounds in the register of equality and antidiscrimination: In order to assess whether a religious group has a First Amendment claim, the Court examines the treatment of comparable secular groups.<sup>92</sup> That is one method the Court uses to analyze antidiscrimination claims as well—identifying a comparable man if a woman alleges she was discriminated against on the basis of sex or identifying a comparable white individual if a member of a racial minority alleges they were discriminated against.<sup>93</sup> Moreover, as the summaries of the prejudice strand of political process theory make clear,<sup>94</sup> social and political history suggests there are reasons for courts to be skeptical of laws that discriminate on the basis of race and laws that disfavor certain religious groups. Both racial minorities and religious minorities possess attributes that scholars and courts have described as warranting heightened judicial solicitude.<sup>95</sup> Additionally, certain strands of antidiscrimination law regarding race (in particular, the Voting Rights Act provision at issue in the Court's decision in *Brnovich*) contain a disparate impact liability standard.<sup>96</sup> Because the disparate impact liability standard most closely resembles the new standard in religious discrimination cases,<sup>97</sup> it is useful to compare the two since the Court has already aligned them in important respects. Finally, as the Introduction and this Part suggest, as a conceptual matter, the two sets of claims (religious discrimination and racial discrimination) could be treated similarly. So it's worth unpacking where and how the Court has diverged in its treatment of the two sets of claims. That's not to say that constitutional text, history, or structure require the two sets of claims to be treated the exact same way, but their conceptual overlap makes it useful to identify where they differ and to assess why that is.

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

93. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 734, 751–64 (2011) (identifying and critiquing this requirement); Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1366–73 (2012).

94. See *supra* notes 52–78 and accompanying text.

95. These attributes include the existence of a history of discrimination and discreteness and insularity. See Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 377 tbl.1 (2014) (listing criteria commonly associated with antidiscrimination protection).

96. See *infra* text accompanying notes 163–195.

97. See *infra* text accompanying notes 111–115.

### A. Defining Discrimination

The Court has adopted different accounts of what constitutes discrimination in cases involving allegations of religious discrimination than in cases involving allegations of racial discrimination. This Section focuses on how the cases seemingly diverge on a basic question—what constitutes discrimination. The full range of definitions or theories of discrimination is beyond the scope of this Article. But it is helpful to reiterate a few accounts of discrimination that have permeated the case law and scholarship, two of which have been presented as alternatives to one another—the first is intentional discrimination, and the second is laws or policies that produce discriminatory effects. Intentional discrimination refers to laws or policies that create a disadvantage on a particular group where lawmakers or policymakers intentionally created that disadvantage.<sup>98</sup> Laws or policies with discriminatory effects are those that result in a greater disadvantage on one group relative to others, no matter the reason why a law or policy was enacted.<sup>99</sup> Sometimes this account of discrimination is referred to as disparate impact liability—where a law may violate the Constitution or a statute if it unintentionally produces a greater disadvantage on one group relative to another. These two kinds of discrimination are sometimes presented as alternatives to one another—or at least as alternative theories of what the Equal Protection Clause might prohibit.<sup>100</sup> In addition to these two accounts of discrimination, there is a third approach worth canvassing—the anticlassification approach. The anticlassification theory maintains that courts should be particularly skeptical of laws or policies that, in their text, single out a particular group for disadvantageous treatment.<sup>101</sup> The anticlassification theory is not necessarily an addition or alternative to the preceding theories; anticlassification theory could be a mechanism to identify intentional discrimination.<sup>102</sup>

#### 1. New Religion Cases

With that background in mind, it is easier to see the divergence between the Court's racial discrimination and religious discrimination cases. In the religion context, the Court has adopted a theory of discrimination that discounts the relevance of intent and focuses more on the relative burdens of a law, comparing the burdens faced by religious organizations to the burdens faced by

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98. *E.g.*, *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 524 (2015). Case law and scholarship differ on what precise mental state or kind of intent the law or policymakers must have. Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 537–54 (2016).

99. Stephanopoulos, *supra* note 17, at 1570.

100. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494–95 (2003).

101. *See* Siegel, *supra* note 89, at 1287–89 (explaining theory).

102. *See* Litman, *supra* note 79.

(at least some) nonreligious organizations.<sup>103</sup> That focus bears important similarities to the idea that discrimination encompasses laws or policies with discriminatory effects—those laws or policies that impose greater disadvantages or advantages on one group relative to others. The Court has also adopted a second account of what constitutes discrimination—the existence of discretionary exemptions in a law or regulation that create the possibility of discriminatory effects or the potential for intentional discrimination. Both theories result in more searching judicial scrutiny of laws where the challenge is based on religious discrimination.

This Section explains how the religion cases adopting a new approach to unintentional discrimination, as well as the theories they channel, invite an analysis of the effects of a law.

a. Discriminatory Effects in the Cases: (Lack of) Burdens on Comparable Secular Activity

Several cases, together with the writings of individual justices, highlight how the Court has, in cases of religious discrimination claims, subjected laws to heightened scrutiny because of the law's effects and specifically because a law results in a secular activity being treated better than religious activity.<sup>104</sup> The Court's opinion in *Tandon v. Newsom*<sup>105</sup> crystallized this trend, which had emerged from a series of unexplained or fractured orders on the Court's shadow docket.<sup>106</sup> *Tandon* appeared to embrace what some scholars called the "most-favored nation" theory of discrimination for free exercise claims; under that theory, a law or policy "discriminates" against religion if it treats a comparable nonreligious entity better than religious entities.<sup>107</sup>

To understand the theory, start by considering Title VII,<sup>108</sup> the statute that prohibits various forms of discrimination by employers who have fifteen or

103. Tebbe, *supra* note 14, at 2399 ("[The Court's interpretation of the Free Exercise Clause] does not require any showing of discriminatory purpose, object or intent."); *id.* at 2399–400 ("[T]he new equality . . . does not require a facial classification.").

104. I discuss potential differences *infra* in the text accompanying notes 126–128. Although Nelson Tebbe believes the theories are distinct from one another, he agrees disparate impact is the closest comparator to the theory the Court has adopted. See Tebbe, *supra* note 14, at 2429–30.

105. 141 S. Ct. 1294 (2021) (per curiam).

106. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (mem.); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (mem.); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (mem.); *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020) (mem.); see Vladeck, *supra* note 26.

107. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50.

108. See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1539–42 (1999) (arguing against the most favored nation approach).

more employees.<sup>109</sup> Given that Title VII prohibits a religious employer with fifteen employees from discriminating on the basis of sexual orientation, but does not prohibit a nonreligious employer with fourteen employees from discriminating on the basis of sexual orientation, a theory that asks whether a law treats a comparable nonreligious activity better than religious activity might suggest that Title VII “discriminates” against the religious employer. The law treats a somewhat comparable nonreligious entity (a secular employer with fourteen employees) more favorably than a religious entity (a religious employer with fifteen employees). But all laws will contain some provision defining their scope (like Title VII’s fifteen-employee limitation), and if those provisions are thought to exempt some comparable secular entities from regulation, then the law might trigger searching judicial review in cases involving religious discrimination. Indeed, relying on this reasoning, one district court invalidated Title VII on religious liberty grounds.<sup>110</sup>

Or consider a hypothetical measure to reduce transmission of the coronavirus that restricts all indoor gatherings to 10 percent capacity, but permits organizations that provide food, healthcare services, or basic household repair items to remain open at 50 percent capacity. Under the most favored nation theory, this measure could “discriminate” against religious entities because it restricts religious entities’ capacity to 10 percent while permitting hardware stores and doctor’s offices to remain open at 50 percent.

This kind of reasoning was on display in *Tandon v. Newsom*, a challenge to a California policy that limited in-home gatherings to three households.<sup>111</sup> The policy prohibited in-home gatherings of both a religious and secular nature; it was facially neutral in that it did not single out secular activity for more favorable treatment or religious activity for less favorable treatment.<sup>112</sup> But California permitted “hair salons, retail stores,” and other service businesses “to bring together more than three households at a time.”<sup>113</sup> For that reason, because the policy treated some, but not all, “comparable secular activities more favorably than at-home religious exercise,” the policy was presumptively unconstitutional.<sup>114</sup>

This reasoning shares several things in common with a discriminatory effects theory of discrimination. First, the trigger for heightened scrutiny, and the reason to presume that a policy is unconstitutional, is not a conclusion about the purpose or intent behind the policy. The intent or purpose of the policy does not factor prominently into an analysis of whether the policy amounts to discrimination. And the analysis does not require a showing that policymakers intentionally sought to prefer secular activities over religious

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109. 42 U.S.C. § 2000e(b).

110. *Bear Creek Bible Church v. Equal Emp. Opportunity Comm’n*, 571 F. Supp. 3d 571 (N.D. Tex. 2021).

111. 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting).

112. *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting).

113. *Id.* at 1297 (majority opinion).

114. *Id.*

ones. Second, the policy is facially neutral: it does not single out religious activities for disadvantageous treatment, nor does it single out secular activities for advantageous treatment. Third, the Court's focus is on the effects or results of the policy—which entities are allowed to gather with more than three homes and which entities are not.

The separate writings in other opinions underscore the extent to which the Court focuses on comparing the burdens imposed on different entities. Justice Gorsuch's concurrence in *Roman Catholic Diocese of Brooklyn v. Cuomo* noted that “hardware stores, acupuncturists, and liquor stores” as well as “[b]icycle repair shops, certain signage companies, accountants, lawyers, and insurance agents” were not subject to the same restrictions as religious gatherings.<sup>115</sup> He specifically drew attention to the “burden on the faithful.”<sup>116</sup> Justice Kavanaugh's concurrence similarly highlighted the disparate effects of the state's rules: “a church or synagogue must adhere to a 10-person attendance cap, while a grocery store . . . down the street does not face the same restriction.”<sup>117</sup>

Decisions leading up to *Tandon* reveal the same tendencies.<sup>118</sup> *Roman Catholic Diocese of Brooklyn v. Cuomo* enjoined a gubernatorial executive order on religious liberty grounds. The order imposed restrictions in particular areas based on COVID-19 rates; in red zones, all public lectures, concerts, and performances were prohibited, but religious gatherings could include 10 people or 25 percent capacity (whichever was lower).<sup>119</sup> The Court described the fault with these restrictions as follows: While a synagogue or church was limited to 10 persons, “acupuncture facilities, camp grounds, garages” and “plants manufacturing chemicals . . . and . . . transportation facilities” were not so limited.<sup>120</sup> The state orders, the Court explained, “lead to troubling results,” since a large store could have many shoppers, but a church or synagogue could not have many worshippers.<sup>121</sup>

115. 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring).

116. *Roman Cath. Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring). In another case, Justice Gorsuch dissented from the denial of emergency relief again to make explicit the concern with discriminatory effects, writing that “even neutral and generally applicable laws are subject to strict scrutiny where” they burden particular rights. *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (mem.) (Gorsuch, J., dissenting).

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

118. *South Bay United Pentecostal Church v. Newsom* enjoined California from enforcing the prohibition on in-person gatherings in certain areas with high coronavirus rates but left in place the percentage capacity limits and the prohibition on singing and chanting during indoor services. 141 S. Ct. 716 (2021) (mem.).

119. *Roman Cath. Diocese*, 141 S. Ct. 63.

120. *Id.* at 66.

121. *Id.* at 66–67.



Decisions after *Tandon* reveal similar pathologies.<sup>122</sup> Dissenting from the Court's refusal to issue an emergency injunction in a case challenging Maine's vaccine requirement for public employees, Justice Gorsuch, together with Justices Thomas and Alito, wrote that the vaccine mandate was not neutral because it failed to treat "comparable secular activity" the same as religious exercise.<sup>123</sup> They noted that the "State allows those invoking medical reasons to avoid the vaccine mandate" but not "those invoking religious reasons to do the very same thing."<sup>124</sup> While Justice Barrett and Justice Kavanaugh concurred in the order declining to issue an emergency injunction, their writing explaining their votes did not engage with or disagree with Justice Gorsuch's analysis on the merits. They merely stated that the issues in the case, which was the Court's first religious liberty challenge to vaccine mandates, were more appropriately addressed on the regular merits docket rather than the shadow docket, because otherwise parties could "force the Court to give a merits pre-view" of how it would resolve a constitutional question.<sup>125</sup>

b. Discriminatory Effects in the Theories: Most Favored Nation, Single Secular Exemptions, and Equal Value

While the theory of discrimination that the Court has adopted shares important similarities with a disparate impact or discriminatory effects theory of discrimination, it is more commonly referred to as the "most favored nation" theory, or what Nelson Tebbe has recently dubbed the theory of "equal value." This Section explains scholars' efforts to describe the doctrine or theory in the Court's COVID-19 cases and shows how these accounts will still turn on an analysis of the effects of a law.

The trigger for heightened review and indicia of discrimination in these cases is whether a state law or policy treats any comparable secular activity more favorably than religious activity. As Nelson Tebbe has explained, this theory differs in some respects from a disparate impact theory of liability.<sup>126</sup> A theory of most favored nation status or equal value could be both more protective and less protective than disparate impact liability. It could be more protective because even if a law or policy does not result in greater burdens on

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122. In a curious footnote in *Kennedy v. Bremerton School District*, the Court stated that a plaintiff may "prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise." 142 S. Ct. 2407, 2422 n.1 (2022) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018)). The Court has never applied that as the standard in race discrimination cases and allowed plaintiffs to show unconstitutional racial discrimination through a combination of burdens on a racial group and "official expressions of hostility." *Id.*

123. *Does 1-3 v. Mills*, 142 S. Ct. 17, 20 (2021) (mem.) (Gorsuch, J., dissenting) (quoting *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam)).

124. *Id.*

125. *Id.* at 18 (Barrett, J., concurring).

126. See Tebbe, *supra* note 14, at 2430-31.

religious groups relative to nonreligious groups, there may still be liability.<sup>127</sup> And it could be less protective insofar as there would be no liability if a law or policy did not treat a comparable secular activity better than a religious activity but nonetheless resulted in comparatively greater burdens on religious activities than nonreligious ones.<sup>128</sup>

But as explained above, the theory the Court adopted still has a lot in common with a disparate impact theory of discrimination. Indeed, the Court's theory could be recast as a species of disparate impact liability rather than as an entirely separate theory. The question that the Supreme Court has focused on in the religious discrimination cases is whether religious activity has been treated relatively worse than any secular activity. That focus is on the effects of a rule, similar to the focus in a disparate impact liability regime. But the comparators are different from those in a traditional disparate impact analysis. No longer is the focus on groups in the aggregate and whether all religious activity is treated worse than all secular activity. Instead, the focus is on whether any religious activity is treated worse than any secular activity. That could be understood as a twist on a disparate impact regime, since the question is not how entire groups are treated relative to one another but how the members of one group are treated relative to individual members of another group.

For comparison, imagine if disparate impact liability proceeded as follows: A racial minority could make out a disparate impact claim any time a law or policy unintentionally resulted in more favorable treatment of any (comparable) white individual. Or a person who identifies as female could make out a disparate impact claim any time a law or policy unintentionally resulted in more favorable treatment of any (comparable) individual who identified as male. That is how the Court has articulated the equal value/most favored nation theory: The question is whether a law or policy resulted in more favorable treatment of any (comparable) nonreligious activity.

Some academics have cast the most favored nation or equal value theory in terms of a "single secular exception" theory that could be a species of anti-classification theory.<sup>129</sup> These scholars depict the relevant question as whether a law contains an exemption from a generally applicable rule for any (comparable) secular activity. But that is not exactly how the Court has framed the legal test in the COVID-19 cases; liability does not exist only where there is an exemption from a generally applicable rule in the text of a statute or regulation. The question is instead whether the law or policy treats "comparable secular activity more favorable than religious exercise," either through an explicit

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127. See *id.* ("[E]qual value bars against effects that are *not* disproportionate.")

128. See *id.* at 2430 ("[D]isparate impact works regardless of exemptions.")

129. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 21–23 (2016); Laycock, *supra* note 107, at 49–50.

exemption, particularized list, or some generally applicable criterion that resulted in comparable secular activity being treated more favorably than religious activity.<sup>130</sup>

Some commentators have also attempted to fit the Court's recent COVID-19 cases into the overarching disparate impact standard that applies in both religious discrimination and racial discrimination cases. Under that theory, laws that are generally applicable and apply to both religious and non-religious activity (or apply to persons of different races) are presumptively constitutional. These commentators have argued that the COVID-19 policies were not generally applicable, and were therefore presumptively unconstitutional, because they did not treat similarly situated religious and nonreligious entities alike.<sup>131</sup>

But that would only be true if the definition of what activity is "similarly situated" is so expansive that it is virtually meaningless and does not produce much of a legal test at all. In the Court's COVID-19 cases, after all, the justices have said that indoor, in-home religious gatherings are equivalent to outdoor "camp grounds" when the risks of virus transmission differ for indoor and outdoor activities. The justices have also said that the risks of transmission are the same for in-home religious gatherings and "transportation facilities" and "hardware stores" where people do not gather for long periods of time while singing or chanting. If those activities are "similarly situated" with respect to the state's interest in reducing the transmission of COVID-19 such that a law cannot differentiate between the activities, then a good deal of secular activity could be similarly situated to religious activity.<sup>132</sup> Or take Justice Gorsuch's writing in *Does 1–3 v. Mills*, where he equated exemptions for persons who cannot be safely vaccinated with exemptions for persons with religious objections to vaccines: The reasons to say that someone does not have to be vaccinated if vaccination would pose a risk to their health and life are not the same as saying that someone does not have to be vaccinated if they do not support vaccines.<sup>133</sup> But if all of these things are equivalent to one another, that would mean a law could not result in (almost) any secular activity being treated more favorably than religious activity. Practically speaking, that would generate something like a discriminatory effects analysis that would ask whether a law or policy results in any secular activity being treated more favorably than religious activity. And that would make the standard functionally

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

131. See, e.g., Mark Storslee (@mark\_storslee), TWITTER (Apr. 10, 2021, 12:03 PM), [https://twitter.com/mark\\_storslee/status/1380914352379863041?s=20](https://twitter.com/mark_storslee/status/1380914352379863041?s=20) [perma.cc/6QD7-8Q5U].

132. See *infra* text accompanying notes 143–159 (discussing how the Court is alternately defining and considering the purpose behind regulation and exemption).

133. *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (mem.) (Gorsuch, J., dissenting). There are also good reasons to distinguish between them for other reasons—it is easier to supervise medical exemptions, and the state may not want to get into the business of distinguishing between different religious objections.

equivalent to the discriminatory effects standard outlined above—namely, whether a law or policy results in some secular activity being treated better than religious activity.

Another way of capturing the change in the Court’s doctrine is to compare the Court’s previous, pre-COVID cases, which did not seek to assess whether laws or policies treated similarly situated religious and nonreligious entities alike or whether laws exempted nonreligious activity from regulation, unless that comparison revealed that the intent behind a law was to disfavor religion. For example, in *Employment Division v. Smith*, the Court upheld a criminal prohibition on peyote ingestion against a challenge that the law prohibited religious exercise that included peyote use.<sup>134</sup> But the prohibition exempted some nonreligious uses of peyote—the law allowed people to use peyote where “the substance has been prescribed by a medical practitioner” but did not similarly exempt religious uses of the drug.<sup>135</sup> To the extent the Court’s prior cases considered whether a law did or did not regulate similarly situated secular activity, they did so only to ascertain whether the law was motivated by an intent to disadvantage a religious exercise; if plaintiffs could show that the law intentionally discriminated against religion, then they would succeed.<sup>136</sup>

Even a narrower version of Tebbe’s equal value theory would seem to involve some analysis of the effects of a law, which activities are treated more favorably than others, and the nature of those activities. Under Tebbe’s articulation of the theory, the question is whether “a government regulates protected activities while exempting other activities” such that the government has “devalued protected practices . . . as less worthwhile than the exempted activities.”<sup>137</sup> How might that analysis work? Say that a city closes all buildings where groups gather in order to fit the buildings with improved ventilation systems and prevent the spread of COVID-19, but during the time window for the installation, a religious group had planned to gather at a church, and so the city’s installation plan shuts down the religious gathering to allow for construction. Or say a city closes its parks in order to spray for bugs at a time when a religious group had planned to gather at one of the parks. The effects of those policies are that the government has treated the “exempted activities” of installing ventilation systems and implementing pesticide treatments as

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134. 494 U.S. 872 (1990).

135. *Smith*, 494 U.S. at 874, 890.

136. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (“The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.”).

137. Tebbe, *supra* note 14, at 2398.

more worthwhile than protected religious exercise. Has the government “devalued” the protected practice of religious exercise by allowing some nonreligious activity but not religious activity to occur? Answering that question seems to invite courts to assess the relative importance of the two activities.

Tebbe’s version of equal value theory would answer the question by analyzing whether the government’s regulatory “interest applies evenly to the regulated and unregulated categories.”<sup>138</sup> For the former policies, which contain no apparent exemptions, perhaps the answer would be no, and the policies would be constitutional since installing new ventilation systems helps to prevent the spread of COVID-19 but religious gatherings do not (and because spraying for bugs wards away bugs but religious gatherings do not). But that inquiry seems to turn on whether the government has shut down buildings and parks for some valid secular purpose, such as preventing the spread of COVID-19 or an infestation of pests. And that inquiry is not meaningfully different from ordinary accounts of intentional discrimination, which focus on the reasons for the government’s actions, not their effects. If equal value differs from that theory (which represented the prior doctrine), as scholars have said that it does, it would seem to call for something else, such as an analysis of the effects of a law or policy and the nature of the activities that it burdens.

And the Court’s COVID-19 cases are quite different from earlier theories of the Free Exercise Clause. The cases seem to include some assessment about whether the exempted or nonregulated activities are, in some general sense, as important as religious activity, and not just whether the government’s regulatory interest applies to both unregulated and regulated entities. Recall that the Court equated outdoor campgrounds with indoor in-home religious gatherings; these things are not similarly situated with respect to the government’s interest in preventing the spread of the coronavirus, but the Court could easily have thought camping less important than religious exercise. The same goes for the Court’s equation of hardware stores and acupuncture services with indoor in-home religious gatherings. These activities are not particularly similarly situated with respect to the government’s interest in containing the spread of COVID-19, but the Court could have thought acupuncture less important than religious exercise.

Several passages in the Court’s opinions suggest that is how the Court approached the analysis—asking whether the regulated activities were as important as constitutionally protected religious exercise. For example, *Tandon* explained that the fact that California permitted “hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time” made out a claim of religious discrimination.<sup>139</sup> But that list would establish the existence of discrimination if what mattered was the general na-

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138. *Id.*

139. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam).

ture of the activities and how important they were, not their risk of transmission of the virus, which would turn on, among other things, the kinds of buildings where they were conducted, how many people were there at any time, what the people there did and how they interacted with others, and so on.

To be sure, *Tandon* asserted that courts should consider whether the religious activities were comparably situated to the unregulated nonreligious activities in terms of the government's interest.<sup>140</sup> But what the Court did, equating private suites or personal care services with in-home religious gatherings, and how it reasoned elsewhere (merely listing activities that were unregulated as if naming the unregulated activities sufficed to establish unconstitutional discrimination), suggests that part of what is driving the analysis is a loose assessment of the general importance of the unregulated activities on the one hand and the regulated, religious activities on the other. *Roman Catholic Diocese* reasoned similarly—asserting that the mere fact that businesses allowed to continue operating included “acupuncture facilities, camp grounds, [and] garages” sufficed to establish religious discrimination.<sup>141</sup> Particularly without any analysis of how and where those businesses were conducted, that reasoning conveys only that the Court made some general assessment of the relative importance of the various activities. Indeed, *Roman Catholic Diocese* noted that “the list of ‘essential’ businesses includes . . . many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.”<sup>142</sup>

Here the analysis seems to turn on the effects of the law—whether the law sweeps in certain kinds of activities (religious exercise) but not others (less important secular activities). That does not necessarily involve a focus on the government's interest or the reasons for a law. It does, however, focus on the results of a law or policy. For example, relying on *Tandon*, a federal district court found that a vaccine requirement was not neutral and generally applicable because it contained a medical exception—an exemption where vaccines were medically contraindicated.<sup>143</sup> The court emphasized that what matters is not the purpose behind the policy or even the purpose behind the exemption.<sup>144</sup>

Another way of getting at whether the new religious discrimination theory is about effects and the relative importance of different activities is to ask what purpose or regulatory interest the Court might be using in order to assess whether the regulated and nonregulated activities are similarly situated to one

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140. *Id.* at 1296.

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

142. *Id.*; see also *id.* at 69 (Gorsuch, J., concurring). The order determined which businesses were allowed to remain open in terms of whether they were deemed essential. *Id.* at 66 (majority opinion).

143. *Dr. A. v. Hochul*, 567 F. Supp. 3d 362, 374–75 (N.D.N.Y. 2021), *rev'd sub nom.* *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) (per curiam).

144. *Id.* at 375.

another. Is the relevant purpose the one behind the underlying prohibition or regulation? Or is the relevant purpose the motivation behind the exemption(s) from the prohibition? In the context of the Court's COVID-19 cases, the purpose of the prohibition on various indoor gatherings was to contain the transmission of the disease. The various exemptions from that prohibition, by contrast, may have a slightly different purpose—they may have rested on something like a balancing analysis that considered the risk of transmission from the activity against the importance of continuing the activity. It is not uncommon for policymakers to consider those kinds of pros and cons when crafting a policy and deciding its scope. The theory of equal value, then, would seem to allow courts, when focusing on a policymaker's reason for treating two activities differently, to conduct the courts' own assessment of the relative importance of various activities. That raises serious concerns about institutional competence and institutional propriety if courts are being asked to determine the relative importance of different kinds of religious exercise.

Consider again the city that closes all buildings where groups gather in order to fit the buildings with improved ventilation systems and prevent the spread of COVID-19. What if the city exempted hospitals and allowed hospitals to continue operating while improved ventilation systems were installed? There, a court might consider whether religious activity is comparably situated to hospitals with respect to the government's interest in the prohibition or it might consider whether religious activity is similarly situated to hospitals with respect to the government's interest in the exemption. The purpose of the underlying prohibition (no gatherings while ventilation is installed) is to contain the spread of COVID-19. The purpose of the exemption, however, is probably something different—an assessment of when the costs of containing the spread of COVID-19 are too high, perhaps because it would constrain important, life-saving activities. How is a court to assess the importance of religious exercise in that calculus?

This example reveals how easily equal value can slip into a discriminatory effects regime that allows courts to assess the relative importance of religious exercise. A city might write the preceding policy in these terms: "There will be no in-person gatherings in buildings while the buildings are fit with improved ventilation systems. However, hospitals are exempt from this requirement." That version of the policy would clearly implicate the equal value theory—there are regulated entities and exempted activities. But a city could just as easily rewrite that policy to accomplish the same results by saying, "There will be no in-person gatherings in buildings that do not offer life-saving care while the buildings are fit with improved ventilation systems." That version of the policy regulates the same entities and exempts the same activities as the preceding policy with the exemption, which means it could raise the same questions about whether the government has devalued religious exercise. Courts could ask the same questions about whether the government's regulatory interest is implicated to the same extent for both regulated and unregulated activities. Given that the equal value theory is not especially concerned with how the law is written (and specifically whether the law contains a facial religious classification), it would be strange if the former version, but not the latter,

triggered heightened judicial scrutiny. And that means the trigger for the theory is, in important respects, the effects of a law, meaning who ends up regulated and who ends up not regulated. Accordingly, the application of the theory may turn on courts' assessment of how important the various activities are.

c. Discretion and Exemptions

The Court's recent decision in *Fulton v. City of Philadelphia* supplied a second account of what constitutes discrimination—or at least what kind of legal structures raise the specter of discrimination.<sup>145</sup> *Fulton* involved a challenge to the City of Philadelphia's contract terms for agencies to participate in the foster care system (in several different ways). In *Fulton*, agencies participated in the foster care process by certifying that foster families satisfy the statutory criteria for fostering children.<sup>146</sup> But to receive a foster care contract from the City to perform that function, agencies had to agree not to "reject a child or family based upon their . . . sexual orientation."<sup>147</sup> Yet several religious agencies refused to certify same-sex married couples.<sup>148</sup> They sued the City, arguing that it violated their right to free exercise of religion to require them, as a condition for participating in the foster certification program, to certify same-sex married couples in violation of their religious beliefs that marriage is between a man and a woman.<sup>149</sup>

The Court held that the City's contract terms were subject to strict scrutiny. The contractual obligation not to discriminate was generally applicable in that it applied to both religious and nonreligious agencies. But the Court read into the contract a discretionary exemption process that allowed the Commissioner to grant an exception "in his/her sole discretion."<sup>150</sup> The City had argued that an exemption was not available to relieve contractors of their obligation not to discriminate in the certification process; it was, instead, applicable only to an agency's ability to refuse referrals to place a child with a certified foster family.<sup>151</sup> In other words, the City argued that it could relieve contracting agencies of the obligation to place children with certain foster families but that it did not have the power to relieve contracting agencies of their obligation to certify prospective foster care families on a nondiscriminatory basis. The Court nonetheless read the contract term to allow the City to

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145. 141 S. Ct. 1868 (2021).

146. *Fulton*, 141 S. Ct. at 1875; 55 PA. CODE §§ 3700.61, 3700.64, 3700.69 (2022).

147. *Fulton*, 141 S. Ct. at 1879 (internal quotation marks omitted).

148. *Id.* at 1875.

149. *Id.* at 1876.

150. *Id.* at 1878.

151. *Id.* at 1879 (citing Brief for City Respondents at 36, *Fulton*, 141 S. Ct. 1868 (No. 19-123)). The City argued that an independent term in the contract prohibited discrimination on the basis of sexual orientation and that the contract term did not provide for any exceptions. *Id.*



relieve agencies of their obligation to certify prospective foster care parents without discriminating on the basis of sexual orientation.<sup>152</sup>

Even after reading the City's contract to do what the City argued it did not, there was no indication that the exemption process would lead to intentional discrimination against religious entities or produce disproportionately negative effects on them. It was undisputed that the City had never granted an exemption from the nondiscrimination requirement.<sup>153</sup> Nor was there any evidence that the City would offer an exemption to nonreligious entities but not religious ones. Still, the hypothetical possibility that the City might consider an agency's religious beliefs in granting a hypothetical exception—something that had never before happened—sufficed to trigger strict scrutiny. "The creation of a formal mechanism for granting exceptions," the Court explained, "invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude," raising concerns about discrimination against religious entities.<sup>154</sup>

Thus, after *Fulton*, it is not only a policy's disparate effects on religious and secular activities that trigger heightened scrutiny. It is also the existence of an exemption process, even if that process does not have a disparately negative impact on religious entities, because the hypothetical possibility of granting an exemption invites the government to consider reasons for not complying with the policy. That prospect, according to the Court, raises an impermissibly high risk of discrimination against religious entities.<sup>155</sup>

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152. *Id.*

153. *Id.* ("[T]he City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one.")

154. *Id.* (quoting *Employment Division v. Smith*, 494 U.S. 872, 884 (1990)). In *Fulton*, the Court maintained that this rule followed from *Smith*, and specifically from *Smith's* discussion of *Sherbert v. Verner*. *Id.* (citing *Smith*, 494 U.S. at 884). *Sherbert* addressed an unemployment benefits scheme that prohibited benefits for those persons who had "failed, without good cause . . . to accept available suitable work." 374 U.S. 398, 401 (1963). But in *Sherbert*, there was no question that the prohibition on employment benefits for persons who "failed, without good cause . . . to accept available suitable work" was relevant to—and indeed an element of—every application for unemployment benefits. Put another way, in order to obtain employment benefits, the state had to determine whether a person had "failed, without good cause" to accept other work; that was a necessary element of an employment benefit determination. There the good cause determination was part and parcel of any employment benefit determination; it did not supply the possibility of exceptions in some cases on a discretionary basis. In part for that reason, the "exception" in *Sherbert* had been applied multiple times—any time the state granted employment benefits, it would have concluded that the person had not failed "without good cause" to accept suitable work.

155. This idea has some similarities to a principle that governs when restrictions on speech are constitutional. In *Saia v. New York*, the Court invalidated a law that prohibited "the use of sound amplification devices except with permission of the Chief of Police" because "[t]here [we]re no standards prescribed for the exercise of [the Chief of Police's] discretion" about whether to grant a permit. 334 U.S. 558, 558–60 (1948). That principle does not map neatly onto the exemption in *Fulton* for a few reasons. One is that the permit process in *Saia* involved "a previous restraint on the right of free speech," *id.* at 559–60, requiring speakers to obtain official

After *Fulton*, several courts of appeals have concluded that policies triggered heightened scrutiny in light of the exemptions contained in the policies.<sup>156</sup> In *Dahl v. Board of Trustees of Western Michigan University*, the U.S. Court of Appeals for the Sixth Circuit concluded that the university's vaccination requirement for student athletes was subject to strict scrutiny because the policy allowed the university to grant individual requests for medical and religious exemptions.<sup>157</sup> Indeed, at least three justices believed that a workplace vaccine mandate was unconstitutional because "individualized exemptions [were] available" if employees supplied a "'written statement' from a doctor or other care provider indicating that immunization 'may be' medically inadvisable."<sup>158</sup> While Justice Barrett and Justice Kavanaugh concurred in the Court's decision to decline to issue an emergency injunction preventing Maine from enforcing the vaccine mandate, they explained that was because "this case . . . is the first to address the questions presented," which made the issue more appropriate for resolution on the "merits" docket, rather than the shadow "emergency docket."<sup>159</sup>

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Both of these accounts of what constitutes a neutral, generally applicable law that is presumptively constitutional—laws with no discretionary exemptions and laws that do not result in secular activities being treated more favorably than religious ones—represent important shifts in the Court's free exercise jurisprudence. *Employment Division v. Smith* held that "generally applicable" laws whose effect was to burden religious exercise are generally constitutional.<sup>160</sup> The Court had previously framed the rule in these terms: Generally applicable laws are constitutional unless "the object or purpose of a

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permission before speaking, an arrangement that raises unique First Amendment concerns. Another is that the structure of the discretion differed; in *Saia*, there was unfettered discretion about whether to grant a permit to begin with, whereas in *Fulton* the issue was about the possible discretion to waive a particular contract requirement. If the requirement in *Fulton* were similar, it would have involved a system of unfettered discretion about whether to grant an entity a contract to certify foster parents to begin with. Instead, the city contract conditions provided a baseline expectation and requirement of nondiscrimination in *Fulton*. There were no similar baseline rules or guidance in *Saia*. The scope of the discretion differed in another way as well: The permitting process in *Saia* concerned whether to grant permission to speak—to use a device for creating and amplifying speech. The universe of discretion in *Fulton* was not limited to activities that appeared constitutionally protected.

156. *E.g.*, *Foothill Church v. Watanabe*, 3 F.4th 1201 (9th Cir. 2021) (mem.) (remanding for district court to consider whether policy requiring health insurance coverage for abortions was subject to strict scrutiny because state health director had the power to exempt individual plans or groups of plans from requirement).

157. 15 F.4th 728 (6th Cir. 2021) (per curiam).

158. *Does 1–3 v. Mills*, 142 S. Ct. 17, 19 (2021) (mem.) (Gorsuch, J., dissenting) (quoting ME. REV. STAT. ANN. tit. 22, § 802(4-B) (2021)).

159. *Id.* at 18 (Barrett, J., concurring).

160. 494 U.S. 872, 878, 880 (1990).

law” was “the suppression of religion or religious conduct.”<sup>161</sup> The Court’s new cases fit under that framework only if the trigger for identifying the object or purpose of a law, or lack of general applicability and neutrality is trivial—a single secular exemption or a law that otherwise results in some remotely “comparable secular activity [being treated] more favorably than religious exercise.”<sup>162</sup> As explained above, the Court has put aside questions of intent in these cases and so expansively interpreted what constitutes similarly situated activity as to usher in a regime where any law or policy that treats some secular activity more favorably than religious exercise may be viewed with suspicion. The new cases represent a change in what constitutes disparate treatment and discrimination in cases involving religion.

## 2. Race Discrimination Cases

Now compare how the Court has rejected a similar standard with respect to racial discrimination—first in interpreting a statute that created a disparate impact liability regime (the Voting Rights Act), and second in constitutional cases arising in a similar context to the religious discrimination cases (the coronavirus pandemic) but concerning other rights, the right to vote and the right to be free from racial discrimination.

Before describing what the cases do, a quick note about what they could do but do not: It is conceivable that cases on race discrimination could implement a similar standard as the religious discrimination cases for cases involving claims of unintentional discrimination (that is, disparate impact claims). Proponents of the theory have argued as much.<sup>163</sup> To understand why, it is important to clarify that, under current law, disparate impact claims, unlike intentional discrimination claims, have only been used by racial minorities.<sup>164</sup> The Supreme Court’s most recent disparate impact case on the Fair Housing Act described disparate impact doctrine in these terms, as a mechanism to protect historically disadvantaged groups from “artificial, arbitrary, and unnecessary barriers” to key institutions and structures within society—employment and housing, among others.<sup>165</sup>

The theory that the Court has used in the context of religion could also work in the context of racial discrimination claims. The question would be

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161. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

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

163. Cass R. Sunstein, *Our Anti-Korematsu*, 1 AM. J.L. & EQUAL. 221, 236–37 (2021); Tebbe, *supra* note 14, at 2458–60.

164. Primus, *supra* note 100, at 528–29 (noting that “[every] authority there is supports the view that employment practices with disparately adverse impacts on historically dominant classes are, as a matter of law, not actionable under Title VII” but cautioning that “[o]ne should not lean too heavily on the authority of” the few cases that exist).

165. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 543 (2015) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)); Primus, *supra* note 100, at 523–31 (identifying this as a possible motive for disparate impact regimes).

whether, under the government’s facially neutral standard, a policy results in racial minorities being treated worse than (some) group of white individuals. As the Introduction explained, that might be the case under absentee voting rules that allow older voters, including some older white voters, but not younger racial minorities, to vote absentee. Or it might be the case under school legacy admissions policies that give preferences to (often white) children of alums of the schools but do not afford a similar preference to racial minorities.<sup>166</sup> In either case, the government would be required to show that the “favored” group (older white voters or white legacy admissions) are very differently situated with respect to whatever the government’s interest is—be it the prevention of voter fraud or the composition of a talented school class that preserves the value of the school. But that is not what the Court has done, either in cases involving a statutory scheme with a disparate impact regime (the Voting Rights Act) or with constitutional cases involving disparate impact claims.<sup>167</sup>

a. Voting Rights Act

In *Brnovich v. Democratic National Committee*, the Court provided the first guidance for how courts should assess vote denial claims under Section 2 of the Voting Rights Act.<sup>168</sup> Section 2 of the Voting Rights Act was amended after the Supreme Court’s decision in *City of Mobile v. Bolden* interpreted the Voting Rights Act to prohibit only intentional racial discrimination in voting and not those voting policies that unintentionally result in racial disparities.<sup>169</sup> The law now provides that

[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.<sup>170</sup>

By statutory amendment, Congress established that the prohibition was violated

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166. See Kathryn Ladewski, Note, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 MICH. L. REV. 577 (2010).

167. This Section considers a Voting Rights Act case in addition to equal protection cases because the nature of the Voting Rights Act claim sounded in discrimination (rather than denial of the right to vote, standing alone), and because that statute codifies a disparate impact liability regime, which bears important similarities to the theory in the new religion cases. See *supra* text accompanying notes 102–134.

168. 141 S. Ct. 2321, 2336 (2021) (describing the case as “involving rules, like those at issue here, that specify the time, place, or manner for casting ballots”).

169. 446 U.S. 55, 61 (1980).

170. 52 U.S.C. § 10301(a).

if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.<sup>171</sup>

Despite that history, the Court did not read the amendment to provide for a “disparate-impact model” similar to that “employed in Title VII and Fair Housing Act cases.”<sup>172</sup> Instead, the Court adopted a list of several factors that courts should consider when assessing a claim under Section 2.<sup>173</sup> The first was “the size of the burden,” meaning how severe or substantial a voting precondition or requirement was.<sup>174</sup> The second was “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982.”<sup>175</sup> That is, “rules in widespread use when § 2 was adopted” are unlikely to violate the provision.<sup>176</sup> The third was “[t]he size of any disparities in a rule’s impact on members of different racial or ethnic groups.”<sup>177</sup> Here, the Court emphasized that because “minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations” result in “predictable disparities” and accordingly do not violate Section 2.<sup>178</sup> Fourth, courts “must consider the opportunities provided by a State’s entire system of voting,” that is, the political process as a whole, rather than a particular voting policy or procedure.<sup>179</sup> Finally, courts must consider “the strength of the state interests.”<sup>180</sup> There, the Court emphasized that a “strong and entirely legitimate state interest is the prevention of fraud” even though there may not be evidence that fraud has ever occurred.<sup>181</sup>

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171. *Id.* § 10301(b).

172. *Brnovich*, 141 S. Ct. at 2340. Under that model, a state would have had to fulfill a “necessity requirement” that “their legitimate interests c[ould] be accomplished only by means of the voting regulations in question.” *Id.* at 2341 (quoting Stephanopoulos, *supra* note 17, at 1617).

173. *Id.* at 2362 (Kagan, J., dissenting) (“Think of the majority’s list as a set of extra-textual restrictions on Section 2 . . . The list—not a test, the majority hastens to assure us, with delusions of modesty—stacks the deck against minority citizens’ voting rights.”).

174. *Id.* at 2338 (majority opinion). The Court said this meant “obstacles and burdens that block or seriously hinder voting” rather than the “usual burdens of voting” or “[m]ere inconvenience.” *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality opinion)).

175. *Id.*

176. *Id.*

177. *Id.* at 2339.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 2340.

The Court's application of these factors to the two Arizona laws, one prohibiting the collection of ballots by persons other than the voter and the other prohibiting the counting of ballots accidentally cast in the wrong precinct on election day, further underscores how little the Court left of any disparate impact standard in the area of voting preconditions and racial discrimination. For the out-of-precinct rule, the Court found that *all* of the factors weighed in favor of the conclusion that the law did not violate Section 2. The Court described "[h]aving to identify one's own polling place and then travel there" as merely the "usual burdens of voting."<sup>182</sup> The Court noted that "it is relevant that in 1982 States typically required nearly all voters to cast their ballots in person on election day."<sup>183</sup> The Court emphasized that the burdens imposed by the precinct rule were "modest when considering Arizona's 'political processes' as a whole,"<sup>184</sup> beginning its opinion with the observation that "Arizona law generally makes it very easy to vote."<sup>185</sup> The Court discounted the fact that "Arizona leads other States in the rate of votes rejected on the ground that they were cast in the wrong precinct"<sup>186</sup> because "even if it is marginally harder for Arizona voters to find their assigned polling places, the State offers other easy ways to vote."<sup>187</sup>

On the disparity itself, the Court found that the "racial disparity in burdens . . . is small in absolute terms" because "a little over 1% of Hispanic voters, 1% of African-American voters, and 1% of Native American voters who voted on election day cast an out-of-precinct ballot."<sup>188</sup> That is, "roughly 99% of Hispanic voters, 99% of African-American voters, and 99% of Native American voters who voted on election day cast their ballots in the right precinct."<sup>189</sup> So even though the percentage of minority voters whose votes were not counted (over 1 percent) was twice as high as the percentage of white voters whose votes were not counted (0.5 percent), because the absolute numbers were small, the disparity was not significant.<sup>190</sup> The Court also concluded that there was an important state interest behind the ballot collection rule, the prevention of fraud, even though there was no evidence of actual fraud.<sup>191</sup> "[A] State may take action to prevent election fraud without waiting for it to occur

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182. *Id.* at 2344 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality opinion)).

183. *Id.* at 2339.

184. *Id.* at 2344.

185. *Id.* at 2330.

186. *Id.* at 2344.

187. *Id.*

188. *Id.* at 2344–45.

189. *Id.* at 2345.

190. *Id.*

191. *Id.* at 2348.

and be detected within its own borders”; “[f]raud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it.”<sup>192</sup>

For the ballot collection rule, the Court noted that the plaintiffs had not “provide[d] statistical evidence showing that [the law] had a disparate impact on minority voters.”<sup>193</sup> Instead, they had relied on evidence including the number of Native Americans in Arizona who live far from polling places or mailboxes.<sup>194</sup> The Court alternatively held that “[e]ven if the plaintiffs had shown a disparate burden caused by [the ballot collection rule], the State’s justifications would suffice to avoid § 2 liability.”<sup>195</sup>

#### b. Shadow Docket Coronavirus Cases

Also relevant are the constitutional cases decided without argument or full briefing (and sometimes without explained opinions). The first was *Republican National Committee v. Democratic National Committee*, the Court’s first foray into voting rights during the coronavirus pandemic.<sup>196</sup> In that case, the plaintiffs had challenged, among other things, Wisconsin’s rules for counting absentee ballots during a spring election that included a presidential primary and a seat on the Wisconsin Supreme Court.<sup>197</sup> As the coronavirus unfolded, more voters requested absentee ballots.<sup>198</sup> At the same time, because of the pandemic, the postal service was experiencing delays. As a result, some voters who requested absentee ballots in a timely manner did not receive their absentee ballots in time to mail them in compliance with the state’s deadline.<sup>199</sup> In order to avoid a scenario where voters were forced to choose between not voting and voting in person in the midst of a pandemic, the district court enjoined the state from enforcing the requirement that absentee ballots be mailed and postmarked by election day (which was April 7 with respect to ballots that were received by April 13).<sup>200</sup>

The district court concluded that, absent the injunction, Black voters would be particularly burdened by the state’s voting policies. Cities that received dramatically more absentee voter requests and that were experiencing backlogs in processing absentee voter requests were “more ethnically diverse

192. *Id.*

193. *Id.* at 2346.

194. *Id.* at 2346–47.

195. *Id.* at 2347.

196. 140 S. Ct. 1205 (2020) (per curiam).

197. *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 958–59 (W.D. Wis. 2020).

198. *Id.* at 961 (noting that one million more voters requested absentee ballots).

199. *Id.* at 962; *Republican Nat’l Comm.*, 140 S. Ct. at 1210 (Ginsburg, J., dissenting) (noting that over ten thousand ballots had not even been mailed out the evening before ballots were supposed to be postmarked).

200. *Bostelmann*, 451 F. Supp. 3d at 976–77.

than other cities in Wisconsin.”<sup>201</sup> Moreover, as the district court found a mere month into the pandemic, “African-American and Latino voters are particularly burdened by the impact of the COVID-19 health crisis with respect to the April 7 election.”<sup>202</sup> That was so in part because of the “digital divide” and historic barriers to voting online that placed “low-income African-American and Latino voters” at greater risk of not registering to vote or not requesting an absentee ballot before the pandemic.<sup>203</sup>

In light of those findings, the district court enjoined the state’s rule that absentee ballots be postmarked by April 7. In the Supreme Court ruling setting aside the injunction, there was no mention of the discriminatory effects and disparate burdens of the state’s voting policies. The Court merely noted that “the deadline for receiving ballots was already extended to accommodate Wisconsin voters, from April 7 to April 13” and that the extension was sufficient to address the effects of the pandemic on voting.<sup>204</sup> The Court also stated that many Wisconsin voters “have requested and have been sent their absentee ballots”<sup>205</sup>—in other words, that other people had no issues complying with the state’s policies.

The Court doubled down on refusing to engage with the possible discriminatory effects and disparate burdens of voting policies during the coronavirus pandemic in a subsequent Wisconsin case concerning the general election.<sup>206</sup> In that case, a district court had once again enjoined the state’s rule for when an absentee ballot had to be postmarked. This time, however, the court of appeals stayed the decision, and the U.S. Supreme Court left the stay in place. While the Court did not issue an opinion explaining its decision declining the stay, several justices did. All of the opinions invoked the merits—that is, their belief that the state’s voting policies were likely constitutional.<sup>207</sup>

The two other stay decisions followed a similar pattern, albeit with less reasoned explanation. In *Andino v. Middleton*, a majority of the Court elected

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201. *Id.* at 966–68 (explaining that “with respect to Racine, like Milwaukee, . . . approximately 23% of its residents are African-American and 21% are Hispanic/Latino”).

202. *Id.* at 968.

203. *Id.*

204. *Republican Nat’l Comm.*, 140 S. Ct. at 1207–08.

205. *Id.* at 1207.

206. *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (mem.).

207. *See id.* at 28 (Roberts, C.J., concurring) (explaining that “this case involves federal intrusion on state lawmaking processes” whereas other cases “implicated the authority of state courts to apply their own constitutions to election regulations”); *id.* at 28–29 (Gorsuch, J., concurring) (“Elections must end sometime, a single deadline supplies clear notice, and requiring all ballots be in by election day puts all voters on the same footing.”); *id.* at 32 (Kavanaugh, J., concurring) (“[T]he Constitution principally entrusts politically accountable state legislatures, not unelected federal judges, with the responsibility to address the health and safety of the people during the COVID-19 pandemic.”); *id.* at 33 (“This Court has long recognized that a State’s reasonable deadlines for registering to vote, requesting absentee ballots, submitting absentee ballots, and voting in person generally raise no federal constitutional issues.”).



to stay a district court decision that had enjoined some of South Carolina's voting rules during the coronavirus pandemic.<sup>208</sup> The district court had enjoined South Carolina's requirement that another individual witness a voter's signature on an absentee ballot.<sup>209</sup> Part of the district court's reasoning was that "African American[s]" were "at a higher risk of developing severe health complications due to COVID-19" and that a witness requirement increased an individual's risk of contracting COVID-19.<sup>210</sup> The district court also questioned whether the law served the state's asserted interest in preventing voter fraud given the kinds of persons who could witness an absentee ballot and the minimal penalties for absentee fraud, together with a lack of evidence of fraud.<sup>211</sup>

The full U.S. Court of Appeals for the Fourth Circuit left this injunction in place,<sup>212</sup> with one judge concurring to emphasize that "COVID-19 disproportionately endangers Black and elderly citizens."<sup>213</sup> The Supreme Court granted a stay—but not as to "ballots cast before" the stay issued and were "received within two days of" the order.<sup>214</sup> Only Justice Kavanaugh explained his vote in this case. And once again, he did so with respect to the merits. Justice Kavanaugh wrote that the Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States."<sup>215</sup>

*Merrill v. People First of Alabama* was the last of the coronavirus voting decisions.<sup>216</sup> In that case, the district court enjoined the Alabama secretary of state's ban on curbside voting in the midst of the COVID-19 crisis.<sup>217</sup> The district court decision noted, among other things, "Alabama's history of disenfranchisement of Black voters."<sup>218</sup> "Redeemers" who "recaptured the Alabama legislature and governorship . . . redrew voting districts to exclude Black voters, implemented at-large elections . . . to dilute Black voting blocs" and "enact[ed] new laws nominally geared toward curbing voter fraud."<sup>219</sup> Against

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208. 141 S. Ct. 9 (2020) (mem.).

209. *Middleton v. Andino*, 488 F. Supp. 3d 261, 266–67, 307 (D.S.C. 2020).

210. *Id.* at 297.

211. *Id.* at 302.

212. *Middleton v. Andino*, 990 F.3d 768 (4th Cir. 2020) (en banc) (mem.).

213. *Id.* at 769 (King, J., concurring).

214. *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (mem.). That limitation ensured that ballots cast while the injunction was in place were not thrown out. Justice Thomas, Justice Alito, and Justice Gorsuch would have granted the stay in full, thus throwing out ballots that were cast. *Id.*

215. *Id.* (Kavanaugh, J., concurring) (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring) (mem.)).

216. 141 S. Ct. 25 (2020) (mem.).

217. *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020).

218. *Id.* at 1104 (cleaned up).

219. *Id.* at 1105.

this history, the district court noted that Alabama’s “absentee ballot reforms enacted in the 1990s disproportionately disadvantaged . . . rural Black citizens who historically relied on absentee voting.”<sup>220</sup> The district court also noted the prevalence of racial discrimination in Alabama’s public schools and the health and healthcare disparities for Black residents in Alabama.<sup>221</sup> And with that context in mind, the district court noted the higher risks that Black adults faced from COVID-19.<sup>222</sup>

The Supreme Court stayed that decision.<sup>223</sup> The Court did not explain why; and it accordingly did not grapple with the racial disparities in the coronavirus pandemic or the discriminatory effects of the voting policies. The only mention of race was in Justice Sotomayor’s closing paragraph of her dissent: “Plaintiff Howard Porter, Jr., a Black man in his seventies with asthma and Parkinson’s Disease, told the District Court: “[S]o many of my [ancestors] even died to vote. And while I don’t mind dying to vote, I think we’re past that—we’re past that time.”<sup>224</sup>

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With the specifics of these cases in mind, it is helpful to draw out some of the differences between the cases on racial discrimination and the cases involving religious discrimination and religious liberty. The Court does not seem interested in the disparate effects of a voting law or policy when the allegation is that a policy discriminates on the basis of race; nor does the Court seem interested in whether there are somewhat comparable individuals that are treated more favorably under the state’s voting policies or procedures. In particular, it does not seem to move the Court that individuals who requested and received an absentee ballot earlier were able to vote absentee even though their voting absentee raises equally (unlikely) risks of fraud or election meltdowns as persons who requested an absentee ballot later. Framed in terms of the equal value theory, in racial discrimination cases, the Court does not require the state to come forward with evidence that the strength of its interest varies with respect to persons who are subject to the law and those who are not. Neither does the Court require the state to come forward with evidence that the strength of interest varies with respect to groups who experience greater burdens because of the law.

In religious discrimination cases, by contrast, the Court does not even require evidence that religious groups face greater burdens under the law than nonreligious groups. Consider here *Fulton v. City of Philadelphia* and *Brno-*

220. *Id.* at 1107.

221. *Id.* at 1107–09.

222. *Id.* at 1096–97.

223. *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (mem.).

224. *Id.* at 27 (Sotomayor, J., dissenting) (quoting *People First of Ala.*, 491 F. Supp. 3d at 1092).

*vich v. Democratic National Committee*. In *Fulton*, recall, there was no evidence that the discretionary exception process was applied in a way that favored nonreligious entities over religious ones.<sup>225</sup> The process had never been applied in the context relevant to the case—where the challenge was to the requirement not to discriminate when certifying foster care families. Nor did the Court point to any evidence that, were the City to ever use that exception process, there was reason to think it would result in greater exceptions for nonreligious entities than religious ones. Even with the absence of any evidence of a disparate impact, the Court still applied strict scrutiny—based on the Court’s seeming assessment of the prospect of religious discrimination. Yet in *Brnovich*, the Court faulted the challenge to the ballot-collection requirement on the ground that the plaintiffs had not supplied evidence of a statistical disparity between racial groups. And on the challenge to the precinct rule, the Court said the plaintiffs’ evidence of a disparity did not suffice in part because the disparity was not large in terms of absolute numbers.

### B. Identifying Discrimination

This Section discusses two kinds of evidence that the Court has used to identify whether discrimination has occurred—how well the government’s justification fits its policy and the existence of societal discrimination or discrimination by private individuals. Again in both instances, the Court has more freely used these tools in cases of religious discrimination than in cases of racial discrimination.

#### 1. Scrutiny of Government Justifications

In the course of ferreting out potential discrimination, the Court has engaged in different levels of scrutiny of the government’s asserted justifications. Analyzing whether a law or policy actually advances a legitimate objective is one way to assess whether the policy was motivated by invidious discrimination. If a policy does not further its purported legitimate objective, then that is a reason to suspect that the true objective may be more nefarious.

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225. The Court does not subject all discretionary action that might result in racial discrimination to heightened scrutiny. Instead, it has made it more difficult to challenge discretionary actions (like peremptory jury challenges, uses of force, charging decisions, and sentencing decisions) even when those discretionary actions result in racial disparities. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (“Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey’s case acted with discriminatory purpose.”); *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996) (explaining that the existence and scope of prosecutors’ “broad discretion” counsels against allowing a discrimination claim about selective prosecution to proceed).

In religious discrimination cases, the Court has required the government to come forward with more than hypotheticals and generalizations, even generalizations backed up by science, in order to justify its policies. In *Tandon v. Newsom*, for example, the Court declared that “the government . . . must do more than assert that certain risk factors” are present in religious services, even though that assertion was backed up by experts in disease control.<sup>226</sup> The Court has likewise demanded that the government explore alternative ways to effectuate its goals.<sup>227</sup>

By contrast, in cases raising the specter of racial discrimination, the Court does not require the same evidentiary support from the government. The Court does not demand that the government show that a policy actually addresses a real problem. Consider that the district court opinion in *Middleton v. Andino*, which enjoined South Carolina’s witness requirement, questioned whether the requirement did in fact further a valid interest. The court noted that absentee voter fraud was “an insubstantial problem” and that the witness requirement “provide[d]” only “ineffectual support towards solving” it.<sup>228</sup> Likewise, the district court opinion in *Democratic National Committee v. Bostelmann*, which extended the receipt deadline for absentee ballots in Wisconsin’s April election, interrogated the state’s asserted interest in “certainty and reliability” and “the orderly administration of elections.”<sup>229</sup> As the district court explained, election deadlines and administration had already been disrupted and “the state’s general interest in the absentee receipt deadline [wa]s not so compelling as to overcome the burden faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of the law.”<sup>230</sup> None of that seemed to matter to the Supreme Court.

*Brnovich* illustrates how the Court has not put the same burden on the state to come forward with evidence that its interest will actually be served by voting restrictions. There, the Court insisted that states did not need evidence that fraud in connection with early ballots had actually occurred in Arizona in order for the state to restrict voting on the basis of fraud.<sup>231</sup>

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226. 141 S. Ct. 1294, 1296 (2021) (per curiam); *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting) (“The district court found each of these facts based on the uncontested testimony of California’s public-health experts.”).

227. See *id.* at 1297 (majority opinion) (faulting the lower court for not “requiring the State to explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities”); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (noting that other jurisdictions adopted restrictions less severe than New York’s).

228. 488 F. Supp. 3d 261, 302 (D.S.C. 2020).

229. 451 F. Supp. 3d 952, 975 (W.D. Wis. 2020).

230. *Bostelmann*, 451 F. Supp. 3d at 976.

231. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2347 (2021) (“And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.”).

## 2. Relevance of Private Action

Another equally important trend in the First Amendment cases has been the Court's blurring of the boundary between public and private actors. It is black-letter law that the Constitution's First, Fifth, and Fourteenth Amendment guarantees apply only to state actors; private persons' activities cannot violate those Amendments.<sup>232</sup> And yet, in religious discrimination cases, the Court has relied on statements or decisions by private actors to assess the constitutionality of state action, suggesting the boundary between state and private action is less clear and less significant than the Court's doctrine imagines it to be.<sup>233</sup>

First consider Justice Alito's concurring opinion in *Espinoza v. Montana Department of Revenue*.<sup>234</sup> In that case, the Court held that Montana could not refuse tax credits for parents wishing to send their children to private, religious schools on the basis of the state's constitutional provision barring aid to religious schools.<sup>235</sup> To substantiate that conclusion, Justice Alito pointed to different pieces of evidence that the original version of Montana's constitutional provision was motivated by religious bias. First, Justice Alito pointed to some private citizens who supported the constitutional amendment—members of the Ku Klux Klan.<sup>236</sup> Second, Justice Alito noted that newspaper articles and cartoons published by private citizens in privately run national papers or magazines evinced hostility toward Catholics.<sup>237</sup> Both of these examples speak to a national public or societal sentiment not specific to Montana. So too did Justice Alito's third category of evidence—the (sometimes violent) behavior of private mobs, again in cities elsewhere in the country.<sup>238</sup>

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232. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991); *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1255 (2010).

233. While one of these cases, *Espinoza v. Montana Department of Revenue*, did so to assess whether there was intentional discrimination, 140 S. Ct. 2246 (2020), the existence of private discrimination could still be relevant to assessing claims of unintentional discrimination because it helps the Court to vary the scope of judicial review based on an analysis of whether the group faces prejudice. See *supra* text accompanying notes 52–78 (explaining prejudice strand of political process theory). Of course, private individuals' statements could shed light on state actors' motives when they work together. See *City of South Miami v. Desantis*, 561 F. Supp. 3d 1211 (S.D. Fla. 2021). And there are sometimes difficult questions about when private and state actors are working in tandem. See Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1966–74 (2000).

234. *Espinoza*, 140 S. Ct. 2246.

235. *Id.*

236. *Id.* at 2268 (Alito, J., concurring) (noting that the Ku Klux Klan supported the state constitutional provision).

237. *Id.* at 2269 (citing the *New York Times* and *Harper's Weekly*).

238. *Id.* at 2272 (pointing to “a mob” in New York, “riots” in Philadelphia, and behavior at schools in Massachusetts).

Next consider how some of the justices have used private actors' decisions in broader society as a basis for more carefully scrutinizing government action. Justice Thomas's statement, joined by Justice Alito, respecting the denial of certiorari in *Davis v. Ermold* is instructive.<sup>239</sup> The two observed that "parties" in litigation "have continually attempted to label people of good will as bigots merely for refusing to alter their religious beliefs" about the validity of same-sex marriage and same-sex relationships.<sup>240</sup> The two justices also maintained that "those with sincerely held religious beliefs concerning marriage . . . find it increasingly difficult to participate in society."<sup>241</sup> These happenings in society more broadly counseled in favor of (re)scrutinizing certain state action. Justice Alito's keynote speech to the Federalist Society Convention in 2020 echoed similar themes. He claimed that "those who cling to old beliefs" regarding marriage (specifically the belief that marriage is between a man and a woman) "risk being labeled as bigots and treated as such by . . . employers."<sup>242</sup> He also invoked "economic boycotts" as evidence of hostility to religion.<sup>243</sup> So some justices seem willing to attribute private entities' animus or discriminatory motives to the government and to assess the scope of societal discrimination against a group when deciding whether laws affecting the group warrant heightened judicial scrutiny.

Here too, the Court has found ways to avoid engaging in a similar analysis for race discrimination claims. For example, in the litigation challenging Secretary of Commerce Wilbur Ross's addition of a citizenship question to the census, the plaintiffs argued that a private citizen, Dr. Thomas Hofeller, had been involved in the proposal to add a citizenship question.<sup>244</sup> While the secretary maintained that adding the question was necessary to enforce the Voting Rights Act,<sup>245</sup> in memos, Hofeller observed that adding a citizenship question "would be advantageous to Republicans and Non-Hispanic Whites" in redistricting.<sup>246</sup> Although the Court ultimately concluded the Secretary's

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239. 141 S. Ct. 3 (2020) (Thomas, J.) (mem.).

240. *Ermold*, 141 S. Ct. at 4 (Thomas, J.).

241. *Id.* at 3.

242. See Justice Samuel Alito, Address at the Federalist Society 2020 National Lawyers Convention (Nov. 12, 2020), <https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society> [perma.cc/2YJW-TFMX].

243. *Id.*

244. NYC Plaintiffs' Motion for an Order to Show Cause, *New York v. U.S. Dep't of Com.*, No. 18-CV-2921 (S.D.N.Y. May 30, 2019).

245. The claim specifically was that DOJ had requested the information so as to better enforce the Voting Rights Act—something the DOJ never attempted to do during Trump's four years in office. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2562 (2019).

246. See NYC Plaintiffs' Motion for an Order to Show Cause, *supra* note 244, at 2.

addition of the citizenship question was pretextual in the sense that Commerce's explanation for adding the question strained belief,<sup>247</sup> Hofeller's role and his hope that a citizenship question would advantage "Non-Hispanic Whites" did not appear in the Court's opinion.<sup>248</sup>

Nor did the Court, in analyzing the racial discrimination claim in the case challenging the Trump administration's rescission of the Deferred Action for Childhood Arrivals program, consider which private groups or individuals supported DACA rescission and why.<sup>249</sup> Nor did the Court consider which private groups and individuals supported the president whose administration rescinded DACA and why. The Court did not, for example, consider the anti-immigrant and anti-Latino sentiments that were frequently expressed by people supporting President Trump's restrictive migration policies (such as news networks that ran stories expressing concerns about how nonwhite immigrants would replace white citizens).<sup>250</sup> Nor did the Court consider the anti-immigrant and anti-Latino sentiments expressed by private citizens at rallies for the Trump administration.<sup>251</sup>

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247. *Dep't of Com.*, 139 S. Ct. at 2575. As the Court explained, pretextual justifications result in an arbitrary and capricious policy that courts set aside under the Administrative Procedure Act. *Id.* at 2577.

248. *See Dep't of Com.*, 139 S. Ct. 2551. For comparison, a three-judge panel representing a North Carolina state court relied on the Hofeller files to conclude that North Carolina had engaged in partisan gerrymandering that violated the state's constitution. *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584, at \*80, \*135 (N.C. Super. Ct. Sept. 3, 2019).

249. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

250. *See* Justin Baragona, *Tucker Pushes Racist 'Great Replacement' Theory Yet Again, ADL Renews Call for Fox to Fire Him*, DAILY BEAST (Sept. 23, 2021, 6:56 PM), <https://www.thedailybeast.com/tucker-carlson-pushes-racist-great-replacement-theory-yet-again-adl-renews-call-for-fox-to-fire-him> [perma.cc/F4E4-7HN8]; Charles M. Blow, Opinion, *Tucker Carlson and White Replacement*, N.Y. TIMES (Apr. 11, 2021), <https://www.nytimes.com/2021/04/11/opinion/tucker-carlson-white-replacement.html> [perma.cc/N9SV-FXMH]; Joe Lapointe, Opinion, *Tucker Carlson's Immigration Rants Are Flat Out Racist*, OBSERVER (Jan. 26, 2018, 6:38 AM), <https://observer.com/2018/01/tucker-carlsons-immigration-daca-rants-are-racist> [perma.cc/X8VG-S93] (noting segments on DACA in particular).

251. *See* CTR. ON EXTREMISM, ANTI-DEFAMATION LEAGUE, MAINSTREAMING HATE 36–37, 42–43 (2018), <https://www.adl.org/sites/default/files/mainstreaming-hate-anti-immigrant-report-2018-v3.pdf> [perma.cc/LT62-TKAV]; Philip Rucker, *How Do You Stop These People?: Trump's Anti-Immigrant Rhetoric Looms over El Paso Massacre*, WASH. POST (Aug. 4, 2019), [https://www.washingtonpost.com/politics/how-do-you-stop-these-people-trumps-anti-immigrant-rhetoric-looms-over-el-paso-massacre/2019/08/04/62d0435a-b6ce-11e9-a091-6a96e67d9cce\\_story.html](https://www.washingtonpost.com/politics/how-do-you-stop-these-people-trumps-anti-immigrant-rhetoric-looms-over-el-paso-massacre/2019/08/04/62d0435a-b6ce-11e9-a091-6a96e67d9cce_story.html) [perma.cc/A6LZ-JRH9]; Tyler Anbinder, *Trump Has Spread More Hatred of Immigrants than Any American in History*, WASH. POST (Nov. 7, 2019), [https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8\\_story.html](https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html) [perma.cc/7ZBZ-LAQB].

### III. A NEW THEORY

This Part offers a theory that can plausibly explain the contours of the Court's new jurisprudence. It then evaluates what the Court's apparent approach to discrimination claims gets right and what it gets wrong.

#### A. *Theory: Social Power, Prejudice, and Grievance*

This Section outlines a jurisprudential theory and worldview that can plausibly explain the Court's new approach to discrimination cases. It explains the possible theory driving these cases in part by comparing and contrasting the Court's approach to judicial review with the political process theory. Recall that in *Carolene Products*, the Court suggested that "[t]here may be narrower scope for operation of the presumption of constitutionality" where "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>252</sup>

This Section argues that the Court has either or both broadened its definition of powerlessness (to include groups who are socially powerless) or has concluded that conservative Christian groups are victims of prejudice and societal discrimination (because some of their beliefs or views have been described as discriminatory). Under either approach, the Court now seems to view conservative Christian groups as a group warranting judicial solicitude because the groups lack social capital or because some portions of society are prejudiced against them. Not much turns on whether the animating theory is a new definition of powerlessness or a conclusion that conservative Christian groups face prejudice. As this Section explains, both have similar implications, flaws, and features.

#### 1. New Powerlessness and Prejudice

One way of understanding the trajectory of the Court's cases, which show greater solicitude for (largely white, Christian, conservative) religious discrimination claims, would be that the Court has adopted a new definition of what counts as "powerlessness." Ely, as well as *Carolene Products*' footnote four, had urged more vigorous forms of judicial review for legislation "directed at particular . . . discrete and insular minorities" who face "prejudice."<sup>253</sup> In the Court's eyes, it seems, groups are powerless not only when they lack *political* power but where they lack *social* capital, particularly in certain spaces like elite institutions of higher education or in popular culture. The

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252. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

253. *Id.* *Carolene Products* had also suggested more careful judicial scrutiny was appropriate where laws violated one of the first several amendments or targeted racial or religious minorities. *Id.* But whether a law violates the First Amendment now appears to turn on the Court's assessment about whether a particular religion has social or political power or faces bias and prejudice. That can explain how and why the Court treats religious discrimination claims by different religious groups in different ways. See *supra* text accompanying notes 25–27, 36–41.



Court may also believe that social conservatives, especially conservative religious groups, now face widespread societal discrimination and prejudice from a society that does not adequately respect the group's views. If social conservatives face societal prejudice, that could be one reason to believe that they lack social capital and power, which is why the theories are not mutually exclusive. Both explanations focus on how society treats and engages with social conservatives' views.

That is where the justices appear to be focused. Consider, for example, Justice Alito's remarks to The Federalist Society convention in November 2020. Justice Alito pointed to a blog post written by a Harvard law professor who had proclaimed that "[t]he culture wars are over. They lost. We won" as evidence that society does not adequately respect social conservatives' views.<sup>254</sup> Justice Alito specifically drew attention to how conservatives were treated at elite law schools: "When I speak with recent law school graduates, what I hear over and over is that they face harassment and retaliation if they say anything that departs from the law school orthodoxy."<sup>255</sup> Justice Alito expressed concern that "those who cling to old beliefs" regarding marriage "risk being labeled as bigots and treated as such by . . . employers," again invoking the specter of how society characterizes and engages with social conservatives' views.<sup>256</sup> He also invoked the existence of private "economic boycotts" protesting LGBTQ discrimination or racial discrimination as evidence of hostility to religion and religious believers.<sup>257</sup> All of these statements are about how certain religions and religious believers lack important social capital and social power. Justice Alito continued this theme in his 2021 remarks at Notre Dame Law School when he sought to address criticisms of the Court's shadow docket. Justice Alito (mis)characterized private citizens' (professors and journalists) criticisms as "unprecedented efforts to intimidate the court,"<sup>258</sup> again indicating an apparent belief that the conservative justices were the victims of social groups (law professors) who disagreed with them. And in another

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254. See Alito, *supra* note 242. The professor was Mark Tushnet. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [perma.cc/YUT2-ER9A].

255. Alito, *supra* note 242. A bizarre manifestation of this worldview is conservatives seeking to suppress counterspeech that is critical of them. An officer of the Stanford Law School Federalist Society lodged a complaint against a fellow student, putting his graduation on hold, for circulating a satirical poster that mocked the Federalist Society's ties to and refusals to disavow the January 6 insurrection at the Capitol. Their complaint alleged that the poster unfairly insulted them. Mark Joseph Stern, *Update: Law Student Who Made Fun of the Federalist Society Will Be Allowed to Graduate After All*, SLATE (June 2, 2021, 5:07 PM), <https://slate.com/news-and-politics/2021/06/federalist-society-stanford.html> [perma.cc/4FHH-TT4E].

256. Alito, *supra* note 242.

257. *Id.*

258. Nina Totenberg, *Justice Alito Calls Criticism of the Shadow Docket 'Silly' And 'Misleading'*, NPR (Sept. 30, 2021, 7:12 PM), <https://www.npr.org/2021/09/30/1042051134/justice-alito-calls-criticism-of-the-shadow-docket-silly-and-misleading> [perma.cc/G75V-KRH2].

speech at Notre Dame Law School's Religious Liberty Initiative in 2022, Justice Alito identified "hostility" to "traditional religious beliefs" as a challenge to religious liberty, and "indifference" to religion and a "turn away from" religion as other challenges.<sup>259</sup> These remarks reveal the Justice believes there is considerable discrimination against conservative Christians, and that conservative Christians are at risk because society no longer shares their values.<sup>260</sup> Indeed, that is how he framed the speech, as about how "to win the battle to protect religious freedom in an increasingly secular society."<sup>261</sup>

Various statements from oral arguments reflect a similar view. Consider Justice Thomas's line of questioning in *Americans for Prosperity Foundation v. Bonta*, argued in April 2021. The case concerned a California rule that required charities to report their largest donors.<sup>262</sup> Justice Thomas asked California's lawyer: "[D]o you think it would be reasonable for someone who wants to make a substantial contribution to an organization that has been accused of being racist or homophobic or white supremacist, that in this environment that they would be chilled . . . ?"<sup>263</sup> Justice Thomas also posited that "in this era, there seems to be quite a bit of . . . loose accusations . . . of being a white supremacist organization or racist or homophobic."<sup>264</sup> In the same argument, Justice Alito referred to the concerns of "organizations that take unpopular positions," including the two plaintiffs in the case who are associated with conservative causes.<sup>265</sup> These statements seem to imply that society is concerned with racism and racial discrimination to such an extent that the people who lack social power include those who are accused of racism or homophobia.

The justices have expressed similar thoughts in written statements. In their statement respecting the denial of certiorari in *Davis v. Ermold*, for example, Justices Thomas and Alito expressed concern that "those with sincerely held religious beliefs concerning marriage will find it increasingly difficult to participate in society."<sup>266</sup> And in *Obergefell* itself,<sup>267</sup> Justice Alito seemed to

259. Notre Dame Law School, *2022 Religious Liberty Summit: U.S. Supreme Court Justice Samuel Alito*, YOUTUBE, at 12:17–13:56 (July 28, 2022), <https://youtube/uci4uni608E>.

260. *Id.* For a powerful analysis, see Sherry F. Colb, *Alito and the Free Exercise of Christianity*, VERDICT (Aug. 10, 2022), <https://verdict.justia.com/2022/08/10/alito-and-the-free-exercise-of-christianity> [perma.cc/2WB8-7VG4]. See also Sherry Colb, *Free Exercise in the Mirror*, 2 N.C. C.R. L. REV. 67 (2022).

261. Notre Dame Law School, *supra* note 259, at 26:50–27:06.

262. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2379 (2021).

263. Transcript of Oral Argument at 82–83, *Ams. for Prosperity*, 141 S. Ct. 2373 (Nos. 19-251, 19-255).

264. *Id.* at 10.

265. *Id.* at 53.

266. 141 S. Ct. 3, 3–4 (2020) (Thomas, J.) (mem.); see also *id.* at 4 (describing arguments made by litigants).

267. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the Fourteenth Amendment guarantees same-sex couples the right to marry).

suggest that the Court's opinion would result in discrimination against religious individuals and entities that would resemble historical discrimination against LGBTQ individuals:

[T]he majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.<sup>268</sup>

These statements also provide some clues about the Court's repeated choice not to conduct searching judicial review in cases that involve racial minorities. The Court may view racial minorities as relatively more socially powerful. Justice Thomas's question from oral argument in *Americans for Prosperity* signaled a view that society now has little tolerance for racism and racial discrimination; that is why, in his view, being accused of racial discrimination is so devastating.<sup>269</sup> Or consider the Court's blithe assertion in *Shelby County v. Holder* that "[r]egardless of how to look at the record, . . . no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965,"<sup>270</sup> which conveys a belief that racial discrimination is no longer a serious problem. At oral argument in *Shelby County*, Justice Scalia made the following claims about the fortitude of civil rights statutes and civil rights protections designed to root out racial discrimination:

[I]t is attributable . . . to a phenomenon that is called perpetuation of racial entitlement. It's been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes.

I don't think there is anything to be gained by any Senator to vote against continuation of this act. And I am fairly confident it will be reenacted in perpetuity unless—unless a court can say it does not comport with the Constitution.<sup>271</sup>

This too suggests a belief that persons fighting against racial discrimination possess a kind of capital that other groups may not.

So one way of understanding the Court's cases would be that the Court is increasingly attuned to social power and social capital as a measure of powerlessness. Another related way of understanding the Court's cases would be that the Court believes that social conservatives (particularly religious social conservatives) face societal discrimination and prejudice because some parts of society treat some social conservative views as discriminatory or as enabling discrimination.

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268. *Id.* at 742 (Alito, J., dissenting).

269. *See supra* text accompanying note 263.

270. 570 U.S. 529, 554 (2013) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 315, 331 (1966) and *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 201 (2009)).

271. Transcript of Oral Argument at 47, *Shelby Cnty.*, 570 U.S. 529 (No. 12-96).

The claim that conservative Christians are socially powerless and the related notion that they accordingly warrant some heightened judicial protection does not necessarily depend on whether conservative Christians or Republicans are actually politically powerful or powerless. Neither the claim nor the theory depends on a conclusion about that group's political power. They are concerned with the group's social capital and economic power, at least in certain circles.

## 2. Redistributing Social Power

The Court's cases do more than rest on the apparent premise that conservative Christians lack social power. They also have the effect of preserving or enhancing societal power for groups they believe are socially powerless or face societal prejudice. Several of the Court's cases enable groups to provide important services, but on terms amenable to them, which increases those groups' power in society. *Fulton v. City of Philadelphia* upheld Catholic Social Services and other agencies' ability to continue certifying prospective foster care parents while refusing to certify same-sex or unmarried couples.<sup>272</sup> (And Philadelphia had never challenged the agencies' ability to provide other services, such as foster care.)<sup>273</sup> *Masterpiece Cakeshop* allowed a goods and services provider to do the same—to retain the economic power and social capital of being a business owner, but on their own terms, rather than those provided by the state's civil rights laws.<sup>274</sup>

By allowing goods and service providers to opt out of civil rights statutes, the Court allows the entities to leverage their economic power to impose their views on other persons in society.<sup>275</sup> Some goods and service providers' economic power puts them in a position to dictate the terms of other people's participation in society. Take the progression from *Griswold v. Connecticut*<sup>276</sup> to *Burwell v. Hobby Lobby Stores, Inc.*<sup>277</sup> *Griswold* (and subsequent cases) held that states could not prohibit people from using contraception.<sup>278</sup> In *Hobby Lobby*, as well as the Court's most recent foray into health insurance coverage for contraception, the Court allowed employers to refuse to provide contraception coverage, despite a federal rule requiring it.<sup>279</sup>

272. 141 S. Ct. 1868 (2021).

273. Brief for City Respondents at 4–9, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

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

275. This is in addition to the important dignitary interests implicated by refusals of service. See Leslie Kendrick & Micah Schwartzman, *The Supreme Court 2017 Term—Comment: The Etiquette of Animus*, 132 HARV. L. REV. 133, 157–58 (2018).

276. 381 U.S. 479 (1965).

277. 573 U.S. 682 (2014).

278. *Griswold*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

279. *Hobby Lobby*, 573 U.S. 682. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* upheld a regulation that allowed employers to opt out of the requirement without even

As Douglas Nejaime and Reva Siegel have explained, the structure of these First Amendment-based claims “amplify the material . . . harms that accommodating such claims can inflict.”<sup>280</sup> Given employees’ limited physical or job mobility, providing employers the power to dictate the terms of health insurance coverage for contraception can alter whether some individuals have practical access to contraception at all.<sup>281</sup> The same kind of claim, a First Amendment exemption from civil rights statutes, has also been advanced by healthcare providers who would refuse treatment or services with which they disagreed or would refuse treatment for individuals whose gender identity or sexual orientation they objected to.<sup>282</sup> And the claims might even extend to “public accommodations, in employment, and in housing.”<sup>283</sup>

Even the Court’s coronavirus religious liberty cases have the effect of bolstering religious groups’ social power. In all of the cases in which the Court struck down public health measures designed to reduce the spread of the coronavirus, the Court concluded that religious entities could not be subject to the capacity limitations that were applicable to secular organizations.<sup>284</sup> As Kate Andrias and Benjamin Sachs observed in their article proposing methods to enable “building and consolidating political power for the nonwealthy,” physical spaces and “gathering spaces, where people are in close proximity, are the most fruitful locations for social-movement building.”<sup>285</sup> The coronavirus decisions, in other words, facilitated movement consolidation and community organizing by groups that some justices perceived as lacking social capital.

Other decisions mandate government support—transfers of wealth and power—to those same groups. *Espinoza v. Montana Department of Revenue*

providing notice to the federal government or insurance company that might have facilitated coverage. 140 S. Ct. 2367 (2020).

280. Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2522 (2015). *Hobby Lobby* was decided on statutory, not First Amendment, grounds. 573 U.S. at 682. For a constitutional decision with a similar structure, see *Foothill Church v. Watanabe*, 3 F.4th 1201 (9th Cir. 2021) (mem.) (remanding in light of *Fulton* because of possible exemption in state regime).

281. Melissa Murray, *Sexual Liberty and Criminal Law Reform: The Story of Griswold v. Connecticut*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 11, 31 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019) (“[T]he stigma and disapproval that once attended contraceptive use can still be felt—albeit in more muted forms . . . . These insights make clear the limitations of decriminalization as a means of law reform, and underscore the many vehicles, beyond the criminal law, that the state may deploy in its efforts to enforce a particular vision of sex and sexuality.”).

282. Nejaime & Siegel, *supra* note 280, at 2566–74; see also Hannah Murphy Winter, *Ohio Allows Doctors to Deny LGBTQ Health Care on Moral Grounds*, ROLLING STONE (July 7, 2021, 4:32 PM), <https://www.rollingstone.com/politics/politics-news/ohio-lgbtq-health-care-1193948> [perma.cc/42AA-4BH9].

283. Nejaime & Siegel, *supra* note 280, at 2574.

284. See *supra* text accompanying notes 111–125.

285. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 551–52, 608–09 (2021).

and *Carson v. Makin* held that states could not exclude religious institutions from tax-credited scholarship funds or state-funded vouchers, even when the funds might be used for religious instruction.<sup>286</sup> *Fulton* required the City to provide contracting funds to religious agencies.<sup>287</sup>

So the Court seems to be affording more rigorous judicial scrutiny in cases involving groups that it perceives to be relatively socially powerless or victims of social discrimination. And the decisions reinforce the groups' social position and power.

This way of understanding the Court's cases differs from the accounts that have been offered by other scholars. Reva Siegel argued that the Court has developed a set of rules that provide for "majoritarian-enhancing" judicial review that supplies majorities more protections than minorities.<sup>288</sup> She wrote that the Court seemed more interested in "protecting members of majority groups from actions of representative government that promote minority opportunities" than in "protecting 'discrete and insular minorities' from actions of representative government that reflect 'prejudice'."<sup>289</sup> Aaron Tang generalized this claim, pointing to other areas of law beyond equal protection.<sup>290</sup> Tang described the Court as creating protections for the politically powerful, writing that the Court now "afford[s] special protections via underdetermined constitutional provisions to politically powerful entities that are able to advance their interests full well in the democratic arena."<sup>291</sup> Tang's formulation might not differ significantly from Siegel's if Siegel's claim that the Court affords greater protection to majoritarian claims means only that the Court affords greater protection to politically powerful entities that are able to advance their interests "full well in the democratic arena."<sup>292</sup>

But to say that the Court is affording increased protections to majorities and the politically powerful may not capture the full picture. The Court may

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286. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022). The decisions followed the Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, which held that states had to provide equal access to religious institutions for *non-religiously-related* funding (there, surfacing playgrounds). 137 S. Ct. 2012, 2024 n.3 (2017) ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.").

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

288. Siegel, *supra* note 22, at 7, 9.

289. *Id.* at 7, 9, 29–58 ("Today, courts reviewing equal protection challenges to facially neutral laws brought by members of minority groups proceed under law that directs judges to defer to representative government, while courts reviewing equal protection claims brought by members of majority groups strictly scrutinize challenges to affirmative action.").

290. Tang, *supra* note 22, at 1454–60 (including the thin protections the Court affords to criminal defendants and victims of policing relative to the stronger protections it affords police officers and state governments).

291. *Id.* at 1430–31 (emphasis omitted).

292. *Id.*

be affording protections to groups it perceives as relatively socially powerless—groups that might or might not be politically powerful, but the Court is not affording them protections for that reason. That is, whereas Siegel maintains that the Court has afforded more searching judicial review to majorities and Tang argues the Court has does so in cases affecting the politically powerful, in the Court’s eyes, the legislation or policy may affect groups who are (relatively speaking, in the Court’s eyes) socially powerless.

The Court may also be affording greater judicial solicitude to groups that it believes face social prejudice—groups whose views are not treated with sufficient respect and groups that are unfairly characterized or stereotyped. Here too, whereas Siegel and Tang ask whether the Court is supplying more favorable judicial scrutiny in cases affecting majoritarian groups or the politically powerful, in the Court’s eyes, it may be varying judicial scrutiny based on whether a group is subject to societal discrimination and prejudice.

These descriptions of the Court’s cases help to supply a missing jurisprudential theory that could explain the trend that Nick Stephanopoulos documented in the Court’s decisions on the law of democracy.<sup>293</sup> Stephanopoulos argued that the Court’s election law and law of democracy rulings not only fail to carry out *Carolene*’s suggestion that there be “more searching judicial inquiry” where “legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”<sup>294</sup> but also invert that principle as well.<sup>295</sup> In other words, the Court has retreated not only from the prejudice prong of *Carolene* but the access prong as well.<sup>296</sup>

Stephanopoulos rejected the idea that the conventional modalities of constitutional interpretation (such as text, history, or doctrine) could justify the Court’s decisions. He also maintained that a theory of judicial restraint could not do so. Instead, Stephanopoulos posited,

[r]unning like a red thread through the Roberts Court’s anti-*Carolene* decisions is perceived, and actual, partisan advantage. . . . [I]ts actions are consistent with the recommendations of conservative elites. Both the Court’s intrusions into, and its abstentions from, the political process also empirically benefit the Republican Party, whose presidents appointed a majority of the sitting Justices.<sup>297</sup>

Stephanopoulos disavowed “psychoanalyzing the Justices” or identifying “what subjectively motivates their rulings.”<sup>298</sup> But a jurisprudential theory and worldview that sees social conservatives as socially powerless and/or as victims

293. Stephanopoulos, *supra* note 22, at 180.

294. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

295. See Tang, *supra* note 22; Stephanopoulos, *supra* note 22.

296. Stephanopoulos, *supra* note 22, at 121–22.

297. *Id.* at 178, 180 (“Whether or not it consciously drives any Justice’s behavior, it better accounts for the Roberts Court’s election law rulings than any alternative hypothesis.”).

298. *Id.* at 180.

of widespread societal prejudice could plausibly be what motivates the rulings and leads to the results he observes.<sup>299</sup> The idea that the justices believe that members of the Republican Party, in particular white, conservative (often) Christians, are socially powerless or victims of rampant discrimination and are affording them heightened judicial protection for that reason helps to explain why and how the justices are generating rulings that advantage the Republican Party.

### B. Evaluation

This Section evaluates the various doctrinal and jurisprudential moves in the Court's new antidiscrimination cases. It first explains what the Court's approach might get right (and where criticisms should not be directed) before analyzing what the theory gets wrong. It ultimately concludes that the Court's two-track system for discrimination claims is unjustifiable.

#### 1. Partial Defense

This Section discusses two features of the new religious liberty cases that are commendable. The Court is right to consider economic and social facts about the world that may be relevant to varying the scope of judicial review, and the Court's definition of religious discrimination also represents a welcome shift inasmuch as it addresses real shortcomings with the definition of discrimination that the Court has used in cases of racial discrimination.

As a general matter, there is much to recommend the idea that, in assessing the degree of scrutiny that courts should apply, one should consider economic realities and social facts about the world.<sup>300</sup> Indeed, critics have pointed to the Court's failure to consider economic realities and social facts as key defects in some of the Court's jurisprudence.<sup>301</sup> That is one of the major claims lodged against the Court's decision in *Lochner v. New York*—that in fashioning a “fundamental right to contract” enjoyed by both the employer and the employee, the Court overlooked the economic realities that gave employers greater power in contracting than employees.<sup>302</sup>

Scholars have criticized modern free speech cases on similar grounds. Consider *McCutcheon v. Federal Election Commission* or *Americans for Prosperity Foundation v. Bonta*. *McCutcheon* invalidated a law that established caps on the overall, combined amount of money that an individual could give to federal candidates, as well as the caps on the overall, combined amount of

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299. See *id.* at 177–79.

300. Lakier, *supra* note 29, at 1246–47, 1301–02, 1318–19.

301. *Id.* at 1318–19.

302. See, e.g., Edward S. Corwin, *The Court Sees a New Light*, NEW REPUBLIC (Aug. 4, 1937), <https://newrepublic.com/article/122659/court-sees-new-light> [perma.cc/U79R-6VZ9]; Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 537–38 (2015).



money that an individual could give to federal political action committees and party committees.<sup>303</sup> *Americans for Prosperity* invalidated California's requirement that nonprofits report certain large donors to the state.<sup>304</sup> The effect of both rulings is to give persons or entities with concentrated capital and economic power greater ability to support their preferred political candidates and (to secretly) support preferred causes.<sup>305</sup> As Genevieve Lakier has argued, modern First Amendment doctrine, by insisting on formally equal treatment of all speakers, results in "a powerful sword for reinforcing the power of the propertied and a shield against government efforts at redistribution."<sup>306</sup> A constitutional doctrine that prohibits the government from restricting everyone's opportunities for speech will result in greater opportunities for speech by those with greater resources.<sup>307</sup> The same goes for a doctrine that prohibits the government from attempting to ensure equal access for all speakers: the persons or entities with the most to gain from government policies that attempt to ensure equality of access are those with less wealth and less power, who might lack equal access without government intervention.<sup>308</sup>

Another way of understanding why social facts and social context can be relevant to assessing the proper scope of judicial review is to imagine a hypothetical world where there is a disparity between political power and social power and how that could mean something is amiss on the societal side of the ledger. Imagine a world in which a majority of the population holds one view (call it view X), and view X prevails in the political process time and time again. But the other view (call it view Y) is the view held by the country's largest and predominant employer who possesses outsized wealth and many more resources than any other entity. In that universe, view Y might be the view that is most often heard or shared in society and that society rewards the most (at the expense of view X). In that scenario, one might think that it is correct to be skeptical of the landscape presented by the societal side of the ledger rather than the political one.

So the Court is right, in the religious discrimination cases, to consider facts about the world that relate to the ostensibly private sphere and private markets. As the campaign finance examples suggest, moreover, economic and social distributions of power may be difficult to divorce from political power. Economic resources can fuel political campaigns and political causes and social capital and social networks can do the same. There is little reason for an

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303. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014).

304. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

305. See, e.g., Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 14–15 (2014).

306. Lakier, *supra* note 29, at 1245; see also Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2121 (2018).

307. Lakier, *supra* note 29, at 1318–19, 1322–25; Lakier, *supra* note 306, at 2127–30.

308. Lakier, *supra* note 29 at 1322–25.

arbitrary, overly formal separation between political power and various private forms of power, particularly when the two often work in conjunction.<sup>309</sup>

A few recent examples bolster the point. Consider the award-winning journalist Nikole Hannah-Jones's experience with the tenure process at the University of North Carolina school of journalism. Hannah-Jones was offered the position of the Knight Chair at UNC, a position that historically came with tenure. The journalism school faculty voted to offer her a position on those terms. Then came emails and phone calls to the board of trustees and board of governors from a large donor to the school of journalism—Walter Hussman, for whom the school is named. Hussman expressed concerns about the school associating with Hannah-Jones in light of her work on the 1619 Project, a media project about the role of slavery and racism in American history and politics. After Hussman's misgivings, the board of trustees did not approve her tenure, and Hannah-Jones was initially offered an untenured position. After news broke of Hussman's involvement in the appointment process, the university, under intense pressure, eventually offered her a tenured position, which she ultimately declined.<sup>310</sup>

It would be difficult to sensibly analyze the speech rights at issue in the dispute without taking into account Hussman's economic power vis a vis the university. (After inheriting several newspapers, Hussman gifted the university a \$25 million donation that led the school to rename itself the Hussman School of Journalism.)<sup>311</sup> It would also be a mistake to overlook the social mobilization in support of Hannah-Jones.

309. See, e.g., April Baumgarten, *Professor Whose Sex Ed Programs Drew Conservative Ire to Leave NDSU*, GRAND FORKS HERALD (June 24, 2021, 5:34 PM), <https://www.grandforksherald.com/news/education/7088333-Professor-whose-sex-ed-programs-drew-conservative-ire-to-leave-NDSU> [perma.cc/P5AT-4HHK] (noting how "Christian groups, conservative organizations and Republican legislators" organized against an initiative to reduce teen pregnancy in North Dakota State University).

310. *Nikole Hannah-Jones Issues Statement on UNC Board of Trustees Vote*, LDF (June 30, 2021), <https://www.naacpldf.org/press-release/nikole-hannah-jones-issues-statement-on-unc-board-of-trustees-vote> [perma.cc/Y8QK-TPDF]; Kristen Hare, *Perspective from the Reporter Who's Covered the Nikole Hannah-Jones/UNC Story from the Start*, POYNTER (July 6, 2021), <https://www.poynter.org/reporting-editing/2021/perspective-from-the-reporter-whos-covered-the-nikole-hannah-jones-unc-story-from-the-start> [perma.cc/X2H3-UFKU]; *Nikole Hannah-Jones Issues Statement on Decision to Decline Tenure Offer at University of North Carolina-Chapel Hill and to Accept Knight Chair Appointment at Howard University*, LDF (July 6, 2021), <https://www.naacpldf.org/press-release/nikole-hannah-jones-issues-statement-on-decision-to-decline-tenure-offer-at-university-of-north-carolina-chapel-hill-and-to-accept-knight-chair-appointment-at-howard-university> [perma.cc/WM6T-WZJW]; David Folkenflik, *UNC Journalism School Tried to Give Nikole Hannah-Jones Tenure. A Top Donor Objected*, NPR (June 21, 2021, 6:05 AM), <https://www.npr.org/2021/06/21/1007778651/journalism-race-and-the-fight-over-nikole-hannah-jones-tenure-at-unc> [perma.cc/5JL9-7DVL].

311. University Communications, *Alumnus Walter Hussman Jr. and His Family Make Historic Gift to Carolina*, UNIV. OF N.C. CHAPEL HILL (Sept. 10, 2019), <https://www.unc.edu/discover/hussman-journalism-media-gift> [perma.cc/B2AT-7RPL].

Or consider an example where social mobilization and economic power effectively shifted the political process. North Carolina was one of several states to adopt anti-trans legislation in the mid-2010s; after cities adopted ordinances to allow students to use bathrooms consistent with their gender identities, the state enacted HB2, which required individuals to use public school restrooms and locker rooms based on the gender listed on their birth certificates.<sup>312</sup> The public condemnation was swift, and the National Basketball Association announced that it would move the All-Star Game out of North Carolina if the state kept the legislation.<sup>313</sup> The All-Star Game often brings in over \$100 million in business.<sup>314</sup> Facing popular outcry that included costly sanctions by an entity with a lot of economic power, North Carolina relented and repealed the most significant provisions of HB2.<sup>315</sup>

Intriguingly, some of Justice Thomas's writings have signaled some attention to economic and social facts about the world in the context of First Amendment speech claims related to service providers. In the case about whether presidents may block persons on Twitter under their personal accounts, Justice Thomas wrote that he believed courts should consider how "digital platforms provide avenues for historically unprecedented amounts of speech" and how private ownership of the platforms places "concentrated control of so much speech in the hands of a few private parties."<sup>316</sup> These are social facts about the private sphere—facts that speak to which entities have what kinds of power relative to others. And they probably belong in an analysis of which individuals or entities enjoy more power relative to others.

The move in the religious discrimination cases to consider social and economic facts incorporates a key insight of the progressive law and political economy movement, which has challenged public law's fixation on certain kinds of inequalities—those that are generated by the state rather than by the ostensibly private economy.<sup>317</sup> The LPE critique argues that existing constitutional doctrine enshrines the market and private economic arrangements from constitutional scrutiny and mistakenly views private economic arrangements as entirely distinct from—and entitled to protection from—the state.<sup>318</sup>

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312. Michael Gordon, Mark S. Price & Katie Peralta, *Understanding HB2: N.C. Law Sets State's Role in Defining Inequality*, CHARLOTTE OBSERVER, Mar. 27, 2016, at 25A.

313. *NBA Moves 2017 All-Star Game from Charlotte over HB2 Bill*, ESPN (July 21, 2016), [https://www.espn.com/nba/story/\\_/id/17120170/nba-moving-all-star-game-charlotte-north-carolina-bill](https://www.espn.com/nba/story/_/id/17120170/nba-moving-all-star-game-charlotte-north-carolina-bill) [perma.cc/SY4E-VDXJ].

314. Katherine Peralta, *Charlotte Looks to Shake Off HB2 Legacy with NBA All-Star Game Hoopla*, CHARLOTTE OBSERVER, Feb. 14, 2019, at 1A.

315. *Id.*

316. *Biden v. Knight*, First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

317. Britton-Purdy et al., *supra* note 29, at 1790–91.

318. *Id.* at 1807 (critiquing "an expansion of the conception of First Amendment-protected 'speech' to encompass certain economic transactions, including protecting advertising, campaign spending, and even the sale of data from regulation").

The LPE movement maintains that this is a mistake because economic power is inextricably linked to, and a result of, how political power has been exercised.<sup>319</sup> And it urges greater scrutiny of superficially private economic relationships and economic ordering.<sup>320</sup>

Once the analysis of an entity's power encompasses economic, social, and other "private" facts, it is possible to imagine a theoretical universe where private economic power does stifle certain views in society—views that may even be better, more fairly represented in the political process. Again, imagine the hypothetical society controlled by oligopoly economic power—where a few large corporations or wealthy individuals possess 99 percent of the wealth and own 99 percent of communication platforms. In that universe, if many individuals hold views contrary to the corporate owners and wealthy individuals, there may very well be a disparity between the views that predominate in the private sphere and those that predominate in politics—and that may be because oligopoly control dissuades people from expressing or sharing certain views, because they fear economic or social repercussions. As the North Carolina NBA example suggests, moreover, economic power may sometimes even be enough to counteract the political process itself.

More generally, the potential relevance of social support or economic power to a measure of power (or powerlessness) underscores academic concerns about two aspects of political process theory. One is the malleability of the inquiry into powerlessness. Nicholas Stephanopoulos observed that "judges and academics have offered widely diverging definitions of group influence, ranging from access to the franchise to descriptive representation to the passage of protective legislation."<sup>321</sup> And it is not entirely clear that John Hart Ely's account of powerlessness excludes some assessment of a group's social capital and ability to participate in society. Ely labeled his theory of political power "participation-oriented," which could mean people's ability to speak and associate, in addition to their casting a ballot.<sup>322</sup>

319. *Id.* at 1791 ("As a result, the economy has receded as a subject in fields now reconstituted as fundamentally political . . ."); *id.* at 1792 ("[L]aw specifies the rights, powers, and enforcement mechanisms that constitute economic transactions and, more broadly, economic ordering. These laws are the output of political order, making law the essential connective tissue between political judgment and economic order.").

320. *Id.* at 1821 (urging scrutiny of "the market power that legal structures enable" (emphasis omitted)); Lakier, *supra* note 29, at 1246–47.

321. Stephanopoulos, *supra* note 72, at 1537. As explained above, Stephanopoulos proposed a definition that "[a] group is relatively powerless if its aggregate policy preferences are less likely to be enacted than those of similarly sized and classified groups." *Id.* at 1545. That theory could well take account of economic and social facts that influence a group's success in enacting policies.

322. ELY, *supra* note 19, at 87. Other times, however, Ely seemed to use political power to refer to majoritarian democracy and determining policy. *Id.* at 7 ("[M]ajoritarian democracy is . . . the core of our entire system . . .").

The second concern is also about the prejudice prong of *Carolene*, which called on judges to assess whether a group was unfavorably treated because of unfair prejudice toward them.<sup>323</sup> Critics charged that this component of political process theory required courts to make substantive judgments about whether a group was fairly or unfairly treated and whether laws disadvantaging the group were the product of unreasonable prejudice and stereotypes or instead pursued valid social goals.<sup>324</sup> Michael Klarman specifically urged a version of “political process theory shorn of its prejudice prong” because “there can be no nonsubstantive theory of prejudice.”<sup>325</sup>

The Court’s religious discrimination cases also avoid many of the shortcomings that academics have identified with the definition of discrimination that the Court has used in cases involving race or gender. Recall the critique that plaintiffs shouldn’t have to prove discrimination was intentional in order to prevail: If the government is knowingly creating conditions of inequality, or if the government is not adequately considering the interests of a particular group, commentators argued that could constitute discrimination.<sup>326</sup> The Court’s doctrine on religious discrimination avoids these shortcomings in the Court’s equal protection doctrine.

## 2. Critique and Rejection

This Section focuses on three different criticisms of the Court’s new approach to certain discrimination claims—the first is conceptual-level errors, and the second is the Court’s application of its new approach. The arguably most significant flaw, however, is the third: the Court’s selective application of different doctrinal moves has resulted in an untenable jurisprudence of conservative victimization that judicially reinforces backlash against new antidiscrimination and egalitarian protections. For these reasons, this Section concludes the new theory is ultimately unjustified, at least under current conditions.

### a. Theory and Concept

A few aspects of the Court’s new approach to discrimination claims falter on closer inspection—the Court’s new assessment of powerlessness is artificially crabbed, and its assumption that courts, rather than the political process, should redistribute social power is also dubious.

First, the theory seems to artificially disaggregate social power, on the one hand, from political power on the other when both are relevant to assessing power and powerlessness and the extent of prejudice or discrimination against

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323. *Id.* chs. 5–6.

324. *Id.* at 153; see Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063, 1094 (1981); Lawrence G. Sager, *Rights Skepticism and Process-Based Responses*, 56 *N.Y.U. L. REV.* 417, 427 (1981).

325. Klarman, *supra* note 19, at 784.

326. Litman, *supra* note 79, at 1–2; Brest, *supra* note 84; Robinson, *supra* note 36.

a group. It would be a mistake to arrive at a conclusion about a group's power based largely on indications of social or economic support, such as statements on social media platforms or public statements by corporations and schools. Those measures of power are incomplete, just as a measure focused solely on formal notions of government equality would be incomplete. And yet too often, it seems as though statements by various justices (in opinions or elsewhere) are myopically focused on these measures of power.

Economic and social power are not substitutes for political power, nor are they equivalent to it, even if concentrated economic power may occasionally counteract political power. So even assuming the Court is correct in its assessment of the social capital of certain movements or groups, it is mistaken to stop there without also considering whether those groups have been able to translate social support into policy outcomes or into electing candidates of their choice.

Social support and economic power do not necessarily translate into political wins, particularly at the level of enacting a group's preferred policies.<sup>327</sup> Ely made this observation when discussing a group's access to the political process: "If voices and votes are all we're talking about . . . other groups may just continue to refuse to deal, and the minority in question may just continue to be outvoted."<sup>328</sup> Bertrall Ross and Su Li's efforts to measure political power reflect this intuition with empirics; they found that while different groups may succeed at similar rates when controlling for their size, different groups have to expend very different amounts of time and capital in lobbying and organizing and publicity in order to prevail in the political process.<sup>329</sup> So merely measuring social support or economic power will not yield the complete picture when different amounts of social support or economic power may be required in order for different groups to prevail.<sup>330</sup> Summarizing this idea, a district court in Connecticut, in some of the litigation over marriage equality, observed that there is "no authority or evidence demonstrating that this 'corporate power' has effected appreciable socio-economic or political change" and that "despite the[] sums raised, gay men and lesbians are still unable to impact the outcome of legislative processes."<sup>331</sup> Opponents had argued that the gay rights movement was politically powerful because it possessed "corporate power" and had access to "significant sums of money."<sup>332</sup> These arguments were also aired at the Supreme Court.<sup>333</sup>

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327. Stephanopoulos, *supra* note 72, at 1554–55.

328. ELY, *supra* note 19, at 161.

329. See Ross & Li, *supra* note 74.

330. See *supra* text accompanying notes 308–314.

331. Pedersen v. Off. of Pers. Mgmt., 881 F. Supp. 2d 294, 331–32 (D. Conn. 2012).

332. *Id.*

333. See, e.g., Transcript of Oral Argument at 108, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307) ("Chief Justice Roberts: You don't doubt that the lobby supporting the enactment of same sex-marriage laws in different States is politically powerful, do you? . . . As far as I can tell, political figures are falling over themselves to endorse your side of the case.").

Another way of getting at the disconnect between social power and political power is to consider the role of social protests and public opinion vis a vis the Supreme Court. Scholars have argued that public opinion and protests can influence Supreme Court opinions. But is it possible to sustain the kind of focus and public attention on the Supreme Court that could influence the Court over a period of several decades, the duration of a justice's tenure? Maybe not, which makes social organizing and social capital less effective than possessing certain kinds of political power.

Second, the Court's new approach to antidiscrimination law errs at the level of institutional choice. If any institution should address social or economic inequalities or attempt to redistribute social and economic power in light of perceived disparities, legislatures or the executive branch seem better positioned than the courts, at least at the federal level. That is in part because of each branch's comparative institutional capacity for factfinding and measuring social capital or economic power.<sup>334</sup> But it is also because of democratic design—the relatively insulated federal courts are less accountable to the people and the society they would be restructuring.<sup>335</sup> That makes it particularly problematic for the Court to use its interpretive powers and the power of judicial review to undermine or invalidate legislative or regulatory efforts designed to address disparities.

In addition to the free speech cases discussed above, the Court's right-to-refusal religious discrimination cases are other examples where the Court has invalidated redistributive efforts. *Hobby Lobby*, recall, involved a legislative and regulatory effort to ensure that employers provided health insurance coverage for certain medications—an effort that counteracts the relative bargaining power that employers have in setting the terms of health insurance coverage. And the Court's recent free exercise case, *Fulton*, could be understood in terms of the power that private family care agencies have in structuring or creating families. The City of Philadelphia's contracting scheme gave foster care and adoption agencies considerable authority—delegating to them functions that would otherwise be performed by the government, like placing children with families.<sup>336</sup> The City's effort to regulate the agencies' authority counteracted the agencies' considerable social powers to structure and create families.

To be sure, these examples suggest that the group that has garnered judicial solicitude (conservative Christians) is not politically all-powerful in the sense that it does not always prevail in the political process. But as the next

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334. E.g., William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 887–98 (2013).

335. See, e.g., Nikolas Bowie, Assistant Professor of Law, Harvard Law School, Written Statement to the Presidential Commission on the Supreme Court of the United States (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [perma.cc/ANT9-P9DG].

336. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1875 (2021).

Section explains, it would be a mistake to conclude from this that the group is powerless or warrants some heightened judicial solicitude.<sup>337</sup>

#### b. Application

There are also serious concerns with the Court's application of the new understanding of antidiscrimination. The Court is probably not accurately assessing groups' social or economic power, and it is not accounting for features of the U.S. political system that empower (some) minorities.

First, the Court seems to have a greatly exaggerated view of the economic and social power of racial minorities and LGBTQ individuals, as well as the groups fighting to combat racial discrimination and discrimination against LGBTQ individuals. Consider the allocation of economic power and wealth in the United States. Recent federal surveys found that "the typical White family has eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family."<sup>338</sup> And a "growing body of research suggests that lesbian, gay, bisexual, and transgender (LGBT) people are more likely to be poor than are heterosexual people with the same characteristics."<sup>339</sup> The extreme disparities in wealth between racial groups are in part because of laws and policies that resulted in the accumulation of wealth in white communities, underscoring the importance of political power in addition to economic power.

Indeed, by several measures, the Court may also be grossly exaggerating the extent of social support for addressing racial subordination or rectifying discrimination against LGBTQ individuals. In Justice Alito's keynote speech to the Federalist Society, for example, he repeatedly singled out schools as locations where contrary views were not welcome.<sup>340</sup> Yet consider some important metrics about elite schools: According to federal data, only 2 percent of professors at doctoral universities in 2019 identified as Black women.<sup>341</sup> Surveys indicate over a third of LGBT youths face bullying or harassment at

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337. See *infra* text accompanying notes 338–355.

338. Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [perma.cc/Z4B3-7Q65].

339. M.V. LEE BADGETT & ALYSSA SCHNEEBAUM, *THE IMPACT OF WAGE EQUALITY ON SEXUAL ORIENTATION POVERTY GAPS* (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Wage-Equality-LGB-Poverty-Gap-Jun-2015.pdf> [perma.cc/8Z69-QT4Q].

340. Alito, *supra* note 242.

341. NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., *CHARACTERISTICS OF POSTSECONDARY FACULTY* (2020), [https://nces.ed.gov/programs/coe/pdf/coe\\_csc.pdf](https://nces.ed.gov/programs/coe/pdf/coe_csc.pdf) [perma.cc/L2D2-S7CM].



school.<sup>342</sup> Looking beyond the justices' fixation on elite schools, there are higher maternal mortality rates among Black women; lower home appraisals and loan receipts for Black consumers; and people with "Black sounding" names fare worse in job applications than white applicants with similar credentials.<sup>343</sup> LGBTQ adults continue to report facing discrimination at work, in healthcare, and elsewhere.<sup>344</sup> The FBI reports several thousand hate crimes each year;<sup>345</sup> during the coronavirus pandemic, there were multiple hate crimes against Asian Americans.<sup>346</sup> It is hard, based on these data, to arrive at the conclusion that racial minorities or the LGBTQ community possess out-sized social capital or economic power.

Second, the Court seems to ignore how various elements of the United States constitutional system empower the group that the Court insists should receive greater judicial protection. Recall the example of the hypothetical society where oligopoly control in the private sector suppressed certain views that were more accurately reflected in political outcomes.<sup>347</sup> That hypothetical does not reflect the United States political system. For a variety of reasons, political outcomes in the United States do not neatly measure popular support for policies or ideas. The most obvious reasons why are the institutional design of both the Senate and the Electoral College, which inflate the power of less populated states relative to more populated ones.<sup>348</sup> But there are myriad other contributing factors as well—including gerrymandering that affects the makeup of both the House of Representatives and state legislatures. Because

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342. Ryan Thoreson, "Like Walking Through a Hailstorm": *Discrimination Against LGBT Youth in US Schools*, HUM. RTS. WATCH (Dec. 7, 2016), <https://www.hrw.org/report/2016/12/08/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools> [perma.cc/A5CT-JSSV].

343. David R. Francis, *Employers' Replies to Racial Names*, NAT'L BUREAU OF ECON. RSCH. (Sept. 2003), <https://www.nber.org/digest/sep03/employers-replies-racial-names> [perma.cc/2ZMA-4G8M]; Jake New, *Still at a Disadvantage*, INSIDE HIGHER ED (Mar. 6, 2015), <https://www.insidehighered.com/news/2015/03/06/elite-college-degrees-give-black-graduates-little-advantage-job-market> [perma.cc/D8A5-ST3T]; MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* (10th anniversary ed. 2006); ANDRE M. PERRY, *KNOW YOUR PRICE* (2020); Gianna Melillo, *Racial Disparities Persist in Maternal Morbidity, Mortality and Infant Health*, AJMC (June 13, 2020), <https://www.ajmc.com/view/racial-disparities-persist-in-maternal-morbidity-mortality-and-infant-health> [perma.cc/TRX7-54YD].

344. LINDSAY MAHOWALD, SHARITA GRUBERG & JOHN HALPIN, CTR. FOR AM. PROGRESS, *THE STATE OF THE LGBTQ COMMUNITY IN 2020* (2020), <https://www.americanprogress.org/article/state-lgbtq-community-2020> [perma.cc/Z5Y8-J2PX].

345. *Hate Crime Statistics*, U.S. DEP'T OF JUST. (2020), <https://www.justice.gov/hate-crimes/hate-crime-statistics> [perma.cc/8LBG-8BRR].

346. Sam Cabral, *Covid 'Hate Crimes' Against Asian Americans on Rise*, BBC (May 21, 2021), <https://www.bbc.com/news/world-us-canada-56218684> [perma.cc/N77M-KZW4].

347. See *supra* text accompanying notes 308–309.

348. See, e.g., ADAM JENTLESON, *KILL SWITCH 10* (2021) (noting that "Senate Democrats have represented a majority of the American population at every moment in the twenty-first century so far, regardless of whether they controlled the majority of the seats in the Senate").

of the way district maps are drawn, it is possible that the party that wins control over a chamber may not have won the most votes.<sup>349</sup>

Moreover, these and other electoral structures in the United States currently give an advantage to Republicans,<sup>350</sup> where “the preferences of white evangelicals loom large,” since “they remain the largest single religious group among Republican voters with the power to sway party priorities.”<sup>351</sup> Republicans still control a majority of state legislatures; indeed, they controlled nearly two-thirds of state legislatures in 2021.<sup>352</sup> They hold more “trifectas” (control of all three of the state legislature, state executive, and state courts) than Democrats do.<sup>353</sup> On the federal level, “nearly nine-in-ten members of Congress identify as Christian,” and over two-thirds of Congress is white.<sup>354</sup> And of course, the same group controls the Supreme Court. At least five of the six Republican-appointed justices are Catholic.<sup>355</sup> Five of the six are also white, and five of the six are men.

### c. Selectivity, Grievance, and Backlash

Equally important, the Court has only ever applied its new approach to antidiscrimination law selectively—it considers some social factors or economic context, but not others. And the selectivity with which the Court has applied the theory has resulted in a jurisprudence of conservative victimization that instantiates backlash against advances in equity and inclusion. The theory allows judges to reinforce backlash against new antidiscrimination protections by insisting that the groups opposed to new antidiscrimination measures are powerless and accordingly warrant heightened judicial protection. But the idea that opponents of new antidiscrimination protections are

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349. Stephanopoulos, *supra* note 22, at 124.

350. Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections 1936–2016* (Nat’l Bureau of Econ. Rsch., Working Paper No. 26247, 2019).

351. Becky Sullivan, *The Proportion of White Christians in the U.S. Has Stopped Shrinking, New Study Finds*, NPR (July 8, 2021, 1:12 AM), <https://www.npr.org/2021/07/08/1014047885/americas-white-christian-plurality-has-stopped-shrinking-a-new-study-finds> [perma.cc/Z9JQ-WHYU].

352. *Partisan Composition of State Legislatures*, BALLOTPEDIA, [https://ballotpedia.org/Partisan\\_composition\\_of\\_state\\_legislatures](https://ballotpedia.org/Partisan_composition_of_state_legislatures) [perma.cc/KPP3-ABTL].

353. *State Government Trifectas*, BALLOTPEDIA, [https://ballotpedia.org/State\\_government\\_trifectas](https://ballotpedia.org/State_government_trifectas) [perma.cc/C297-HJFT].

354. ALEKSANDRA SANDSTROM, PEW RSCH. CTR., FAITH ON THE HILL 4 (2021), <https://www.pewforum.org/2021/01/04/faith-on-the-hill-2021> [perma.cc/J3JK-J8SH]; Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress> [perma.cc/FG5F-7PSL].

355. Tony Mauro, *Before the Supreme Court’s First Monday Comes the Sunday Red Mass*, LAW.COM: MARBLE PALACE BLOG (Oct. 1, 2021, 12:47 PM), <https://www.law.com/nationallawjournal/2021/10/01/the-marble-palace-blog-before-the-supreme-courts-first-monday-comes-the-sunday-red-mass> [perma.cc/D2S7-GFZG].

minorities warranting heightened judicial protection threatens to undo many of the new antidiscrimination protections.

This Section explains these facets of the Court's new theory—one, how it is selectively applied; two, how it shares some parallels to narratives in politics and public commentary about conservative victimization; and three, how it judicially reinforces backlash against new antidiscrimination measures and facilitates the First Amendment steadily devouring them.

The Court only selectively applies the new theory of antidiscrimination. In particular, it considers some social facts but not others, and the kinds of social facts it considers lead the Court to favor conservative or Republican-associated interests. Consider the Court's treatment of socioeconomic disparities in *Brnovich v. Democratic National Committee*, the recent case interpreting the Voting Rights Act.<sup>356</sup> In the course of explaining why voting rules that have a disparate impact on racial minorities do not necessarily give rise to a claim under Section 2 of the Voting Rights Act, the Court observed that "minority and non-minority groups differ with respect to employment, wealth, and education" and that, as a result "even neutral regulations . . . may well result in some predictable disparities."<sup>357</sup> That observation is about social and economic facts in the world that, under the Court's attitudinal orientation in religious discrimination cases, should have given rise to a presumption that the plaintiffs had a plausible claim of discrimination—since it provides evidence of exclusion and subordination in the private sphere. But in *Brnovich*, the Court made the opposite move: Instead of treating social stratification as a reason for more searching judicial scrutiny, the Court gave that as a reason for less searching view. This differential treatment of social and economic facts in different contexts understandably gives rise to a perception of bias.

These disparities do not mean that the justices are consciously or intentionally making decisions in order to rule in favor of their preferred groups. Instead, the Court's apparent theory of social power may be an example of how background experiences and ideology influence judging or how justices' jurisprudential views may track the political interests of the party that appointed them. The Court's doctrine involves an assessment of what kinds of discrimination are prevalent, and which groups possess the right amount of power, or fair share of power. The Court's softening of the rules for plaintiffs in religious discrimination cases reflects its sense that religious discrimination is prevalent. The cases rest on the presumption that religious discrimination occurs with sufficient frequency and perhaps more frequency than racial discrimination.

The fact that this Court would make those generalizations is not particularly surprising. Members of a group will have greater insight into discrimination against that group than they would have into discrimination against

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356. 141 S. Ct. 2321, 2339 (2021).

357. *Brnovich*, 141 S. Ct. at 2339.

other groups. People are more likely to perceive the existence of discrimination against them or people like them.<sup>358</sup> People are also more likely to view efforts to hold others accountable or to identify wrongdoers as impermissible retaliation or unjustified overreactions when those efforts are directed at people who share their views.<sup>359</sup> The rise of polarization may also contribute to these views—heightened divisions between groups and either-or narratives may lead people to perceive that opposing groups are more hostile to them than they are.<sup>360</sup> These dynamics and others may affect the justices' assessments of a group's power. And the upshot is that a Court that is represented mostly by members of one group—Christian conservatives, most of whom are white—will perceive discrimination against that group and may believe that group is underrepresented elsewhere.<sup>361</sup>

An irony, of course, is that the very group the justices maintain faces this kind of discrimination is the same group that holds a majority on the U.S. Supreme Court and has for much of the institution's history.<sup>362</sup> Nor is the Supreme Court unique in that respect; the same could be said for the history of Congress, the Presidency, state legislatures, and other political offices.<sup>363</sup> Yet despite this, the Court maintains that Christian conservatives are powerless and seemingly at perpetual risk of discrimination and subordination.

The duality has created an appearance of grievance and victimization in the Court's new jurisprudence. The Court's doctrine insists that perhaps the most prevalent form of discrimination is discrimination that is targeted at a

358. E.g., Evelyn R. Carter & Mary C. Murphy, *Group-Based Differences in Perceptions of Racism: What Counts, to Whom, and Why?*, 9 SOC. & PERSONALITY PSYCH. COMPASS 269 (2015); Richard P. Eibach & Joyce Ehrlinger, "Keep Your Eyes on the Prize": Reference Points and Racial Differences in Assessing Progress Toward Equality, 32 PERSONALITY & SOC. PSYCH. BULL. 66, 66–67 (2006); Don Operario & Susan T. Fiske, *Ethnic Identity Moderates Perceptions of Prejudice: Judgments of Personal Versus Group Discrimination and Subtle Versus Blatant Bias*, 27 PERSONALITY & SOC. PSYCH. BULL. 550 (2001); Joe Neel, *Poll: Most Americans Think Their Own Group Faces Discrimination*, NPR (Oct. 24, 2017, 4:45 AM), <https://www.npr.org/sections/health-shots/2017/10/24/559116373/poll-most-americans-think-their-own-group-faces-discrimination> [perma.cc/5NZT-TSVC].

359. Emily A. Vogels et al., *Americans and 'Cancel Culture': Where Some See Calls for Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), <https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment> [perma.cc/AFC9-KHVC]; e.g., Marilyn B. Brewer, *The Psychology of Prejudice: Ingroup Love and Outgroup Hate?*, 55 J. SOC. ISSUES 429 (1999).

360. PEW RSCH. CTR., *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC* (2014), <https://www.pewresearch.org/wp-content/uploads/sites/4/2014/06/6-12-2014-Political-Polarization-Release.pdf> [perma.cc/A3Y4-MTCX].

361. Zalman Rothschild's research about how Republican-appointed judges rule more frequently in favor of these new free exercise claims coheres with these dynamics as well. Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067 (2022).

362. Leah M. Litman, Melissa Murray & Katherine Shaw, *A Podcast of One's Own*, 28 MICH. J. GENDER & L. 51, 52–54 (2021).

363. *Id.*; see *supra* sources cited in notes 352–354 (describing composition of Congress).

group the justices belong to and the group that exercises the political power of the Court. Despite claiming that people with certain views about marriage increasingly find it difficult to participate in society,<sup>364</sup> several of the justices were selected as justices on the Supreme Court in part because they hold those views.<sup>365</sup> Even though a conservative Christian ideology may open up political opportunities, the justices maintain that it renders them (and others like them) vulnerable to exclusion and subordination.<sup>366</sup>

A *National Review* piece is representative of this narrative and actually frames its claims in terms that call to mind political process theory. The piece attempted to depict “political discrimination as [a] civil-rights struggle,” arguing that “conservatives’ resistance to racial, gender, and sexual progressivism mark them as moral deviants . . . leading to pervasive discrimination against, and censorship of, conservative views.”<sup>367</sup> The piece seemed to channel the same idea that seems to be driving the Court’s doctrine regarding discrimination. The author insisted that “in high-status environments,” (which the author defined to include elite universities, “creative professions” including journalism and arts, and “doctors and lawyers” and the wealthy) “the angle tilts against conservatives.”<sup>368</sup> The piece warned of the threat to liberty and equal treatment not from government but from societal institutions, and it argued that aggressive government intervention should be used to reduce those disparities.

The trajectory of the Court’s cases provides some evidence for critics’ claim that political process theory “demand[s] value judgments” from courts despite promising that it would allow courts to remain neutral.<sup>369</sup> In particular, the prejudice prong of political process theory requires courts to consider how often groups should prevail in the political process and also when actions that affect a group are borne out of prejudice or discrimination.

This reality echoes a note of caution that Melissa Murray raised about one facet of the Supreme Court’s antidiscrimination jurisprudence—animus doctrine, which maintains that discrimination occurs when the government tries

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364. *E.g.*, *Davis v. Ermold*, 141 S. Ct. 3 (2020) (Thomas, J.) (mem.). For other examples, see *supra* text accompanying notes 266–268.

365. REPUBLICAN NAT’L COMM., REPUBLICAN PLATFORM 2016, at 10 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL%5B1%5D-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf) [perma.cc/LH5M-GJUW] (“We understand that only by electing a Republican president in 2016 will America have the opportunity for up to five new constitutionally-minded Supreme Court justices appointed to fill vacancies on the Court. Only such appointments will enable courts to begin to reverse the long line of activist decisions—including *Roe*, *Obergefell*, and the Obamacare cases . . .”).

366. Murray, *supra* note 31, at 281–82.

367. Kaufmann, *supra* note 32 (cleaned up).

368. *Id.*

369. Brest, *supra* note 64, at 131.

to harm a particular group.<sup>370</sup> Some academics greeted the animus principle as a welcome shift from what was otherwise a rigid anticlassification principle in antidiscrimination law.<sup>371</sup> Using the anticlassification principle, the Court had reviewed racial classifications negatively affecting white people under the same standard of review that it had used for racial classifications negatively affecting racial minorities<sup>372</sup> and had invalidated classifications that served benign purposes or remedial aims.<sup>373</sup> As Russell Robinson observed, “when strict scrutiny appears in the Court’s race jurisprudence today, it is almost invariably on behalf of white litigants” who “wield it to dismantle affirmative action policies. For at least the last thirty years . . . strict scrutiny has been the principal tool of civil rights retrenchment, protecting whites rather than blacks and Latinos.”<sup>374</sup>

But as Murray argued, the animus principle could be wielded against antidiscrimination measures just as the anticlassification principle could be. In particular, “those seeking accommodations on religious grounds have sought to frame themselves as dissenters from majoritarian norms.”<sup>375</sup> And the Court has enthusiastically embraced that frame—not just in *Masterpiece Cakeshop*, where Murray observed it, but in the Court’s more recent religious liberty and religious discrimination cases as well.

The Court’s doctrine now provides a judicial forum that protects backlash against legislative or judicial wins by historically disadvantaged groups.<sup>376</sup> When the Court holds that certain kinds of discrimination are forbidden or presumptively unconstitutional (as in the case of marriage equality), it creates a group that is newly at risk of exclusion and discrimination—the group who agreed with or supported the discrimination that the Court (or the political process) have called into question. That was one of the conservative justices’ criticisms of *Obergefell*: The dissenters argued explicitly that protecting

370. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (explaining that if “the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest” (emphasis omitted)); see also Dale Carpenter, Windsor Products: *Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 205; Murray, *supra* note 31.

371. Robinson, *supra* note 36.

372. *Id.*; Siegel, *supra* note 89.

373. Robinson, *supra* note 36, at 172–74.

374. *Id.* at 172–73 (footnote omitted).

375. Murray, *supra* note 31, at 258; see *id.* at 281 (“[T]he Court’s approach in *Masterpiece Cakeshop* makes clear that the concept of animus may be applied flexibly—and indeed, inverted—to protect a broader range of claimants. With this in mind, what really distinguishes the vision of animus in *Masterpiece Cakeshop* from that which is invoked in Kennedy’s earlier animus jurisprudence is the individual who is deemed the object of the state’s antipathy.”).

376. On backlash, see Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728 (2017).

LGBTQ equality marginalized those people whose religious beliefs were opposed to marriage equality.<sup>377</sup>

The same goes for race discrimination. As Reva Siegel observed, “[o]n one view—a view some Justices appear to hold—th[e] change in the Court’s role is appropriate because racial minorities are now the favorites of the law, and discrimination against them is no longer common.”<sup>378</sup> That was also the Court’s view during Reconstruction. When the Court held that Congress lacked the authority to enact the Civil Rights Act of 1875, which prohibited racial discrimination by private entities, the Court wrote, “[w]hen a man has emerged from slavery . . . there must be some stage . . . when he . . . ceases to be the special favorite of the laws.”<sup>379</sup> Justice Scalia echoed this line of thinking at oral argument in *Romer v. Evans* when he characterized a state constitutional amendment prohibiting antidiscrimination measures protecting LGBTQ persons in this way: “no homosexual can be treated differently . . . . He simply cannot be given special protection by reason of that status.”<sup>380</sup>

In addition to reinforcing backlash, affording heightened judicial protection to groups that were (and still may be) opposed to new antidiscrimination measures is one mechanism for “preservation-through-transformation.”<sup>381</sup> That phrase, coined by Reva Siegel, describes the phenomenon where the law formally changes but also materially preserves existing status hierarchies.<sup>382</sup> Affording heightened judicial protection to groups that were opposed to new antidiscrimination protections is one way to do that, because it will limit the reach of new antidiscrimination protections by creating exemptions to the new protections or potentially invalidating them entirely. Indeed, after *Bostock v. Clayton County* held that Title VII’s prohibition on discrimination on the basis of sex prohibited employees from discriminating on the basis of sexual orientation,<sup>383</sup> one district court held that portion of Title VII could not be applied to employers with religious objections to LGBTQ equality.<sup>384</sup> And the

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377. See *supra* text accompanying note 268.

378. Siegel, *supra* note 22, at 92.

379. The Civil Rights Cases, 109 U.S. 3, 18–19, 25 (1883).

380. Transcript of Oral Argument at 17, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

381. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–20 (1997).

382. *Id.*

383. 140 S. Ct. 1731 (2020).

384. *Bear Creek Bible Church v. Equal Emp. Opportunity Comm’n*, 571 F. Supp. 3d 571 (N.D. Tex. 2021).

Court will soon consider whether the First Amendment requires certain exemptions from state antidiscrimination measures protecting LGBTQ persons.<sup>385</sup>

Take one potential doctrinal implication of the Court's religious discrimination and religious liberty jurisprudence. For the last several years, particularly as the fight for marriage equality and LGBTQ equality began to see victories, states enacted laws granting exemptions to religious believers. These laws purport to provide exceptions from generally applicable statutes to individuals or entities whose sincerely held religious beliefs conflict with the obligations imposed by such statutes.<sup>386</sup>

385. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (mem.) (granting certiorari to consider “[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment”).

386. ALA. CODE § 26-10D-5(a) (LexisNexis Supp. 2021) (“The state may not refuse to license or otherwise discriminate or take an adverse action against any child placing agency that is licensed by or required to be licensed by the state for child placing services on the basis that the child placing agency declines to make, provide, facilitate, or refer for a placement in a manner that conflicts with, or under circumstances that conflict with, the sincerely held religious beliefs of the child placing agency provided the agency is otherwise in compliance with the requirements of the Alabama Child Care Act of 1971, Chapter 7, Title 38, and the Minimum Standards for Child Placing Agencies.”); *id.* § 22-21B-4(a) (“A health care provider has the right not to participate, and no health care provider shall be required to participate, in a health care service that violates his or her conscience when the health care provider has objected in writing prior to being asked to provide such health care services.”); ALA. CONST. art. I, § 3.01(V)(a)–(b) (“Government shall not burden a person’s freedom of religion even if the burden results from a rule of general applicability, except as provided [in the following sentence]. Government may burden a person’s freedom of religion only if it demonstrates that application of the burden to the person: (1) Is in furtherance of a compelling governmental interest; and (2) Is the least restrictive means of furthering that compelling governmental interest.”); ARIZ. REV. STAT. ANN. § 15-1862(E) (2019) (“A university or community college shall not discipline or discriminate against a student in a counseling, social work or psychology program because the student refuses to counsel a client about goals that conflict with the student’s sincerely held religious belief if the student consults with the supervising instructor or professor to determine the proper course of action to avoid harm to the client.”); *id.* § 41-1493.04(A)(1) (2017) (“Government shall not deny, revoke or suspend a person’s professional or occupational license . . . for . . . [d]eclining to provide . . . any service that violates the person’s sincerely held religious beliefs.”); ARK. CODE ANN. § 20-6-305(c)(2) (2018) (“A healthcare provider or healthcare facility may decline to comply with an executed physician order for life-sustaining treatment form based upon religious beliefs or moral convictions . . . .”); FLA. STAT. § 761.061(1) (2021) (“The following individuals or entities may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage if such an action would cause the individual or entity to violate a sincerely held religious belief of the individual or entity . . . .”); GA. CODE ANN. § 49-7-6 (2013) (“Any employee . . . may refuse to accept the duty of offering family-planning services to the extent that such duty is contrary to such employee’s personal religious beliefs . . . .”); IDAHO CODE § 18-611(2) (2016) (“No health care professional shall be required to provide any health care service that violates his or her conscience.”); IND. CODE § 25-17.3-5-2.5(b) (2022) (“A genetic counselor may not be required to: (1) perform; (2) participate in; or (3) provide; a service that violates any sincerely held ethical, moral, or religious belief held by the genetic counselor.”); KAN. STAT. ANN. § 60-5322(b)–(c) (2005) (“Notwithstanding any other provision of state law, and to the extent



The Court's jurisprudence—and specifically its proclivity to find that government officials discriminated on the basis of religion—supplies a potential justification for these statutes. Statutes granting religious exemptions could be (and have been) challenged on the ground that they result in disparities or hardships on individuals who would otherwise be protected by the antidiscrimination measure.<sup>387</sup> In order to justify those results, the state may need to point to a compelling justification.<sup>388</sup> The prevalence of religious discrimina-

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allowed by federal law, no child placement agency shall be required to perform, assist, counsel, recommend, consent to, refer or otherwise participate in any placement of a child for foster care or adoption when the proposed placement of such child would violate such agency's sincerely held religious beliefs. . . . No child placement agency shall be denied a license, permit or other authorization, or the renewal thereof, or have any such license, permit or other authorization revoked or suspended by any state agency, or any political subdivision of the state solely because of the agency's objection to performing, assisting, counseling, recommending, consenting to, referring or otherwise participating in a placement that violates such agency's sincerely held religious beliefs."); LA. STAT. ANN. § 40:1061.20 (2016) (conscience in healthcare protection); MICH. COMP. LAWS ANN. § 722.124e (West 2019) (exemptions for private child-placing agencies); MISS. CODE ANN. §§ 11-62-1 to 11-62-19 (2019) ("Protecting Freedom of Conscience from Government Discrimination Act"); MO. REV. STAT. § 191.724 (2016) (health insurance); MONT. CODE ANN. § 27-33-105 (2021) (protecting free exercise of religion); N.C. GEN. STAT. § 51-5.5(a) (2021) ("Every magistrate has the right to recuse from performing all lawful marriages under this Chapter based upon any sincerely held religious objection."); N.D. CENT. CODE § 50-12-07.1 (2018) ("A child-placing agency is not required to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the agency's written religious or moral convictions or policies."); OHIO REV. CODE ANN. § 4112.024(A) (LexisNexis Supp. 2022) (exceptions to housing discrimination); OKLA. STAT. ANN. tit. 10A, § 1-8-112 (West Supp. 2022) (exemptions for private child-placing agencies); S.C. Exec. Order No. 2018-12, 42 S.C. Reg. 5 (Apr. 27, 2018) (foster care); S.D. CODIFIED LAWS § 26-6-39 (Supp. 2022) ("[The s]tate may not take adverse action against [a] child-placement agency acting on [the] basis of sincere written religious policy."); TENN. CODE ANN. § 36-1-147(a) (2021) ("[N]o private licensed child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies."); TEX. HUM. RES. CODE ANN. § 45.009(a) (West 2019) (exempting child welfare services); W. VA. CODE ANN. § 16-30-12 (LexisNexis 2021) (conscience exemption for healthcare providers); *id.* § 33-16E-7 (LexisNexis 2017) (religious exemption for employers).

387. See, e.g., Nejaime & Siegel, *supra* note 280, at 2538–42, 2552–65 (outlining how religious exemptions burden individuals otherwise protected by statute); Adrienne M. Spoto, Note, *Fostering Discrimination: Religious Exemption Laws in Child Welfare and the LGBTQ Community*, 96 N.Y.U. L. REV. 296 (2021); Barber v. Bryant, 193 F. Supp. 3d 677 (S.D. Miss. 2016) (enjoining Mississippi's HB 1523), *rev'd*, 860 F.3d 345 (5th Cir. 2017).

388. E.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. . . . The exercise of their freedom on terms equal to others must be given great weight and respect by the courts."); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 761–67 (2014) (Ginsburg, J., dissenting) (requiring government to show a compelling reason for allowing employers to refuse to offer insurance for contraception); *id.* at 728 (majority opinion) (assuming "that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA"); *Grutter v.*

tion could provide one such justification. If religious discrimination is widespread and likely to occur, even from generally applicable laws, then state laws that prophylactically exempt individuals or entities from generally applicable laws seem more justified. The doctrine reinforces the states' argument that exemptions are needed in order to guard against a risk of religious discrimination or unconstitutional state action.

In the abstract, the Court is probably right to consider economic and social facts about the world. But the selectivity with which the Court does so and the Court's poor assessment of the social power of various groups has created a jurisprudence of victimization and backlash that make the Court's two-track system ultimately unjustifiable. It cannot be that a group that, at minimum, is poised to control one of the three branches of the federal government for decades can maintain a persistent story of victimization—justifying the aggregation of more authority and more power.

#### CONCLUSION

The developments in the Free Exercise Clause parallel developments in the Equal Protection Clause over the last several decades. In particular, Reva Siegel and Russell Robinson, among others, have argued that the Court's embrace of the anticlassification theory for the Equal Protection Clause has made it easier for white plaintiffs to win racial discrimination claims than for racial minorities to do so.<sup>389</sup> The shifts in the Court's free exercise jurisprudence, and the theory motivating those shifts, this Article has suggested, will make it easier for conservative Christian groups to succeed on free exercise claims than for other minority religions to do so.

One key premise of the Court's apparent theory is that (conservative, Christian) religious believers face widespread discrimination—discrimination that may be more prevalent than racial discrimination, such that it is appropriate to presume that a policy's discriminatory effects were the result of discrimination in cases involving religion but not in cases involving race.

That premise and the various doctrinal moves that implement it can be understood by way of a contrast to political process theory. Political process theory called for more aggressive forms of judicial review where legislation negatively affected politically powerless groups of discrete and insular minorities who faced prejudice. The Court seems to be of the view that courts should more carefully review legislation that negatively affects groups that are socially powerless and that social conservatives are one such group. The Court may also be of the view that social conservatives face widespread societal prejudice and should be afforded judicial solicitude for that reason as well. This new orientation toward religious discrimination claims seems to maintain that a group can be politically powerful—not only winning elections but having its

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Bollinger, 539 U.S. 306 (2003) (requiring government to show a compelling interest for discrimination on the basis of race); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (requiring government to show an "exceedingly persuasive justification" for discrimination on the basis of sex).

389. Siegel, *supra* note 22, at 92; Robinson, *supra* note 36.

policy preferences enacted in the political process, including the courts—but still be powerless because they lack certain kinds of social capital and face certain kinds of societal prejudice.

While some parts of the Court's new approach to religious discrimination claims have things to recommend them, the current shape and application of the theory is problematic and ultimately unjustified. The Court may be right to consider social context, economic power, and related facts in assessing a group's power. But it is wrong to ignore the importance of political power and the rules that allocate it, and it is wrong to think that the Court should be the institution to recalibrate society and redistribute power to groups that it perceives as socially powerless. The Court has also created a jurisprudence of conservative grievance and backlash that threatens to undo new egalitarian, antidiscrimination protections.

Appreciating how the Court has applied its new theory of religious discrimination, as well as how the Court's new theory relates to political process theory, invites questions about whether the problem is the theories themselves or the Court's application of them. That is, is the Court's new account of discrimination theoretically attractive but the Court's application of it just mistaken? Separating a theory from its application is a difficult task. There are, however, at least two reasons to doubt whether the Court's new theory of discrimination belongs in free exercise jurisprudence. One is that the only Supreme Court cases to ever apply this theory suggest it is not judicially administrable. Courts are loosely equating activities that are not comparable, raising questions about whether they are competent to make such assessments. The second problem is that, as Section II.A explained, the theory itself seems to invite courts to assess the relative importance of religious exercise compared to other activities.

One can ask a similar question about political process theory, or at least the prejudice prong of political process theory. If the Court's free exercise cases are rooted in the idea that courts should afford heightened judicial solicitude to groups that are powerless because they face prejudice and bias, is that an indictment of the theory itself, or is the problem the Court's application of the theory? The Court's free exercise cases provide some additional fodder for critics of Ely's prejudice prong who have expressed concern that the theory would result in courts picking and choosing between groups in unprincipled ways and ultimately favoring their preferred causes and groups.<sup>390</sup> Whether that is enough to abandon the theory or even just the prejudice prong, however, is beyond the scope of this Article.

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390. Klarman, *supra* note 19, at 748, 819; Doerfler & Moyn, *supra* note 78.