

# WHAT IS DISCRIMINATORY INTENT?

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*The Constitution's protection of racial and religious groups is organized around the concept of discriminatory intent. But the Supreme Court has never provided a crisp, single definition of 'discriminatory intent' that applies across different institutions and public policy contexts. Instead, current jurisprudence tacks among numerous, competing conceptions of unconstitutional intent. Amplifying the doctrine's complexity, the Court has also taken conflicting approaches to the question of how to go about substantiating impermissible motives with admissible evidence.*

*The Court's pluralistic view of intent is in theory plausible, and perhaps even unavoidable. But its lack of any consistent approach in practice to the question of how to sift and weigh different sorts of evidence of unconstitutional motive is not defensible. Rather, the current doctrinal apparatus for discovering discriminatory intent has hidden regressive effects: It subtly and silently moves evidentiary burdens between different plaintiffs and between different defendants. The resulting case outcomes are likely to shape the way in which the public perceives the extent and nature of unconstitutional discrimination. This perceptual effect, in turn, compounds and entrenches the doctrine's regressive distributive effects.*

*In lieu of current arrangements, I propose a revised doctrinal framework that acknowledges conceptual pluralism in the constitutional law of antidiscrimination, while encouraging courts to acknowledge frankly and manage responsibly that conceptual diversity. It also reorients the evidentiary framework for demonstrating discriminatory intent to mitigate the presently distorted allocation of judicial resources.*

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#### INTRODUCTION

“Discriminatory intent” is a central term in the judicial interpretation of constitutional clauses requiring the equal treatment of persons without regard to their race, ethnicity, or religion.<sup>1</sup> There is nothing inevitable about this. The centrality

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<sup>1</sup> See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1479 (2017) (discussing how an intent standard is met); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1831 (2014) (Alito, J., concurring) (concurring in the rejection of a challenge to peti-

of intent is not apparent from the text of the First Amendment's Religion Clauses or the Fourteenth Amendment's Equal Protection Clause.<sup>2</sup> And it is quite possible to imagine a jurisprudence of constitutional equality for natural persons that does not hinge upon the subjective psychological state of the defendant state actor—even if it still relies on some conception of discrimination as a means to implement the abstract ideal of equality.<sup>3</sup>

The central role of intent in the doctrinal framing of individual rights against unconstitutional discrimination is a surprisingly recent doctrinal innovation. As late as 1971, the Supreme Court in *Palmer v. Thompson* could claim to find “no case in this Court [holding] that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”<sup>4</sup> The *Palmer* Court's statement, to be sure, is carefully calibrated. It carefully skirted prior judicial accountings of legislative intent in early twentieth-century federalism<sup>5</sup> and Establishment Clause<sup>6</sup> domains. It also put to one side prior judicial challenges to the racially discriminatory actions

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tioner municipality's use of prayer at the beginning of official meetings by noting that the mistake was at worst careless and not done with a discriminatory intent); see also Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 333–34 (2014) (“Plaintiffs must show either by direct evidence or by inference that the state intended to bring about segregation—a state policy that merely causes segregation, without such intent, is not subject to challenge.”).

<sup>2</sup> See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”); U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

<sup>3</sup> For a leading example of such a theory, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). See also Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–55 (1978) (criticizing the role of “fault” and “causation” in antidiscrimination law for precluding relevant inquiries).

<sup>4</sup> 403 U.S. 217, 224 (1971). For a similar statement in the First Amendment Free Speech domain, see *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (quoting *McCray v. United States*, 195 U.S. 27, 56 (1904)), saying that “[t]he decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.”

<sup>5</sup> See, e.g., *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20, 38 (1922) (taking the “intent” of Congress to be pivotal when invalidating a tax on the products of child labor).

<sup>6</sup> See, e.g., *Board of Ed. v. Allen*, 392 U.S. 236, 243 (1968) (looking at the “purpose” of a measure to ascertain compliance with the Establishment Clause); *McGowan v. Maryland*, 366 U.S. 420, 453 (1961) (holding that a state law violates the Establishment Clause if “its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion”).

of specific officials.<sup>7</sup> Nevertheless, it captures a surprising, and now largely forgotten, skepticism about the role of intent when interpreting the Constitution's protections for vulnerable minority groups.

We know now, of course, that the *Palmer* Court's intent skepticism would prove evanescent. In the same Term it was abjuring intent in *Palmer*, the Court doubled down on the role of improper, non-secular purpose in Establishment Clause jurisprudence.<sup>8</sup> The Justices subsequently underscored in no uncertain terms that officials must not act on the basis of a preference for one religious denomination.<sup>9</sup> Two years after *Palmer*, Equal Protection jurisprudence respecting race began to change course when the Court, in a critical school desegregation case, flagged its attentiveness to any potential impermissible "*purpose or intent to segregate.*"<sup>10</sup> Then, three years after that, the landmark decision of *Washington v. Davis* held that a "discriminatory racial purpose" was "necessary" to state an Equal Protection violation.<sup>11</sup> The last piece of the doctrinal mosaic to fall into place concerned the Free Exercise Clause. Long focused on the disparate effect of neutral laws on religious believers,<sup>12</sup> it pivoted sharply in the early 1990s to a new standard in which discriminatory intent played a central role.<sup>13</sup> As

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<sup>7</sup> Cases that are difficult to explain without accounting for intent include *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), which invalidated an oddly shaped boundary drawn around the city of Tuskegee as motivated by race; and *Hunter v. Erickson*, 393 U.S. 385, 391 (1969), which invalidated a housing ordinance that placed "special burdens" on racial minorities. Indeed, some of the first Equal Protection cases concerned discriminatory enforcement of the law. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating conviction of a Chinese national prosecuted in a pattern of discriminatory enforcement of a San Francisco ordinance concerning laundries).

<sup>8</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (imposing a "secular purpose" requirement). In fact, the use of intent and purpose in Establishment Clause jurisprudence goes back at least to the direction in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), that the state may not "prefer one religion over another."

<sup>9</sup> See *Larson v. Valente*, 456 U.S. 228, 255 (1982) (condemning a state rule because of its "express design—to burden or favor selected religious denominations").

<sup>10</sup> *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

<sup>11</sup> 426 U.S. 229, 241 (1976).

<sup>12</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that government has an obligation to create laws that are neutral in their application to different religions).

<sup>13</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (holding that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral"); see also *Emp't Div. v. Smith*, 494 U.S. 872, 882 (1990) (upholding criminalization of penalties on ceremonial use of peyote, but flagging that there was "no contention that Oregon's drug law represents an attempt to regulate religious beliefs").

a result, intent now plays a central role whenever an individual litigant invokes the Constitution's protection against official discrimination because of race, ethnicity, or faith.

But what does it mean to say that an official action is motivated by a 'discriminatory intent'? And how can litigants in practice prove up an allegation of improper motivation? These simple questions turn out to have complex answers. For the federal judiciary has not homed in upon a single definition of discriminatory intent. Nor has it developed a consistent approach to the evidentiary tools through which discriminatory intent is substantiated.<sup>14</sup> Instead, studied ambiguity in doctrinal formulations means that judges have a large measure of discretion when resolving constitutional discrimination cases. Their leeway flows from an ability to tack between different conceptions of discrimination. It also follows from an ability to select among various evidentiary mechanisms by which its allegation can be substantiated.

My aim in this Article is to offer a map of discriminatory intent's competing definitional and evidentiary strands. By demonstrating the complexity of definitions and courts' fickle approach to questions of proof, I develop the basis for a critique of the way in which those threads are presently woven together—and a new way forward.

The idea that simple doctrinal terms can mask deep disagreement is hardly new. While few should be surprised that 'discrimination' has been productive of dissonance, an illustrative range of the divergent judicial approaches to questions of proof is helpful to motivate the analysis.<sup>15</sup> Three are from the Supreme Court. One is from a state trial court, but it so usefully illustrates a rarely litigated legal question about discrimination that I include it here too.

*First*, in March 2017, the Supreme Court rejected a long-standing prohibition on any post-trial inquiry into juror behavior in holding that a Colorado trial court should have allowed testimonial evidence that a juror "relied on racial stereotypes or animus to convict a criminal defendant."<sup>16</sup> The dissenting Justices agreed that such discriminatory intent was pernicious and unconstitutional, but argued that the stability of the com-

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<sup>14</sup> See *infra* subpart II.F.

<sup>15</sup> My analysis focuses on constitutional, rather than statutory, antidiscrimination jurisprudence. Different frameworks of burden shifting have developed in the statutory jurisprudence, and the kinds of evidentiary issues addressed in Part III that arise in considering government action do not arise.

<sup>16</sup> Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

mon-law rule against impeaching jurors outweighed the costs of verdicts tainted by such intent.<sup>17</sup> Had the dissenters prevailed, criminal cases where a biased juror does not reveal her bias until the eve of verdict would have lacked any forum for airing of discriminatory intent's role in securing a conviction.

*Second*, and mere weeks later, the Court invoked statistical evidence, public statements, and the trial testimony of state legislators to hold that the use of race as a proxy for partisan affiliation in North Carolina's legislative redistricting violated the Equal Protection Clause.<sup>18</sup> No Justice even blinked at the use of trial testimony this time. Nor did they abjure statistical evidence—even though similar evidence had previously been repudiated in the criminal context as evidence of improper racial intent.<sup>19</sup> But, unlike the jury bias case, the Court did not suggest that a litigant needed to point to the presence of stereotypes or other *negative* views in order to trigger constitutional scrutiny. The kind of intent the Court searched for seemed different.

*Third*, a few months after the North Carolina judgment, a Minnesota jury issued a verdict of acquittal in the nationally watched manslaughter trial of police officer Jeronimo Yanez, related to his shooting of African-American motorist Philando Castile.<sup>20</sup> Although race loomed large in public debate about the incident—one of many high-profile police shootings of African-Americans—the prosecution's case rested on evidence from an expert in police use of force<sup>21</sup> and featured neither testimonial nor empirical inquiries into Officer Yanez's potential biases. For instance, jurors heard nothing about experimental psychology data that points toward a persistent but unconscious racial differential in police's willingness to shoot.<sup>22</sup> As a result, the trial process marginalized the poten-

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<sup>17</sup> *Id.* at 875 (Alito, J., dissenting) (“[T]he Court is surely correct that even a tincture of racial bias can inflict great damage on that system . . .”).

<sup>18</sup> See *Cooper v. Harris*, 137 S. Ct. 1455, 1475 (2017).

<sup>19</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987) (rejecting the use of statistical evidence to allege racial bias in the administration of capital sentences).

<sup>20</sup> See Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> [<https://perma.cc/T2KQ-M8PU>].

<sup>21</sup> See Sarah Horner, *Witness Testimony from the Jeronimo Yanez Trial: A Summary*, MINNEAPOLIS STAR (June 15, 2017), <http://www.twincities.com/2017/06/15/yanez-trial-with-jury-in-4th-day-of-deliberations-heres-what-witnesses-said-at-trial/> [<https://perma.cc/TL87-YACV>].

<sup>22</sup> For a recent summary of those studies, see Joshua Correll et al., *The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 201, 207 (2014), which concluded, on the basis of several experimental studies, that police have a “prepotent tendency to

tial role of race in police violence cases by omitting statistical evidence about how race can influence use-of-force decisions below the surface.

*Finally*, ten days later, the Court took up another legal dispute about the role of constitutionally sensitive classification. That case concerned an executive order issued by President Trump imposing limitations on travel to the U.S. by nationals of six Muslim-majority nations.<sup>23</sup> Because the so-called travel ban was challenged on Establishment Clause grounds for establishing a religious preference, the case presented the question of whether public statements by a presidential candidate presaging a policy decision targeting Muslims could be introduced in a challenge to a policy action widely understood as (and arguably explicitly embraced as) the discriminatory one promised during the campaign.<sup>24</sup> Despite the Court's reliance on government actors' public statements in the North Carolina case mere months beforehand, the Government strenuously insisted that looking at candidate Trump's statements would be improper—ensuring that the most powerful evidence of impermissible motive be kept at bay—and, of course, calling for the case to be resolved without the President, unlike Officer Yanez, testifying.<sup>25</sup>

These cases—all from a single four-month period in 2017—suggest some disarray in the ways by which discriminatory intent can and must be proved. Official statements, statistics, extrinsic circumstances, and the routine tools of discovery, such as depositions and interrogatories—all these float in and out of judicial view. Adding to the confusion, the cases pivot on quite different conceptions of discriminatory intent. Bias, these precedents suggest, can be open and obviously invidious; it can be neutral and functional in orientation; it can be a matter of the classifications used by state actors in reaching a decision; or it can be implicit and unconscious, a function of a state actor's implicit reliance on invidious background social structures.

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shoot" African-American subjects, but explored ways to manage this tendency through training.

<sup>23</sup> See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>24</sup> See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2086 (2017) (per curiam). The Court here used a declarative statement to the effect that such campaign statements are not admissible. But the statement is embedded in a larger discussion of the government's position and is thus not plausibly read as a stand-alone holding.

<sup>25</sup> See *id.*

It should not surprise that ideas of ‘discrimination’ and ‘discriminatory intent’ would prove so controversial and difficult. Those concepts are closely entangled with notions of equality, and it has long been clear that the latter is “itself . . . many distinct notions, each an element in its grammar.”<sup>26</sup> Moreover, a recent wave of philosophical reflection on the term discrimination has revealed a range of possible understandings of the term. These efforts do not necessarily lead to a focus on individual intent in the sense familiar to lawyers and legal scholars. Deborah Hellman, for example, has identified a class of “demeaning” classifications applied in the context of power asymmetries as the core moral wrong of discrimination.<sup>27</sup> Benjamin Eidelson concurs that “core cases of wrongful discrimination” involve acts that “manifest disrespect for the discriminatees as persons.”<sup>28</sup> In contrast, Tarunabh Khaitan has argued that the “point” of antidiscrimination law is “to secure an aspect of the well-being of persons by reducing the abiding, pervasive, and substantial relative disadvantage faced by members of protected groups.”<sup>29</sup> In somewhat similar terms, Sophia Moreau offers a more liberty-oriented account of antidiscrimination law as the protection of “deliberative freedom” to make decisions about how to live “insulated from pressures stemming from extraneous traits.”<sup>30</sup> When sophisticated exegetes of the moral right of discrimination diverge so widely, we should expect that Justices, walled apart by their own partisan and jurisprudential disagreements, will also come to vest a single term with many different meanings.

My aim is not to adjudicate between competing philosophical accounts of discrimination. Nor do I want to simply casti-

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<sup>26</sup> DOUGLAS RAW ET AL., EQUALITIES 132 (1981). A different version of this point is Peter Westen’s celebrated argument that equality, in the legal context, derived its meaning wholly from extrinsic sources. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982) (contending that “the idea of equality is logically indistinguishable from the standard formula of distributive justice”).

<sup>27</sup> See DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 29–35 (2008). For a crisp formulation of Hellman’s nuanced claim, see Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3046–47 (2014), explaining that “discrimination is wrong when it is demeaning,” and that “[d]emeaning has two parts, which [she] call[s] the expressive dimension and the power dimension. An action, policy, or practice demeans if it expresses that the person or people affected are less worthy of equal concern or respect and if it is the action, policy, or practice of a person or entity that has the power or capacity to put the other down.”

<sup>28</sup> BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT 6 (2015).

<sup>29</sup> TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 91 (2015).

<sup>30</sup> Sophia Moreau, *What Is Discrimination?*, 38 PHIL. & PUB. AFF. 143, 147 (2010).



gate the Justices for their inconstancy (a pointless task). Instead, I hope to provide a clear mapping of how the slippery concept of ‘discriminatory intent’ works in practice, and a new perspective on the distributive consequences of that practice.

To that end, the Article maps out the two sources of judicial discretion in constitutional doctrine intimated by my opening examples.<sup>31</sup> The first involves the *kind* of discriminatory intent that is alleged. The second concerns the *manner* in which it is proved or refuted in different institutional contexts through admissible evidence. Both these questions—of definition and of proof respectively—are consequential in practice. How courts translate and then implement the general idea of discriminatory intent determines how and when norms embedded in the First and Fourteenth Amendments check official action.<sup>32</sup> By carefully parsing the answers to these ‘what’ and ‘how’ questions, I hope to refine our understanding of the nor-

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<sup>31</sup> In order to keep the analysis manageable, I focus here on constitutional law, and not on the statutory law of discriminatory intent. For one analysis of relevant federal statutes that addresses some of the same theoretical issues, see Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399 (2006). More generally, the employment discrimination literature is focused on defining the ‘right’ kind of intent for statutory liability. Compare David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 915–19 (1992) (advocating a negligence standard), with Stephanie Bornstein, *Reckless Discrimination*, 105 CAL. L. REV. 1055, 1059 (2017) (advocating a recklessness model), and Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 13–14 (suggesting that a negligence standard has not been adopted). This is a distinct normative inquiry from the taxonomical analysis I pursue here.

<sup>32</sup> My analysis here is focused on the Constitution’s norms of antidiscrimination that protect vulnerable social groups based on suspect classifications such as race and religion. “Discriminatory intent” is relevant in other doctrinal contexts—but the relevant conceptions of bias in those other fields is narrower and more specific and, therefore, does not raise the same concerns of conceptual pluralism and evidentiary approach as the Equal Protection Clause and Religion Clauses. For example, the First Amendment’s Free Speech Clause is violated if an official acts “out of a desire to prevent . . . First Amendment [activity].” *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016). Other than this reference to the narrow idea of retaliatory intent, however, Free Speech has tended to avoid doctrinal tests that direct judicial attention narrowly to motivation. Justice Elena Kagan, though, has argued that First Amendment doctrine “comprises a series of tools to flush out illicit motives and to invalidate actions infected with them.” Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996). Even Kagan, however, does not contend this function is explicit in doctrinal formulations or that judges directly ascertain the motives of official actors. *Id.* The Dormant Commerce Clause, in contrast, is tailored around a more discrete concern with “regulatory measures designed to benefit in-state economic interests.” *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (citation and quotation marks omitted). This conception of discrimination is also relatively narrow in comparison to the more complex conceptions at work in the Equal Protection and Religion Clause contexts.

mative choices implicit in the present doctrine—and in particular to identify its distributive consequences for different ascriptive groups.

Consider first what the term ‘discriminatory intent’ means when it comes to traits such as race, ethnicity, alienage, and gender.<sup>33</sup> The term is often used almost interchangeably with words like motivation, purpose, and animus.<sup>34</sup> It can profitably be understood to encompass legal theories of antidiscrimination which account for the mental state of the alleged malefactor. Intent is hence commonly viewed as distinct from, and even at war with, a consequence-focused conception of disparate impact.<sup>35</sup> In this Article, I use the term ‘discriminatory intent’ to capture *any theory of antidiscrimination liability that turns in any way upon the cognitive processes of the alleged discriminator*. Importantly, this includes rules that look to the semantic content of the rules that the alleged discriminator applied. Thus, my taxonomy and analysis capture as much of the law as possible. This allows me to consider the extent to which core conceptions of discrimination are related to what at first blush might seem to be unrelated concepts, such as a ‘colorblind’ anticlassification rule. I conclude, perhaps a touch counterintuitively, that the norm of colorblindness is appropriately understood as a rule against a certain kind of discriminatory intent.

With that in mind, the seemingly simple concept of discriminatory intent can be disaggregated into at least five dis-

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<sup>33</sup> The idea of discrimination also arises under the Dormant Commerce Clause. See, e.g., *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) (holding a state tax on capital stock unconstitutional under the Commerce Clause because it “facially discriminates against interstate commerce”). But the kind of discrimination at issue in Dormant Commerce Clause cases is distinct and different from the kind at issue in Equal Protection and First Amendment cases. The former is a species of economic dealing, most often by legislatures directed at a large group of faceless nonresidents not modeled as possessing any distinctive traits. The gap between this notion of discrimination and the notion at stake in the Equal Protection and First Amendment contexts is sufficiently large that it seems unwise to conflate the concepts.

<sup>34</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (describing the bare desire to harm as an “improper animus or purpose”); *Lyng v. UAW*, 485 U.S. 360, 370 n.8 (1988) (characterizing such motives as “illegitimate”).

<sup>35</sup> See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495 (2003) (identifying the possibility that “equal protection might affirmatively prohibit the use of statutory disparate impact standards”). There are also conceptual approaches to antidiscrimination law that align disparate treatment and disparate impact as two means of achieving the same goal. See Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1359–60 (2017) (arguing that a form of “status causation” underpins both species of liability).

tinct theoretical strands. First, perhaps the most intuitive meaning of discriminatory intent is action taken as a result of “a bare congressional desire to harm a politically unpopular group,”<sup>36</sup> or another aversive view of the group.

Second, a suspect classification might be used not out of a desire to harm, but because it is deemed a more efficient source of information about how to achieve a licit goal than readily available alternatives. This too can trigger constitutional scrutiny.<sup>37</sup> Race, for example, might be thought to predict partisan identity. Or, religion can be taken as a proxy for terrorism risk.<sup>38</sup>

A third possibility is that a discriminatory intent is present on any occasion upon which the relevant criterion plays a role in government decision making. This is often known as an “anticlassification” principle.<sup>39</sup> The latter is easy to conceptualize as hinging on the semantic content of the law, and not the quality of the decision maker’s intentions.<sup>40</sup> But it is a mistake to think of anticlassification as exhausted by a concern with the facial content of the law. The logic of anticlassification, I will argue, is also necessarily concerned with the quality of official intentions, above and beyond the content of legal texts.

Fourth, an impermissible classification can work as a marker of the boundary between two hierarchically arranged social groups even when applied in a seemingly neutral and evenhanded way. This ‘social group polarization’ approach illuminates several early decisions concerning laws that formally applied in evenhanded ways. Yet it is rarely mentioned now.

Finally, a prohibited classification might play a subtler psychological role—one that the official in question might not immediately recognize because of implicit bias or the culpable

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<sup>36</sup> U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

<sup>37</sup> See, e.g., Cooper v. Harris, 137 S. Ct. 1455, 1464 n.1 (2017) (“A plaintiff succeeds at [the first stage of the analysis] even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones.”).

<sup>38</sup> Notice that this is distinct from the idea that a licit trait might be employed as a proxy for an impermissible criterion.

<sup>39</sup> Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (“[T]he anticlassification . . . principle holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race.”).

<sup>40</sup> Cf. *id.* (identifying intentional discrimination as a supplement case that might “also” count as a violation of the anticlassification principle, rather than a core case).

failure to account for structural inequalities.<sup>41</sup> These forms of reckless or negligent action are analogous to bad intent in ways that make them appropriate subjects here, falling just within the perimeter of my analytic reach.

These different conceptions of discriminatory intent are, to be sure, difficult to distinguish sharply. They have fuzzy, overlapping boundaries. Rather than frankly recognize plurality and overlapping conceptualizations of discriminatory intent, however, federal courts treat the concept as unitary.<sup>42</sup> The result is that judges retain considerable discretion to move between different versions of discriminatory intent. How this discretion is exercised, I will argue, can and does raise substantial normative questions. This is because the way in which judges exercise their discretion can hinge upon their subjective evaluations of the importance of different discrimination-related harms. Worse, the weight of different harms often seems to depend on the identities of the perpetrator and the state actor. Paradoxically, antidiscrimination law can itself have a discriminatory cast.

There is a second reason why the jurisprudence of discriminatory intent remains unpredictable and incoherent in practice. There are a number of ways to prove the presence of discriminatory intent. Five evidentiary tactics stand out.<sup>43</sup>

First, a judge might look at the superficial, semantic content of a decision—the text of a law or an executive order, for example. Second, they might look to the oral statements of the relevant decision maker. Third, that decision could be situated in its context by looking upstream at the sequence of events leading up to its execution and then downstream to its consequences. This context may well provide powerful circumstantial evidence of an improper motivation. Fourth, in some cases, the motivations of the relevant government actor can be directly probed using the well-worn instruments of civil discovery, such as depositions and interrogatories. Fifth, a judge might consider statistical evidence derived from an econometric analysis to the effect that an impermissible classification played a role in government decision making.

Despite having embraced all of these evidentiary instruments at one moment or another since the mid-1970s, when

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<sup>41</sup> See, e.g., Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473–75 (2010) (discussing the pervasiveness of implicit, unconscious biases).

<sup>42</sup> See *infra* Part II.

<sup>43</sup> See *infra* Part III.

intent was first coming into its doctrinal ascendancy, the Court has since backpedaled—albeit in fits and starts. It has showed no overt recognition that changes in the kinds of evidence available to show bias lead inexorably to changes in the kinds of bias that can successfully be challenged in court.<sup>44</sup> Its untheorized and *sub rosa* reorientation of constitutional antidiscrimination law should provoke concern not only because that change has been subject to no careful judicial or academic scrutiny, but also because it has operated as a subterranean way of changing the reach and coverage of the Constitution's foundational protections for vulnerable minorities.

This matters because the idea of discriminatory intent plays a large role in many contemporary policy flashpoints. It bubbles to the surface of national debate over the so-called travel ban, the persistence of police violence against African-American men and women,<sup>45</sup> and the cyclic resurgence of contestation about affirmative action.<sup>46</sup> More generally, recent events in the public sphere have demonstrated that even the most naked and virulent forms of animus continue to mar the American body politic.<sup>47</sup> Their influence on officials empowered with the enormous discretionary authorities of today's government cannot be dismissed out of hand. In this context, rigorous and fair-minded thinking about how to define and discover discriminatory intent is surely needed more than ever.

My focus on the *concept* of discriminatory intent, and the mechanics of its substantiation in court, is a departure from the literature's dominant concerns. There is now abundant scholarly commentary on what might be called the grand theories of equality or religion threading through the Constitution.<sup>48</sup> Questions of how discriminatory intent is defined and

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<sup>44</sup> See *infra* Part IV.

<sup>45</sup> See Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2016) (identifying racial disparities in use of police force, but not police shootings).

<sup>46</sup> See Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html?hpw&rrref=us&action=click&pgtype=Homepage&module=well-region&region=bottom-well&WT.nav=bottom-well> [<https://perma.cc/DH3S-UPBQ>] (noting renewed interest among political branches for enforcing limits on affirmative action).

<sup>47</sup> See *id.*

<sup>48</sup> In respect to the Equal Protection Clause, important recent scholarship focuses on overarching goals and broad, synoptic judgments. See, e.g., Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 154 (2016) (contending that "the Supreme Court has steadily diminished the vigor of the Equal Protection Clause in most respects"); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013) [hereinafter Siegel, *Equality Divided*]. A number of recent articles,

proved tend to be ancillary and subordinate to a larger critique of the ideological orientation of the doctrine.<sup>49</sup> In contrast, the only extended study of the manner by which judges discover discriminatory intent is almost twenty years old.<sup>50</sup>

My argument proceeds in four steps. Part I begins by charting the ascendancy of discriminatory intent as a touchstone of liability under the Equal Protection and Religion Clauses. The following Part develops the claim that ‘intent’ is

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however, critique specific elements of the judiciary’s framework for implementing the idea of discriminatory intent. See, e.g., Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (discussing the four decisions that form the foundation of the “anti-animus doctrine” of Equal Protection). In addition, Richard Fallon has offered a searching critique of the idea of legislative intent more generally. See Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016). My discussion of impermissible intent in the legislative context overlaps in focus with Fallon’s piece. My aim, however, is to understand how judicial scrutiny of legislative intent interacts with judicial scrutiny of other officials’ motivations under the First and Fourteenth Amendments. In contrast, recent Religion Clause scholarship focuses on precise doctrinal questions related to the hotly contested question of accommodations from generally applicable laws, see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015), and the status of corporate entities, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1469–70 (2015).

<sup>49</sup> One recent major contribution, by the Critical Race theorist Ian Haney-López, argues that the Justices have “split equal protection into the separate domains . . . one governing affirmative action and the other discrimination against non-Whites” in a move that has made it systematically easier for white plaintiffs to prevail. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1828 (2012). He asserts that the Court has “rejected inquiring into the thoughts of individual government actors.” *Id.* at 1795. He also harshly criticizes the turn to intent and the refusal to distinguish remedial from “oppressive” race-conscious measures. *Id.* at 1805–06, 1815–16. Unlike Haney-López, I do not aim here to critique the Court’s conception of Equal Protection. Indeed, I read the doctrine as remaining more open and pluralistic than he does. Moreover, unlike him, I focus on the shifting conceptual and evidentiary methods under the rubric of discriminatory intent as the causal mechanism through which the focus of the courts has shifted.

<sup>50</sup> See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L. REV. 279, 284 (1997). Selmi’s central claim is that “the Court has only seen discrimination, absent a facial classification, in the most overt or obvious situations—situations that could not be explained on any basis other than race.” *Id.* Whereas Selmi focuses on the narrowing of the intent inquiry, my aim is to explore the range of definitional, analytic, and empirical options at play in the judicial discernment of discriminatory intent. Another earlier article critiques the counterfactual method of ascertaining unlawful intent as impossible to implement. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1113–14 (1989). In my view, the counterfactual method for analyzing discriminatory intent is simply a way of framing the question whether unlawful intent is at work, and not a way of answering that question. Finally, a recent student note draws on conceptions of intent from psychology to argue for treating foreseeable harms as intentional. Julia Kobick, Note, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 519–20 (2010).

not a singular concept, but better understood as encompassing an array of different possibilities. It offers an analytically generic typology of meanings. Part III catalogs the evidentiary instruments available for identifying impermissible motives. One inference that follows from the taxonomy is negative: There is no neutral way of putting into practice the idea of discriminatory intent. As in any craft, the choice of tools changes the nature of the ultimate product. Normatively freighted choices are simply unavoidable. The final Part pivots to a critique of the Court's observed choices on the basis of their distributive and epistemic effects. That is, it examines the way in which the Justices' choices allocate scarce judicial resources between different victims of discrimination, and the way in which they shape public understanding of discrimination's moral harm.

## I

### THE RISE AND RISE OF DISCRIMINATORY INTENT

This Part maps the emergence of discriminatory intent as a touchstone of jurisprudence under the Equal Protection Clause and the Religion Clause. My account of Equal Protection Clause jurisprudence focuses largely on race, where the key precedents were handed down. But I also draw upon case law about other suspect classifications and fundamental rights insofar as they are pertinent to the story.

#### A. The Equal Protection Clause

Enacted later, but liquidated in court more quickly than most other elements of the Constitution's text, the Equal Protection Clause of the Fourteenth Amendment generated a jurisprudence of intent within the first two decades of its ratification—at least in respect to administration of the laws, if not to legislation.<sup>51</sup> There was nothing inevitable about this doctrinal move. The Court's first major interpretation of the Clause, in the 1880 case of *Strauder v. West Virginia*, did not hinge on intent.<sup>52</sup> *Strauder* concerned a state statute that limited jury service to “white male persons who are twenty-one

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<sup>51</sup> The leading accounts of the Equal Protection Clause's adoption emphasize the divergence of views among those who debated and adopted the measure. *E.g.*, WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 126, 131 (1988); John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws”*, 1972 WASH. U. L.Q. 421, 432 (1972).

<sup>52</sup> 100 U.S. 303, 310 (1880).

years of age.”<sup>53</sup> Invalidating the conviction of an African-American man under this regime, the Court found a failure of formal equality on the face of the statute that violated the Constitution’s “immunity from inequality of legal protection.”<sup>54e</sup> It was the “statute” rather than any person, the Court explained, that “discriminat[ed]” in the sense of unevenly extending the protection of state law.<sup>55</sup> Later cases suggested that the complete exclusion of African-Americans from juries could be *prima facie* evidence of a constitutional violation.<sup>56</sup> Defendants hence were constitutionally entitled to introduce evidence of such exclusion.<sup>57</sup> But the analytic reach of jury exclusion cases did not enlarge much before the Court imposed stringent evidentiary requirements that in practice foreclosed *Strauder* challenges.<sup>58</sup> Such interactions between substantive laws and evidentiary protocols were to prove an important element in the story of Equal Protection doctrine, and a central pivot of my story here.

Seven years after *Strauder*, in *Yick Wo v. Hopkins*, the Court was presented with a habeas petition from a Chinese national convicted under a San Francisco municipal ordinance regulating the licensing of laundries.<sup>59</sup> Although the petitioner attacked the ordinance both on its face and as applied, the Court considered solely the motives behind the exercise of prosecutorial discretion.<sup>60</sup> In particular, the Justices focused on the selective enforcement of the ordinance against Chinese laundry owners as evidence of the “hostility to the race and nationality to which the petitioners belong, and which in the eye of the law, is not justified.”<sup>61</sup> Absent evidence of discriminatory intent, the Court clarified in a sequel case—again one involving evenhandedness in the enforcement of San Francisco

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<sup>53</sup> *Id.* at 305 (citation omitted).

<sup>54</sup> *Id.* at 310.

<sup>55</sup> *Id.* For an extension of this logic, see *Pace v. Alabama*, 106 U.S. 583, 584 (1883), which rejected a challenge to a statute that imposed higher penalties on interracial rather than intraracial fornication because “[e]quality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offence, to any greater or different punishment.”

<sup>56</sup> See *Neal v. Delaware*, 103 U.S. 370, 397 (1881).

<sup>57</sup> See *Carter v. Texas*, 177 U.S. 442, 449 (1900).

<sup>58</sup> Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1462–63 (1983).

<sup>59</sup> 118 U.S. 356, 356–57 (1886).

<sup>60</sup> See *id.* at 373–74.

<sup>61</sup> *Id.* at 374.



ordinances—that no Equal Protection challenge would stand.<sup>62</sup> *Strauder* and *Yick Wo* thus reflect distinct doctrinal potentialities embedded in the Equal Protection Clause. They were harbingers of a concern about classification and a concern about animus, respectively.<sup>63</sup>

*Yick Wo*'s immediate implications were stifled by the federal judiciary's endorsement of state-enforced segregation. This culminated, of course, in *Plessy v. Ferguson*. While not disavowing *Yick Wo*, the *Plessy* Court blocked any inquiry into the motives of state actors by suggesting that any "badge of inferiority" flowing from segregation arose "because the colored race chooses to put that construction upon it."<sup>64</sup> *Plessy* thus undercut arguments about official intent by placing blame for racial stratification on "social prejudices" and the "general sentiment of the community,"<sup>65</sup> as if these had nothing to do with law. Since the Justices then likely approved of racial segregation as public policy,<sup>66</sup> they were hardly likely to perceive an improper motive at work in Louisiana's segregation of railroad passengers by race.<sup>67</sup>

Only in the late twentieth century, as the Court worked though the implications of the majestic opacities of *Brown v. Board of Education*,<sup>68</sup> did the idea of discriminatory intent come to the fore once more. *Brown* repudiated *Plessy*'s conclusion that de jure segregation had no direct impact on African-

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<sup>62</sup> See *Ah Sin v. Wittman*, 198 U.S. 500, 507–08 (1905) (noting that petitioner had failed to show that there were non-Chinese-owned establishments that had been spared enforcement).

<sup>63</sup> The theme of normative pluralism runs through the best historical scholarship on the Fourteenth Amendment's enactment. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63 (1955) (finding in the enactment history of the Fourteenth Amendment "no specific purpose going beyond the coverage of the Civil Rights Act is suggested; rather an awareness on the part of these framers that it was a constitution they were writing, which led to a choice of language capable of growth."); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888* at 349–50, 349 n.143 (1985) (suggesting that the Equal Protection Clause was understood initially only to apply to "remedial" or "protective" functions of state government). One consequence of the diversity of original public understandings of the Fourteenth Amendment is that there is necessarily a measure of interpretive space for doctrinal pathways as diverse as *Strauder* and *Yick Wo*.

<sup>64</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

<sup>65</sup> *Id.*

<sup>66</sup> See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 332.

<sup>67</sup> Hence the Court's failure, twelve years after *Plessy*, even to inquire into the motives behind a Kentucky law that prohibited integrated colleges. See *Berea College v. Kentucky*, 211 U.S. 45, 57–58 (1908) (upholding the measure as a valid exercise of the state's police power in respect to corporations).

<sup>68</sup> 347 U.S. 483 (1954).

Americans' "status in the community."<sup>69</sup> But otherwise the Court's opinion in *Brown* did not clarify "which conception of discrimination [the Court] embraced, or how far the principle of [Equal Protection] extended."<sup>70</sup> Over the next two decades, the ensuing desegregation litigation did not require the Court to select a "precise identification of the objectionable aspect of racial classifications."<sup>71</sup> Only when the city of Jackson, Mississippi, closed its public swimming pools to stymie court-ordered integration was the Court confronted with a state action clearly motivated by an improper animus yet simultaneously even-handed in its semantic content and effect.<sup>72</sup> A closely divided Court held in *Palmer v. Thompson* that the "bad motives" of the measure's legislative supporters did not bear on its constitutionality.<sup>73</sup>

This rule did not endure. Faced with a turn by lower courts to a disparate impact standard,<sup>74</sup> the Court in 1976 in *Washington v. Davis* held that "the basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."<sup>75</sup> Much criticized even at the time, *Washington* explicitly rested on a concern about the destabilizing effects of a constitutional effects rule. But the fact that the Court had a clear idea of what it disfavored did not mean it understood the alternative that it was embracing.<sup>76</sup> Indeed, because the

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<sup>69</sup> *Id.* at 494.

<sup>70</sup> David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 947 (1989) [hereinafter Strauss, *Discriminatory Intent*].

<sup>71</sup> Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 296 (1991).

<sup>72</sup> See *Palmer v. Thompson*, 403 U.S. 217 (1971).

<sup>73</sup> *Id.* at 225. For early critical commentary that anticipated later judicial criticisms, see Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

<sup>74</sup> See, e.g., *Davis v. Washington*, 512 F.2d 956, 959-60 (D.C. Cir. 1975), *rev'd sub nom. Washington v. Davis*, 426 U.S. 229 (1976) (remarking "that use of selection procedures that do not have a disparate effect on blacks would have resulted in an even greater percentage of black police officers than exists today"); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm.*, 482 F.2d 1333, 1337 (2d Cir. 1973) (requiring that plaintiffs show a sufficient "disparity between the hiring of Whites and minorities").

<sup>75</sup> *Washington v. Davis*, 426 U.S. 229, 240 (1976).

<sup>76</sup> *Id.* at 248 ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes . . ."); see also *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (striking down a racially neutral felon disenfranchisement law enacted by the Alabama constitutional convention in 1901 because the law had been motivated by a "zeal for white supremacy"). For early criticism, see Theodore

Justices in *Washington* faced a record with no evidence of such invidious purpose,<sup>77</sup> they had no need to do more than reject a disparate impact standard (albeit without necessarily rejecting evidence of a disparate impact as probative of a discriminatory intent). They thus had no need to reckon with the different ways an impermissible classification or animus might figure in a decisional process.

Over time, ambiguity about the precise nature of the discriminatory intent that lay at the heart of an Equal Protection violation became generative rather than paralyzing. Without the encumbrance of a fixed point of analytic departure, the Court wrought a doctrinal framework in which subtly distinct notions of intent could play a role. Within the race context, for example, the Court increasingly devoted its scarce resources to the government's use of "race-based measures" that classified using race on their face.<sup>78</sup> Any occasion on which "the government distributes burdens or benefits on the basis of individual racial classifications," the Court cautioned, "would lead to 'strict scrutiny.'"<sup>79</sup> In contrast, in the context of rules that overtly classify by gender, after some wobbling,<sup>80</sup> the Court settled into the practice of querying whether a legal distinction is "in reliance on '[s]tereotypes about women's domestic roles . . . .'"<sup>81</sup>

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Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977).

<sup>77</sup> To the contrary, the case involved a personnel test administered by the Washington, D.C. police department, and the record contained evidence of the "affirmative efforts of the Metropolitan Police Department to recruit black officers." *Davis*, 426 U.S. at 246.

<sup>78</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

<sup>79</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); see also *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (describing the use of such classifications as "pernicious" (citation omitted)).

<sup>80</sup> For example, the Court held that pregnancy discrimination in state insurance coverage fell outside the compass of Equal Protection, justified by the assertion that there was "no risk from which men are protected and women are not." *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974). *Geduldig* failed to inquire into stereotypes or impermissible intent, placing it in the category of disparate impact cases (although one that was wrongly decided even on those terms).

<sup>81</sup> *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017) (quoting *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003)); see also *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (expressing similar concern about laws based on "archaic and overbroad generalizations"); see also *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring) (expressing that "something more than accident is necessary to justify the disparate treatment [of women] who have as strong a claim to equal treatment as do similarly situated surviving

In the absence of an overt classification, the Court's approach to allegations of improper bias against minorities oscillated, yielding inconsistent results across cases.<sup>82</sup> In one line of cases that did not involve the application of strict scrutiny, it emphasized that "a bare . . . desire to harm a politically unpopular group" necessarily clashed with the Equal Protection Clause.<sup>83</sup> These cases varied in subject-matter, touching on voting, fiscal distributions, and the taxation of out-of-state car purchases. And they rested on a variety of rationales, including the lack of "a legitimate and specific explanation" or the presence of "stereotypic assumptions or hostility toward a class."<sup>84</sup> Hence, the doctrinal framework for the evaluation of discriminatory intent seems to vary depending on whether a formal classification, a stereotype, or an unexplained hostility is perceived to be at work.

Nor did the cases that followed immediately on *Washington v. Davis*'s heels resolve the question of what evidence could be used to prove bad intent. Instead, the Court initially took a sweeping view of the kinds of evidence admissible to demonstrate discriminatory intent<sup>85</sup>—an element of the doctrine I shall explore at greater length below—and a narrow view of whether the Constitution was violated in cases of mixed mo-

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spouses."). The intent requirement in gender Equal Protection jurisprudence has traveled a crooked path. Klarman, *supra* note 71, at 304 (noting the "apparently chaotic" character of the early gender jurisprudence). Five years after *Washington v. Davis*, for example, the Court upheld California's statutory rape law against a challenge that it discriminately targeted men alone. See *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 471–72 (1981). Writing for the Court, Chief Justice Rehnquist parenthetically noted the petitioner's argument that the statute "rests on archaic stereotypes," but rejected this contention with a citation to *United States v. O'Brien*, 391 U.S. 367, 383 (1968). *Michael M.*, 450 U.S. at 472 n.7.

<sup>82</sup> See *infra* subpart II.B.

<sup>83</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973)); see also *Lyng v. UAW*, 485 U.S. 360, 370 n.8 (1988) (characterizing such motives as "illegitimate"). The Court also uses the term "animus" to capture the same idea. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (describing the bare desire to harm as an "improper animus or purpose"); see also *Romer v. Evans*, 517 U.S. 620, 634 (1996).

<sup>84</sup> Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 489 (2004) (collecting cases).

<sup>85</sup> See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (demanding a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including the impact and the history leading up to the decision); *Castaneda v. Partida*, 430 U.S. 482, 496–97 (1977) (accepting mathematical evidence to establish a *prima facie* case of discrimination).

tives.<sup>86</sup> Uncertainty rapidly became apparent in the Court's handling of how allegations of unconstitutional bias against a protected group were proved up. Unguided by any disciplining procedure or logic, the Court could oscillate abruptly between cases.

An example of such inconsistency in the treatment of circumstantial evidence of bad intent is found in two cases wherein at-large voting systems were challenged as tainted by discriminatory intent. One of these cases elicited a studied refusal to account for the circumstantial evidence of intent,<sup>87</sup> while the other generated a careful tallying of relevant clues.<sup>88</sup> Unsurprisingly, the two cases also yielded different results.

In sum, while the idea of “discriminatory intent” has served since 1976 as an organizing principle in Equal Protection jurisprudence, the Court has not hewed to a clear and specific understanding of such “intent,” or a single understanding of how it is to be proved. Whereas some lines of cases underscore the distinctively negative or aversive quality of unconstitutional purposes, other lines of cases turn on the stereotypical content of the government's intent. Yet other lines of cases make the assumption that the mere presence of race as a criterion in a process of government decision-making suffices to trigger a constitutional worry. Even within the bounds of Equal Protection jurisprudence, therefore, the idea of an unconstitutionally discriminatory intent has become remarkably plural since 1976.

## B. The Religion Clauses

Government motive—in particular, the intention to discriminate either for or against religion, or else between denominations—has loomed large since the inception of

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<sup>86</sup> See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (proof of discriminatory purpose requires showing that the government decision-maker “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”). *Feeney* thus narrowed the kinds of intention that counted for the constitutional purposes by excluding cases in which racial effects were anticipated but not intended. Some commentators treat the case as a ruling on the evidence that can be used to demonstrate unlawful intent. Siegel, *Equality Divided*, *supra* note 48, at 19. But *Feeney* does not preclude the evidentiary use of a law's consequences to gauge intent. Rather, it directs that certain kinds of intent are not inconsistent with the Constitution.

<sup>87</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 73 (1976) (describing evidence of bias as most tenuous and circumstantial). But see *Selmi*, *supra* note 50, at 310–11 (pointing out persuasive evidence of “the perpetuation of an all-white local election scheme in Mobile” that was available to the Court but ignored).

<sup>88</sup> *Rogers v. Lodge*, 458 U.S. 613, 625–26 (1982) (carefully accounting for evidence of bias and invalidating Burke County, Georgia's redistricting scheme).

Establishment Clause jurisprudence.<sup>89</sup> It has also come to play an increasing pivotal role in Free Exercise cases since the early 1990s.<sup>90</sup> As in the Equal Protection context, the Court has identified the government actor's intentions as analytically pivotal, rather than the consequences of its actions or its impingement on some fixed and discernable "immunity" under the Constitution.<sup>91</sup> As in the Equal Protection context, the doctrinally relevant sense of 'intent' consistently reflects some kind of binary opposition in which religion (or a particular denomination) is either favored or disfavored. In some iterations, the psychological and processual quality of the term 'intent' frays, ceding ground to a more objective-seeming inquiry into an externally determined 'purpose.' Still, the doctrine at its core maintains, albeit as one element of many, an intuition that certain motivations are unconstitutional because they entail discrimination on religion-related grounds.<sup>92</sup>

As of the beginning of 1947, the Supreme Court had decided only two Establishment Clause cases. But neither left any enduring impact upon the law.<sup>93</sup> In its first major engagement with the Clause, the Court upheld that year, a decision by Ewing Township, New Jersey, to provide free transportation to all non-profit schools, including sectarian ones.<sup>94</sup> In influential dicta, the Court spelled out a synoptic understanding of the Clause that prohibited certain measures based on their effect, and in particular, whether they "aid one religion, aid all religions, or prefer one religion over another."<sup>95</sup> Fourteen years later, upholding Maryland's Sunday closing laws, the Court

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<sup>89</sup> See, e.g., Corbin, *infra* note 92, at 306 (explaining that motives behind government action are only illegitimate if there is "a discriminatory intent to devalue or exclude minority religions").

<sup>90</sup> See *id.* at 303 (explaining that after a 1990 case, *Employment Division v. Smith*, "neutral laws of general applicability, regardless of the impact they may have on a religious practice, do not violate the Free Exercise Clause" because they lack discriminatory intent).

<sup>91</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55 (1913) ("[A]n immunity is one's freedom from the legal power or 'control' of another as regards some legal relation.").

<sup>92</sup> My reading of the doctrine differs from others who find intentionality only in very recent Supreme Court doctrine. See, e.g., Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 304 (2015) (dating the role of intent in Establishment Clause analysis to the 2015 case of *Town of Greece v. Galloway*).

<sup>93</sup> Both involved federal spending on sectarian institutions. See *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (discussing sectarian schools); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (concerning a religiously affiliated hospital).

<sup>94</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947)

<sup>95</sup> *Id.* at 15.

subtly reformulated the doctrinal test to train upon the “purpose and effect” of challenged laws.<sup>96</sup> The Court two years later examined the “purpose” of a Pennsylvania town’s statute mandating that school days begin with a Bible reading to determine whether it was “secular.”<sup>97</sup> And by 1971, the requirement of “a secular legislative purpose” seemed a touchstone of Establishment Clause analysis.<sup>98</sup>

In many cases, this litmus test for constitutionality resulted in a close examination of the state’s proffered justifications for a statute—cases that often involved some form of aid to sectarian educational institutions—to ascertain whether they were pretextual, rather than an exposition of how “purpose” in this context was conceptualized or ascertained.<sup>99</sup> In other cases, the Court disapproved of government action on the ground that it was intended “to endorse or disapprove of religion.”<sup>100</sup>

Purpose plays a role now in two ongoing lines of Establishment Clause cases. The first concerns the judicial analysis of physical fixtures such as displays, statutes, and monuments alleged to “establish” religion in a quite concrete sense. The leading precedent concerns the posting of the Ten Commandments in classrooms, but there are endless variants.<sup>101</sup> These cases, to be sure, do not involve a ‘discriminatory’ intent in the sense of an invidious, negative view of a certain class. But they do involve an improper intention respecting religion. They con-

<sup>96</sup> See *McGowan v. Maryland*, 366 U.S. 420, 445 (1961).

<sup>97</sup> See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (rejecting proffered secular motives). Earlier school prayer decisions had not rested on a finding of improper purpose, but on effects. See *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“There can be no doubt that New York’s state prayer program officially establishes the religious beliefs embodied in the Regents’ prayer.”).

<sup>98</sup> *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); accord *Mueller v. Allen*, 463 U.S. 388, 394 (1983); see also *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (stating that “[i]n order to pass muster, a statute must have a secular legislative purpose . . .”).

<sup>99</sup> See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion) (“[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.” (citations omitted)); *Walz v. Tax Comm’n*, 397 U.S. 664, 687 (1970) (endorsing proffered reasons for religious organization tax exemptions).

<sup>100</sup> *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (quotation omitted).

<sup>101</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (“The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion.”); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (“The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.”).

cern a mental state of ‘discrimination,’ that is, in roughly the same way as affirmative action. The latter trigger strict scrutiny not necessarily because they are animated by a hatred of Caucasians, but rather “because racial characteristics so seldom provide a relevant basis for disparate treatment.”<sup>102</sup> Establishment Clause scrutiny of facial religious distinctions, by analogy, can be understood as constitutionally suspect because such classifications are also “so seldom . . . relevant.”<sup>103</sup>

The most extended discussion of the role of the intentions and purposes of official actors in Establishment Clause cases can be found in a 2005 plurality decision holding unconstitutional the posting of the Ten Commandments in two Kentucky county courtrooms.<sup>104</sup> The defendant counties had initially posted large, prominent replicas of the Decalogue in courtrooms. Once these were challenged, the counties twice shuffled their exhibits so as to include an increasing variety of secular images, including the Magna Carta and the Declaration of Independence.<sup>105</sup>

Writing for a plurality, Justice Souter rejected the counties’ submission that the idea of purpose was too inchoate to operationalize. The plurality cited cases—including *Washington v. Davis*—in which purpose was a touchstone of constitutional validity.<sup>106</sup> “[A]n understanding of official objective emerges from readily discoverable fact,” argued Justice Souter, pointing to the various contextual clues that could illuminate such purpose.<sup>107</sup> At the same time, he conceded that a strategic governmental actor could obscure its motive. But this, he argued, posed no conclusive concern. In the Establishment Clause, Souter explained, “secret motive stirs up no strife and does nothing to make outsiders of nonadherents.”<sup>108</sup>

This last point is ambiguous. It might be read to suggest that the Establishment Clause is necessarily underenforced. Alternatively, it might be understood to connote that the Clause is not concerned with the content of the psychological state of official actors, but rather with the *publicly articulated* understanding of that psychological state. In my view, the first reading of Justice Souter’s argument is more plausible. To

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<sup>102</sup> *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)).

<sup>103</sup> *Id.*

<sup>104</sup> *See McCreary Cty. v. ACLU*, 545 U.S. 844, 881 (2005).

<sup>105</sup> *See id.* at 851–56.

<sup>106</sup> *See id.* at 861.

<sup>107</sup> *Id.* at 862.

<sup>108</sup> *Id.* at 863.



begin with, as Richard Schragger has observed, “a pervasive feature of the Court’s Establishment Clause jurisprudence is that the Court’s stated doctrine is underenforced or is irrelevant to a whole range of arguably pertinent conduct.”<sup>109</sup> Justice Souter’s statement simply acknowledges that mundane fact.

More substantively, imagine a case in which officials enact a measure for wholly secular reasons, a measure that is reasonably perceived as motivated by favor or disfavor for religion based on official statements at the time. Imagine further that the officials can produce persuasive documentary evidence that *in fact* secular grounds alone played a role. It is hard to imagine that the measure would be invalidated because of its impermissible *intent*. Rather, the question would be whether the perceived “endorsement” of religion would constitute an independent violation of the Establishment Clause.<sup>110</sup>

A second line of cases, in contrast, concerns measures that draw a distinction between regulated parties based on denominational affiliation. In the seminal case in this doctrinal strand, the Court in *Larson v. Valente* invalidated a Minnesota statute that drew no facial distinction between denominations, but rather imposed reporting requirements solely on religious organizations that solicited more than half of their funds from nonmembers.<sup>111</sup> In so doing, explained the Court, the statute inscribed “explicit and deliberate distinctions between different religious organizations” depending on age and size.<sup>112</sup> The Court could have limited its analysis to the face of the statute. Indeed, some commentators have treated *Larson* as a case

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<sup>109</sup> Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 585 (2011) (footnote omitted).

<sup>110</sup> For the concept of endorsement, see, for example, *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring), which asks whether the state had impermissibly “sen[t] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” See also *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 592–94 (1989) (engaging in an endorsement analysis based on Justice O’Connor’s concurrence in *Lynch*). Commentators have argued that the endorsement test is in decline. See Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 144–58. And some Justices have vigorously attacked the endorsement test on the rare occasions it has been employed to invalidate a measure with concededly secular purposes. See *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari).

<sup>111</sup> 456 U.S. 228, 230–31 (1982) (describing Minnesota Charitable Solicitation Act, Minn. Stat. §§ 309.50–309.61 (2017)).

<sup>112</sup> *Id.* at 246 n.23.

about “religious classifications” alone.<sup>113</sup> But this is a mistake. The Justices also considered the measure’s “express design—to burden or favor selected religious denominations led the Minnesota Legislature to discuss the characteristics of various sects with a view towards ‘religious gerrymandering.’”<sup>114</sup> A denominational preference, *Larson* suggests, obtains not only when there is facial discrimination, but also when there is an intent or “design” to “burden or favor selected religious denominations.”<sup>115</sup>

The path of Free Exercise doctrine has been different from Establishment Clause doctrine. The emergence of discriminatory intent—foreshadowed somewhat in cases such as *Larson*—came later and more abruptly. Until the end of the nineteenth century, the Free Exercise Clause was understood to draw a distinction between impermissible laws that penalized “mere opinion” and those that “reach[ed] actions . . . in violation of social duties or subversive of good order.”<sup>116</sup> Its contemporary revival began with the 1963 decision *Sherbert v. Verner*, in which the Court invalidated a South Carolina unem-

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<sup>113</sup> See, e.g., Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 324 (saying only that the Court treated a religious classification as suspect).

<sup>114</sup> *Larson*, 456 U.S. at 255 (citation omitted). In other cases involving a denominational preference challenge, however, the Court did limit itself to the face of the statute. See *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 695 (1989) (reading *Larson* to apply to cases of facial preference[s]). But other courts have discussed *Larson* as a nondiscrimination rule. See *Children’s Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000).

<sup>115</sup> For similar statements that seem to turn on government intent, see *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–9 (1989), explaining that “[i]t is part of our settled jurisprudence that ‘the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization,’” and *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989), saying that “[w]hatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed . . . .”

<sup>116</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1879). *But see* *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943) (invalidating a municipal license tax on the sale of religious pamphlets as an improper “condition to the pursuit of” religious activities). It is noteworthy here that *Reynolds* and *Murdock* alike involved religious minorities—Mormons and Jehovah’s Witnesses—that were at the time subject to considerable public contempt and discrimination. See also Kelly Elizabeth Phipps, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862–1887*, 95 VA. L. REV. 435, 440–42 (2009) (summarizing anti-Mormon rhetoric in Congress in the 1880s); SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (2000) (documenting violence against Jehovah’s Witnesses in the early twentieth century). It is telling that while the Court reached different results in those two cases, in neither instance did it identify or discuss the possibility of a discriminatory intent.

ployment compensation statute that excluded those who declined employment on a Saturday—a measure with an unequivocal “secular purpose,” as the dissenting Justice Harlan remarked.<sup>117</sup>

*Sherbert* marked the beginning of a sequence of Free Exercise decisions focused on the *effects* of challenged laws.<sup>118</sup> But intent was not wholly absent from the case law. In 1978, for example, the Court invalidated a Tennessee prohibition on ministers serving as delegates to a constitutional convention.<sup>119</sup> The Court warned that “government may not *as a goal* promote ‘safe thinking’ with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion.”<sup>120</sup>

It was only at the beginning of the 1990s that the Court turned away from an effects-based framework and embraced discriminatory intent as an analytic touchstone.<sup>121</sup> In *Employment Division v. Smith*, the Court rejected Free Exercise protection from the incidental burdens on religious liberty created by neutral, generally applicable rules.<sup>122</sup> Like *Washington v. Davis*’s repudiation of disparate impact in the Equal Protection context, *Smith*’s rejection of *Sherbert*’s effects test was immediately controversial.<sup>123</sup> And as in *Washington v. Davis*, judicial

<sup>117</sup> 374 U.S. 398, 421 (1963) (Harlan, J., dissenting).

<sup>118</sup> See, e.g., *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 832 (1989) (referring to the three previous cases in which “denial of unemployment compensation benefits violated the Free Exercise Clause”); *Hobbie v. Unemp’t Appeals Comm’n*, 480 U.S. 136, 137 (1987) (“The question to be decided is whether Florida’s denial of un-employment compensation benefits to appellant violates the Free Exercise Clause.”); *Thomas v. Review Bd.*, 450 U.S. 707, 709 (1981) (asking “whether the State’s denial of unemployment compensation benefits . . . constituted a violation of [Petitioner’s] First Amendment right to free exercise of religion”).

<sup>119</sup> See *McDaniel v. Paty*, 435 U.S. 618, 629 (1978).

<sup>120</sup> *Id.* at 641 (emphasis added).

<sup>121</sup> See Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1269–70 (2008) (concluding that in general the government cannot target individual religious groups in regulations, barring extraordinary circumstances). Intent-based tests do not exhaust the law of religious liberty. The effects test of *Sherbert* remains the nub of statutory religious freedom protections under the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. §§ 2000bb to 2000bb-4 (2012). See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–69 (2014) (applying the RFRA to a federal mandate on employers to provide insurance plans covering contraception). In addition, the Court has recently suggested identified religious institutions as bearers of a still-inchoate form of constitutional immunity. See *Hosana-Tabor Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012). Neither of these lines of doctrine hinges on intent.

<sup>122</sup> 494 U.S. 872, 879 (1990).

<sup>123</sup> Scholars of all stripes attacked *Smith* in unstinting terms. See, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 10–23 (deriding the Court’s misconception of neutrality in *Smith*); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 138–39 (1992) (arguing that

rejection of an effects test hinged on the test's potentially destabilizing consequences in practice—and not the allure of a competing doctrinal measure.<sup>124</sup> Finally, just as in the Equal Protection context, the Court did not limit instances of discrimination to cases in which a racial classification was present on the textual surface of a law. Rather, in short order, the Court explained that the Free Exercise Clause was equally offended by a facially neutral measure that evinced an impermissible intent on the part of the relevant institutional decision-maker. Invalidating a municipal ordinance that prohibited ceremonial animal sacrifices required by Santeria ritual, but not other like animal killings, the Court cautioned that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral” but rather in conflict with the Free Exercise Clause.<sup>125</sup>

### C. Intent and the Protection of Social Groups: A Summary

In the Equal Protection and the First Amendment Religion Clause contexts, the Supreme Court has moved from a focus on effects to an analysis trained on government's discriminatory intent or purpose.<sup>126</sup> In the context of race-based claims and Free Exercise claims, it has made this move for very similar reasons related to the potential destabilizing effects of an effects test, but with a parallel dearth of close attention to the embraced alternative. The Establishment Clause, in contrast, has been characterized by attention to official purpose for much longer and lacks the animating concern with seismic repercussions from an effects-based rule. As the Court has become more politically conservative over the last few decades, the purpose-focused strand of Establishment Clause jurisprudence has come under increasing pressure. One Justice even suggested that denominational preferences could be acceptable provided they tracked the historical dominance of certain

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*Smith* “gives social policy, determined by the State, primacy over the rights of religious communities”).

<sup>124</sup> See *Smith*, 494 U.S. at 888 (worrying that “[a]ny society adopting [an effects test for religious liberty claims] would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them”). It would be too facile to respond that the pre-history of Free Exercise jurisprudence demonstrated the absence of such destabilization. That the *Sherbert* regime had not destabilized may well have been a result of the Court maintaining the social equilibrium by watering down the effects test to make it palatable in practice.

<sup>125</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32, 546 (1993).

<sup>126</sup> See *supra* subparts I.A–B.

faiths.<sup>127</sup> As this pressure increases, the treatment of racial and religious classifications is likely to diverge: whereas measures adopted to advance the interests of one race are likely to remain subject to close constitutional scrutiny, it will probably be easier for governments to undertake measures to promote either religion per se or (more usually) majority faiths. Such measures will include moments of prayer in official government functions,<sup>128</sup> programs of state aid that predictably promote sectarian institutions,<sup>129</sup> and official representations that endorse and promote religion.<sup>130</sup> A likely corollary to this development will be increasing space for expressions of disfavor directed at minority faiths.

It is worth noting that this partial congruence between the Court's treatments of race and religion is by no means an obvious or inevitable doctrinal development. Although religion is sometimes enumerated as one of the suspect classifications under the Equal Protection Clause,<sup>131</sup> antidiscrimination norms about race and religion have developed along doctrinally divergent tracks. In part, this is because the historical circum-

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<sup>127</sup> See *McCreary Cty. v. ACLU*, 545 U.S. 844, 889–94 (2005) (Scalia, J., dissenting) (suggesting that government need not remain neutral between religion and nonreligion but can “acknowledg[e] a single Creator”). To date, the rather startling idea that government can embrace and act upon overt hostility to Buddhism, Hinduism, and other nonmonotheistic faiths has yet to gain formal traction in the case reporters.

<sup>128</sup> See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1815 (2014) (upholding rotating prayers at the beginning of town meetings).

<sup>129</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 653–54 (2002) (endorsing school vouchers program, while acknowledging the risk that financial incentives might skew a program toward religious schools, but ultimately concluding that so long as “neutral, secular” criteria were used no constitutional problem obtained).

<sup>130</sup> The legal treatments of racial and religious discriminations also diverge in respect to “how far [the Constitution] limits government in affirmatively pursuing concerns related to religion or race.” Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 396–97 (2012) (arguing that the government has more “leeway” when it comes to religion as opposed to race). The Court, however, has recently started to narrow this difference. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (striking down Georgia’s exclusion of religious entities from a generally available funding program).

<sup>131</sup> See, e.g., *Pollock v. Farmers’ Loan & Tr. Co.*, 157 U.S. 429, 596 (1895) (Field, J., concurring) (suggesting that religion is a suspect classification), *aff’d on reh’g*, 158 U.S. 601 (1895), *superseded on other grounds by constitutional amendment*, U.S. CONST. amend. XVI. The issue remains unsettled in most courts of appeals. See *Hassan v. City of New York*, 804 F.3d 277, 299 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (“Perhaps surprisingly, neither our Court nor the Supreme Court has considered whether classifications based on religious affiliation trigger heightened scrutiny under the Equal Protection Clause.” (footnote omitted)).

stances of extreme racial stratification have had a distinctive role in American social and political history that has no precise religious parallel. Even if the twentieth century was woefully replete with examples of similarly extreme subjugations of religious minorities in other parts of the world, none is fairly compared to the peculiar institution. Nevertheless, the design of an antidiscrimination norm in respect to religion raises questions akin to those that arise in the design of a racial equality norm.

## II

### THE DIVERSITY OF DISCRIMINATORY INTENTS

'Discriminatory intent' is not a unitary concept. It is protean and plural. By looking at the species of intent the Court has recognized, the kinds that it has rejected, and the forms that simmer away at the periphery of its vision, it is possible to snap into focus the unavoidable diversity of discriminatory intent as a concept.

Such diversity is not intrinsically a problem: many important terms in constitutional law have multiple meanings. But the Court has failed to explicitly recognize that impermissible intent can take one of several forms. As a result, it has failed to grapple with the imperative of maintaining a diversity of evidentiary approaches. Its selectivity over evidentiary methods—which is unjustifiable as an effort to match evidentiary tools to the various forms of observed discriminatory intents—generates highly problematic outcomes.<sup>132</sup> It is an implicit tax-and-subsidy regime favoring some groups over others.

This Part steps back from the doctrine and provides a general taxonomy of 'discriminatory intent' by drawing on economics, political science, and psychological literature—all bodies of scholarship that provide more precise and tractable definitions of discrimination than constitutional law. I argue here that the term 'discriminatory intent' encompasses a wide range of possible operational understandings. I trace five potential understandings of 'discriminatory intent' by tacking back and forth between doctrine and extrinsic social science evidence. Beyond demonstrating the plasticity of discriminatory intent as a concept, an important dividend from my analysis is that even doctrinal formulations that are generally thought to work independent of intent (e.g., the anticlassification approach in Equal Protection) turn out, on closer inspection, to be best

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<sup>132</sup> See *infra* subpart IV.A.

understood as focused on the quality and content of officials' cognitive processes.

A second analytic payoff is that each conception of discriminatory intent has fuzzy boundaries. It is far from clear which cases fall within each category. When the Court draws distinctions about what is within and what is beyond the constitutional pale, the reasons for these divisions can be opaque or inconsistent.

Before turning to these variations, however, it is worth explaining why one well-respected theory of discriminatory intent does not appear in the taxonomy. In an influential 1989 article, David Strauss offered a "definition" of discriminatory intent that turned on the analytic device of "reversing the groups," and asking whether the same decision would have been made had the adverse effects of government action fallen on the majority rather than the minority.<sup>133</sup> The counterfactual "reversing the groups" test seems to avoid direct inquiry into mental states, and instead, calls for a judicial reconstruction of what government actors would have done but for the suspect classification at issue. However, as Strauss observed (in an effort to demolish the coherence of a discriminatory intent standard), his proposed counterfactual inquiry still requires a designation of which features of the background world—including not just the identity of the parties but also "differences in the size of the two groups and in their economic and social status, as well as the[ir] history of relations"—would change, and which would be held constant, in the hypothetical.<sup>134</sup> He thought this an infeasible inquiry.

But assume that the counterfactual is narrowly defined to focus on a change to the identity of the affected party.<sup>135</sup> This would require a judge to decide whether the official had in fact been moved by some kind of race-specific reason. They would therefore have to decide not only which sorts of race-specific reasons count for constitutional purposes, but also would have to estimate their causal effect on the relevant official decision

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<sup>133</sup> Strauss, *Discriminatory Intent*, *supra* note 70, at 956–57. The same test was proposed earlier by Eric Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31, 51 (1982).

<sup>134</sup> Strauss, *Discriminatory Intent*, *supra* note 70, at 971.

<sup>135</sup> Audit studies employing testers in retail and housing contexts employ this assumption. See, e.g., Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 305 (1995) (finding race and gender effects by audit studies). But see James J. Heckman, *Detecting Discrimination*, 12 J. ECON. PERSP. 101, 102 (1998) (noting "fragility" of findings from audit studies given "alternative assumptions about unobservable variables and the way labor markets work").

being challenged. Reversing the groups—at least when precisely applied to the transaction at stake—hence simply requires the judge to ask if an improper intent is at work. What ‘counts’ as an improper intent remains to be determined.<sup>136</sup> The “reversing the groups” lens, at least in its simplest and most tractable form, is best viewed as an analytic frame for, rather than as a resolution of, the difficult question of how to define discriminatory intent.

#### A. Animus as Discriminatory Intent: Taste-Based Discrimination

The simplest and perhaps most intuitive form of “discriminatory intent” is the “disutility caused by contact with some individuals.”<sup>137</sup> In a very influential body of work, the economist Gary Becker has termed this “taste-based discrimination” and deployed it as a conceptual device to model labor market dynamics with discriminatory employers or coworkers.<sup>138</sup> Becker’s model of taste-based discrimination focuses on the market equilibrium that would result from employers averse to contact with minority employees and thus willing to pay a premium to employ (equally skilled) non-minority employees. The dynamic effect of this premium is to create a competitive advantage for non-discriminating firms. The theory hence predicts that “[a]s long as there is a single nondiscriminatory employer, all discriminators will be driven out of the market.”<sup>139</sup> Of course, the absence of market dynamics, and its

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<sup>136</sup> Strauss asserts that this captures both conscious and unconscious intent, but it could also capture instances in which officials make different decisions because changing ascriptive identity changes the social welfare effects of a decision. See Strauss, *Discriminatory Intent*, *supra* note 70, at 960. But it is not clear how he would treat cases in which race serves as a proxy for a valid character trait, such as criminality or partisan identity. This problem parallels the principal barrier to causal identification in many econometric studies. See Kerwin Kofi Charles & Jonathan Guryan, *Studying Discrimination: Fundamental Challenges and Recent Progress*, 3 ANN. REV. ECON. 479, 480–81 (2011) (“The main problem this line of inquiry confronts is that, in observational data, individuals of different races may systematically differ with respect to other determinants of labor market outcomes apart from race, including some that are unobserved.”).

<sup>137</sup> GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 15 (2d ed. 1971).

<sup>138</sup> *Id.* at 14 (modeling taste-based discrimination as a “discrimination coefficient,” which “acts as a bridge between money and net costs. Suppose an employer were faced with the money wage rate  $\pi$  of a particular factor; he is assumed to act as if  $\pi(1 + d_i)$  were the net wage rate, with  $d_i$  as his [discrimination coefficient] against this factor.”). For a similar treatment of discrimination, see Harold Demsetz, *Minorities in the Market Place*, 43 N.C. L. REV. 271, 271 (1965), who viewed “discrimination against” as an “aversion to association” with certain groups.

<sup>139</sup> John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1422 (1986).



substitution by democratic pressures, means that there is no similar sorting effect at work in government.<sup>140</sup>

Taste-based discrimination can be roughly translated into the lexicon of constitutional doctrine as “animus.” A measure may hence be invalid because its adoption was “born of animosity toward the class of persons affected.”<sup>141</sup> For example, in striking down Section 2 of the Defense of Marriage Act (DOMA), the Court in *United States v. Windsor* focused on whether that provision had the “purpose and effect of disapproval of a class.”<sup>142</sup> A prohibition on animal sacrifices enacted by the residents of the Florida city of Hialeah out of “hostility” toward the Santeria faith similarly rested on constitutionally-infirm ground.<sup>143</sup> Alternatively, animus may enter into the constitutional analysis, not because the decision-maker is biased, but rather because it acts to the detriment of a person because of the animus of third parties. For example, a state-court judge cannot deny custody to a parent solely on the ground that her new spouse is African-American, such that the child will be subject to less favorable social treatment once within her care.<sup>144</sup>

*Windsor*, which concerned DOMA’s denial of federal recognition to same-sex marriages, illustrates an important distinction between Becker’s concept of taste-based discrimination and the “animus” version of discriminatory intent in the constitutional context.<sup>145</sup> There are instances in which animus has taken a laboring oar, the effect of the challenged measure has been to create physical separation from the protected class as

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<sup>140</sup> Deborah Hellman offers a different definition of animus focused on the intent to harm. See Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 903 (2016) (“One way to fail to treat someone as an equal is to intend to harm him—to adopt a policy that burdens him not merely in spite of this burden but deliberately because of it.”). I employ Becker’s definition because he attends to both the intent to harm and the intent to avoid or to deny benefits out of aversive sentiments.

<sup>141</sup> *Romer v. Evans*, 517 U.S. 620, 634 (1996).

<sup>142</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013).

<sup>143</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541 (1993).

<sup>144</sup> See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”). I have characterized *Palmore* as concerned with taste-based discrimination, but it can also be ranked as a case about statistical discrimination, see *infra* subpart II.B, in the sense that the custody decision was based on an estimate of the expected welfare of the child under different familial arrangements. The race of the parent, in this view, operated as a proxy for welfare.

<sup>145</sup> See *Windsor*, 133 S. Ct. at 2684 (“[G]ranting certiorari on the question of the constitutionality of § 3 of DOMA:” a federal law that made same-sex marriage illegal).

Becker predicted.<sup>146</sup> But in *Windsor*, the central tendency of the challenged measure was not, as Becker theorized, to discourage contact with the maligned group. To be sure, DOMA's effect may well have been to suppress the public expression of gay unions, and thus diminish the visibility of gay people. But DOMA's main intended effect was not to promote physical separation from gays and lesbians. It was rather to delegitimize same-sex unions (and thus to disparage their participants).

*Windsor* also points toward an ambiguity in the definition of animus. The idea of taste-based discrimination connotes an almost physical repugnance toward the disapproved group. As Martha Nussbaum has underscored, "disgust" of this form is plausibly understood to propel what the Court calls animus.<sup>147</sup> At the same time, it seems reasonable to think that the federal law challenged in *Windsor* was also animated by a sense of moral disapproval that is not well captured by the concept of taste-based discrimination. Indeed, in endorsing the right to same-sex marriage two years after *Windsor*, the Court "emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."<sup>148</sup> Since the Court's decision finding a right to same-sex marriage did not rest on a finding of animus, it had no cause to ask whether a sincerely-held moral theory can itself revolve around some kind of contempt for, or a demand for the subordination of, a protected class, such that it is a form of animus. That question about the perimeter of the "ani-

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<sup>146</sup> See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985).

<sup>147</sup> See Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 683 (2010) ("The idea that same-sex unions will sully traditional marriage therefore cannot be understood without moving to the terrain of disgust and contamination."). See generally MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010) (describing the Court's conception of animus).

<sup>148</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). For a moral argument that seems to fall within this category, see J.M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 437 (1987) (arguing that anti-gay legislation "may manifest, not contempt, but rather a sense of the equal worth and human dignity of those people whose conduct is outlawed precisely on the ground that it expresses a serious misconception of, and actually degrades, human worth and dignity, and thus degrades their own personal worth and dignity, along with that of others who may be induced to share or emulate their degradation"). It seems worth asking here whether Finnis's position is empirically plausible as a description of widely held views about gays. Cf. Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 116–17 (1997) (concluding that it is not).

mus” form of discriminatory intent, like others, remains unexplored.<sup>149</sup>

B. Impermissible Criteria as Proxies for Licit Ends: The Problem of Statistical Discrimination (with Attention to the Double-Effect Doctrine)

The second leading theory of discrimination focuses on the informational role played by salient characteristics such as gender or membership in a racial or religious ascriptive group.<sup>150e</sup> Economists dissatisfied with Becker’s theory of taste-based preferences observed that such characteristics might be valuable if they operated as proxies for other less observable characteristics. For example, an employer might believe that African-Americans are less productive than Caucasian workers. As a result, she might employ race as a proxy for productivity. On this view, employers use race as a proxy for otherwise unobservable characteristics such as investments that workers make in terms of habits of action and thought, steadiness, punctuality, responsiveness, and initiative.<sup>151</sup> Studies of labor markets confirm that observed racial differential in wages is due in part to such “statistical discrimination.”<sup>152</sup>

A central difference between taste-based discrimination and statistical discrimination is that the first concerns a *state*

<sup>149</sup> Perhaps the closest decision on point is *Bob Jones Univ. v. United States*, which upheld the Internal Revenue Service’s decision to deny a religious college tax-exempt status because of its racially discriminatory policies. See 461 U.S. 574, 581 (1983) (describing discriminatory policies). This suggests that animus embedded in the rhetorical and ideological matrix of a legible faith system remains nonetheless animus. For a consideration of the same question in the form of an inquiry into the meaning of the term “bias” in the psychological literature, see Christian S. Crandall & Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, 129 PSYCHOL. BULL. 414, 417 (2003).

<sup>150</sup> The leading papers are Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972), and Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. ECON. PERSP. 91, 96 (1998).

<sup>151</sup> See Kenneth J. Arrow, *The Theory of Discrimination*, in DISCRIMINATION IN LABOR MARKETS 3, 24–27 (Orley Ashenfelter & Albert Rees eds., 1973) [hereinafter Arrow, *The Theory of Discrimination*] (“Skin color and sex are cheap sources of information. Therefore prejudices (in the literal sense of pre-judgments, judgments made in advance of the evidence) about such differentia can be easily implemented False.”).

<sup>152</sup> For powerful evidence from innovative experimental studies, see John A. List, *The Nature and Extent of Discrimination in the Marketplace: Evidence from the Field*, 119 Q.J. ECON. 49, 49–50 (2004). Other studies have identified evidence of taste-based discrimination by leveraging differences in black-white racial preferences between states. See Kerwin Kofi Charles & Jonathan Guryan, *Prejudice and Wages: An Empirical Assessment of Becker’s The Economics of Discrimination*, 116 J. POL. ECON. 773, 773–74 (2008).

*of desire* while the second concerns *a state of belief*.<sup>153</sup> A taste-based discriminator has a preference in respect to future states of affairs, and hence acts with an intention or a purpose to make those come about. A statistical discriminator has a belief about the world, whether certain or probabilistic, that provides a basis for action toward an end that itself has no impermissible content. There is then a logical distinction between the two forms of discrimination.

At the same time, these two categories are not absolutely distinct from one another in practice. Consider, for example, the idea of a *stereotype*, a generally pejorative term used to condemn certain generalizations, and in particular generalizations with a negative character.<sup>154</sup> Some stereotypes may be based on spurious correlations, or reflect the outcomes of third parties' prejudice (e.g., a belief that a certain racial minority is lazy may be premised on comparatively higher unemployment rates that in turn are predicated on animus). Others may be based on sound empirical foundations. And there is an intermediate category in which the generalization is based on a morally flawed reading of available data. Taste-based and statistical discrimination, in short, are not acoustically separate from each other in practice.

It is not immediately obvious why the Constitution should be concerned with the *epistemic* use of an impermissible ground at all, provided the government's ends are legitimate and its beliefs are untainted by animus. The case law contains only fragments of an answer. One theory might be that it is difficult or impossible to distinguish between taste-based discrimination and statistical discrimination, so that the latter must be prohibited along with the former. In Justice O'Connor's words, we might conclude that taste-based discrimination is "potentially so harmful to the entire body politic," whereas "racial characteristics so seldom provide a relevant basis for disparate treatment," that the two must be treated alike.<sup>155</sup> Her claim here may be that statistical discrimination is so seldom effective, while taste-based discrimination is so easily hidden, that a broad prophylactic rule is required.

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<sup>153</sup> See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 476 (1992) (drawing this distinction).

<sup>154</sup> See FREDRICK SCHAUER, PROFILES, PROBABILITIES & STEREOTYPES 3-4 (2003). As Schauer observes, "judgment without generalization is impossible," such that it cannot be that all generalizations used as heuristics are impermissible. *Id.* at 214-15.

<sup>155</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995) (citation and quotation marks omitted).

Neither the Court nor commentators, however, have ever substantiated either element of Justice O'Connor's logic. Nor is either element obviously true. The fact that race (for example) seems to provide information for employers,<sup>156</sup> suggests that it may be epistemically useful in other policy contexts—for example, the provision of protection against private animus. At the same time, it is far from clear that we cannot distinguish statistical discrimination and taste-based discrimination in practice.

Alternatively, a constitutional prohibition on statistical discrimination might be justified by analogy to the dynamic effects of statistical discrimination on human capital acquisition for labor markets. As Glenn Loury has pointed out, the existence of statistical discrimination entails that the purportedly subordinate class (e.g., African-Americans in the labor market) can expect to receive lower returns on investments in education.<sup>157</sup> A dynamic effect of statistical discrimination by race in current labor markets, Loury observed, is to disincentivize the acquisition of human capital by African-Americans.<sup>158</sup> The generalizations upon which statistical discrimination are predicated, even if false at their inception, become self-confirming over time. The question is then whether a similar dynamic arises in the constitutional context when official distinctions, inaccurate in their inception, provoke behaviors that in turn render the distinctions increasingly sticky over time. For example, if police falsely believe that a certain race is more violent, they may treat members of that race with greater harshness and force as a prophylactic; in time, this treatment will induce the very violence that was feared and used as justification.

It is not at all clear that doctrines under the First and the Fourteenth Amendment, however, evince any consciousness of the possibility of such dynamic effects of law. As a result, the justification for including discrimination as proxy within the *constitutional* prohibition (as opposed to simply outside the domain of decent, sensible policy) remains to be stated.

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<sup>156</sup> See List, *supra* note 152, at 49–50.

<sup>157</sup> See GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 87–88 (2002).

<sup>158</sup> See *id.* at 179–84; see also Arrow, *The Theory of Discrimination*, *supra* note 151, at 24–27 (noting the possibility of such adaptive human capital investments); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 *GEO. L.J.* 1619, 1626 (1991) [hereinafter Strauss, *Racial Discrimination in Employment*] (“Statistical discrimination can lead to inefficiently low investment in human capital among members of the group that is discriminated against.”).

Perhaps fittingly, doctrinal treatment of statistical discrimination—wherein the relevant trait is deployed as a proxy for some otherwise licit end—has a hesitant and equivocal quality. The border between permissible and prohibited states of mind here seems to slice between cases that are more alike than different.<sup>159</sup> On the one hand, where race is used as a proxy for partisanship in the redistricting context, the Constitution is squarely implicated.<sup>160</sup> Similarly, when race is deployed as a proxy for risk when managing a carceral population, that decision also elicits strict scrutiny.<sup>161</sup> Further, when gender is used as a proxy for a trait, based on some stereotype about men and women, the relevant law receives heightened scrutiny.<sup>162</sup> On the other hand, when race is employed as a trait in police suspect descriptions, federal courts have not expended significant effort in considering their constitutionality.<sup>163</sup> Insofar as contact with the police is the modal form of interaction between the state and certain racial minorities (or, at least, men within that minority group) in urban contexts,<sup>164</sup> this lacuna is a significant one.

Not only is the justification for a constitutional prohibition on statistical discrimination unclear, its current borders are also theoretically problematic. Consider two cases: In the first, the normatively salient trait is used as a proxy for a licit end. In the second, an official takes a decision aiming at a wholly licit end by relying on a lawful classification but does so with the knowledge that the adverse effects of that decision will fall

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<sup>159</sup> The border between taste-based discrimination and statistical discrimination is also less crisp than generally believed. A generalization deployed for the purpose of statistical discrimination might itself be a function of animus against a given group, or otherwise go awry in a number of different ways. Cf. Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 21, 26 (1991) (noting a variety of forms of irrational prejudices, including "(a) a belief that members of a group have certain characteristics when in fact they do not, (b) a belief that many or most members of a group have certain characteristics when in fact only a few do, and (c) reliance on fairly accurate group-based generalizations when more accurate classifying devices are available"). Some of these generalizations, however accurate, might also reflect taste-based discrimination.

<sup>160</sup> See *Cooper v. Harris*, 137 S. Ct. 1455, 1464 n.1 (2017) ("A plaintiff succeeds at [the first stage of the analysis] even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones."); *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[T]he precise use of race as a proxy for 'political interest[s]' is prohibited).

<sup>161</sup> See *Johnson v. California*, 543 U.S. 499, 505 (2005).

<sup>162</sup> See *United States v. Virginia*, 518 U.S. 515, 532 (1996).

<sup>163</sup> See R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1077–78 (2001).

<sup>164</sup> See Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162–63 (2015).

largely upon a protected class. What makes the latter case interesting is the contingent background fact of a high correlation between the lawful classification selected and the impermissible classification. For example, take the decision to reward military veterans with employment-related preferences, or the decision to intensify coercive street policing in urban neighborhoods with high levels of street-centered narcotics transactions. These are both cases in which a reasonable decision maker cannot but be aware that their decision is predicated on a criterion that is functionally indistinguishable from—and, indeed, perhaps from the outside observationally equivalent to—a decision based on the impermissible criterion. In one case, it is gender, in another race.<sup>165</sup> What then is the difference between taking aim directly at a protected class, and taking aim at a classification that substantially and predictably overlaps with that class?

In the ‘type two’ cases described above, the Court has found no constitutional infirmity.<sup>166</sup> This nonliability rule, first announced in *Personnel Administrator v. Feeney*, a case involving the gendered effects of veterans’ employment-related benefits,<sup>167</sup> tracks the Thomist doctrine of double effect. That argument in turn was reintroduced to modern philosophy by Philippa Foot. It holds, in rough paraphrase, that an “oblique” intention in respect to an impermissible goal is not usually fatal to the morality of an action aimed at an otherwise proper end.<sup>168</sup>

But should all cases of double-effect really be ranked as outside the domain of constitutional concern? Setting aside the difficult proof problems that might arise in determining what criterion a decision-making official in fact employed, the question is a more different one than judges or commentators seemingly realize.

There are numerous significant commonalities, as well as some differences, between the *Feeney* scenario and plainly im-

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<sup>165</sup> This problem is distinct from the cases in which statistical discrimination and animus turn out to be observationally equivalent. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 791 (1994).

<sup>166</sup> See, e.g., *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (proof of discriminatory purpose requires showing that the government decision-maker “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

<sup>167</sup> See *id.* at 259.

<sup>168</sup> See Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 25 (1978) (distinguishing between “direct” and “oblique” intentions).

permissible uses of statistical discrimination. For one thing, neither involves a goal that itself has an impermissible character (e.g., when people are targeted for police coercion on the basis of an *a priori* belief that criminality is concentrated within certain racial minorities). In both cases, the official is likely aware that the impermissible criterion (race, ethnicity, or religion) is entangled, directly or obliquely, with the means elected to accomplish the licit goal. What divides the cases is the presence of a very specific and finely drawn form of intentionality: in one case, the official consciously deploys that criterion, whereas in the other case, the official knowingly ignores the role of the normatively fraught classification as a marker of practical social difference in the world. The intent to use (say) race as a proxy is *constitutionally* distinct from the decision to use a functional substitute for race. But the moral quality and consequences of those decisions track each other more closely than the doctrine suggests.<sup>169</sup>

Let's accept the salience of the double-effect doctrine as a matter of constitutional law. Still, it seems worth noticing that in both legal and philosophical treatments of specific double-effect cases, there is no hard-and-fast boundary between direct and oblique intentions. What is clear in theory, in other words, is murkier in real life. Philosophers do not morally excuse the terrorist, for example, on the ground that he intended only political change, whereas the deaths he caused were merely obliquely intended.<sup>170</sup> Nor should they.

Even if full information is available, the distinction between direct and oblique intention must be drawn on the basis of *objective* construals of intents, not the "idiosyncrasies of particular individuals and their willful or perverse constructions of the purposes of their actions."<sup>171</sup> This principle is akin to (although not precisely the same as) the familiar axiom of the law that people are understood to intend the natural and foreseeable consequences of their actions.<sup>172</sup> If individuals' subjective

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<sup>169</sup> Both *Washington v. Davis* and *Emp't Div. v. Smith* pointed to the practical consequences of an effects rule as a reason to limit liability to cases of intentional discrimination. *Feeney* makes no such appeal to practicality although the case can readily be understood in the same terms.

<sup>170</sup> G.E.M. Anscombe, *War and Murder*, reprinted in *MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS* 280–81 (James Rachels ed., 1971).

<sup>171</sup> Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1155 (2003).

<sup>172</sup> See, e.g., GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 286 (1958) ("There is no legal difference between desiring or intending a consequence as following from your conduct, and persisting in your conduct with a knowledge



accounts of their own purposes controls, intent doctrine would rarely rule an action out of constitutional bounds.

But if the boundary between direct and oblique intention is necessarily drawn on the basis of an objective construal of intent, then the double-effect scenarios covered by *Feeney* necessarily raise the question of when an otherwise licit criterion is so closely and predictably correlated with a normatively problematic criterion that the same constitutional concerns are triggered.<sup>173</sup> To my knowledge, courts have not engaged in this inquiry. They simply have not recognized the need for objective construals of intentionality in the way that philosophers have.

To the extent the double-effect doctrine itself provides a basis for the rule, moreover, a powerful challenge by T.M. Scanlon holds that what matters in such cases is not the quality of the actor's intentions, but rather the availability of objective justifications for the specific action.<sup>174</sup> As I understand it, Scanlon's framing would not necessarily treat the veterans' benefits case differently from the use of race as a proxy for carceral risk (although, depending on the specific justificatory facts available, it may or may not yield a different distribution of outcomes). But the point here is that both cases would be analyzed under a parallel rubric and would stand or fall on the same grounds.

### C. Anticlassification: Race and Religious Classifications as Discriminatory Intent

Some bases for government decisions inflict such grave dignitary and stigmatic harm by dint of their history or because of present circumstances that their deployment can never be justified by balancing the costs and benefits.<sup>175</sup> This logic sup-

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that the consequence will inevitably follow from it, though not desiring that consequence.”).

<sup>173</sup> *Feeney* recognized this problem but provided a *non sequitur* by way of answer. According to Justice O'Connor, the inevitability of a discriminatory effect can lead to a “strong inference” of discriminatory intent—unless “the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate.” *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 n.25 (1979). But then the legislature has chosen, among many policy ends, one that imposes “unavoidable” and symmetrical costs to a protected group—which itself might be constitutionally problematic. The *Feeney* Court simply assumes that it is not.

<sup>174</sup> T.M. SCANLON, *MORAL DIMENSIONS* 1–37 (2008); see also Fallon, *supra* note 48, at 564–65 (discussing Scanlon's approach). I am grateful to Andrew Verstein for discussion of this point.

<sup>175</sup> There might also be a deontic justification for an anticlassification rule. That is, it is always *per se* wrong for an official to take account of a suspect classification in their reasoning. This argument would require, of course, some

ports an “anticlassificatory” approach to Equal Protection or the Religion Clause. This approach has been understood to focus on the formal content of the formal enunciations (i.e., a statute, regulation, or directive) issued by official actors of the formal criterion used in an orally-delivered order. But I shall argue that it sweeps more broadly.

Most notably, the Court has deployed some version of an anticlassificatory lens in present Equal Protection law in respect to race. That clause of the Fourteenth Amendment is summarized as a means of “protecting individuals from the harm of categorization by race.”<sup>176</sup> But it has taken a different path, in contrast, in its treatment of gender under the Equal Protection Clause by dint of its focus on false and degrading stereotypes—a concern that reflects a distinct concern with misguided statistical discrimination.<sup>177</sup> In the Religion Clause context, the Justices have also taken a mixed path in which an anticlassification logic plays a part, but does not explain all the cases. Hence, Douglas Laycock has identified “formal neutrality,” or “the mere absence of religious classifications,” as one element of Religion Clause doctrine.<sup>178</sup> Formal neutrality entails that financial aid be distributed in terms that make no distinction between religious and nonreligious entities and would prohibit regulatory exceptions exclusively drawn for religious actors.<sup>179</sup> Both of these positions are found in current jurisprudence.<sup>180</sup> There are, however, many other areas of Re-

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explanation of why suspect classifications are wrong regardless of consequence. See *infra* text accompanying note 190 (discussing one possibility).

<sup>176</sup> Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287 (2011) [hereinafter Siegel, *From Colorblindness to Antibalkanization*].

<sup>177</sup> See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (noting the dominance of stereotypes in this jurisprudence and tracing its etiology).

<sup>178</sup> Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 320 (1996); accord Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1001 (1990). For a defense of formal neutrality in the Establishment Clause context, see Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961).

<sup>179</sup> See Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 178, at 1001.

<sup>180</sup> See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (nondiscriminatory funding); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–9 (1989) (religion-based regulatory exceptions). But cf. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338–39 (1987) (finding an exception to Title VII for religious groups).

ligion Clause jurisprudence that formal neutrality does not explain.<sup>181</sup>

An anticlassification rule seems at first blush to fall outside the domain of discriminatory intent. That rule, viewed superficially, simply demands that judges examine the formal content of the rule of decision deployed by a government actor. But this exclusion is too quick for a number of reasons. As an initial matter, anticlassification rules must bite on the cognitive content of government decision-makers' behavior, in addition to the formal context of laws and regulations, to have any practical effect in our system of constitutional adjudication. That is, an anticlassification approach might be understood as a directive that officials *never deploy, in their own thinking, the relevant prohibited ground as a criterion for decision, whether openly or otherwise.*

This formulation focuses on the content of the rules subjectively applied by the official and asks whether the cognitive process deployed to reach a decision, whether articulated or not, turned at any point on an impermissible classification. In this sense, it is directly concerned with reasons an official in fact has for acting (i.e., their intentions) and not the formal content of the law. Consistent with this, it would seem that in most cases, a government classification is not subject to challenge unless it is actually *applied* by an official to a litigant: The mere fact of its existence is (rarely) enough.<sup>182</sup>

Moreover, the most forcefully tendered alternative justification for an anticlassification rule, which is framed in terms of its effects on citizens, rather than officials' intentions, turns out to be implausible on even superficial inspection. Speaking of the Equal Protection Clause, Justice Thomas has argued that "[t]he Constitution abhors classifications based on race not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government *places citizens on racial registers* and makes race relevant to the provision of burdens or benefits, it

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<sup>181</sup> See, e.g., *Hosana-Tabor Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 709 (2012) (creating a regulatory exception for some religious entities).

<sup>182</sup> For example, in racial gerrymandering cases, voters who live outside the allegedly gerrymandered district generally lack Article III standing. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (citing *United States v. Hays*, 515 U.S. 737, 744–45 (1995)). Establishment Clause cases are a limited exception to this general rule. See *Van Orden v. Perry*, 545 U.S. 677 (2005) (Rehnquist, C.J., plurality opinion).

demeans us all.”<sup>183</sup> (As an aside, note that although this is victim-focused language, the italicized language is couched in terms of officials’ intentions—and not on the semantic quality of the relevant law or regulation—even as the final clause is focused on the experience of those subjected to classifications).

Yet taken as a literal account of subjective experiences of those subject to impermissible classifications, Justice Thomas’s argument is not true. It is plain that members of the polity have widely divergent responses to different government acts even when they do not implicate a suspect classification.<sup>184</sup> Not all members of the polity feel demeaned when a racial, ethnic, or religious classification is deployed. Some, to the contrary, feel immense pride. Indeed, it is not even clear that all those disadvantaged by the use of such a criterion *should* feel slighted (as in the use of affirmative action, for example, where other psychological reactions are both plausible and likely).<sup>185</sup> As Lourey notes, “the simple fact that a person classifies others (or herself, for that matter) in terms of ‘race’ is in itself neither a good nor a bad thing.”<sup>186</sup> Where it is a source of identification, belonging, and self-respect, such labels have a range of use beyond disparagement.

The appeal of anticlassification thus cannot hinge on the subjective and perhaps idiosyncratic experiences of those who perceive the government acting and thereby form judgments of their political standing. Indeed, it is striking that many policies that are challenged under an anticlassification rule do not use the prohibited criterion in a highly salient and public fashion. Paradoxically, that criterion is salient only because of litigation challenging it.<sup>187</sup> There is something troublingly circular about

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<sup>183</sup> Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) (emphasis added). For a collection and critique of the seminal opinions in the race context, see Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1, 3–7 (1991).

<sup>184</sup> Cf. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 954–58 (1995) (recognizing that government actions may have different meanings for various observers and that government); Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1584 (2012) (noting that “observers might perceive an appearance differently, disagree over whether and how it should be assigned meaning, or value the same meaning differently”).

<sup>185</sup> See Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 17 (2000) (“Affirmative action expresses inclusion, not exclusion. While individual white applicants who would be admitted under a race-blind system are in fact excluded (in other words, they do suffer concrete harm), the best understanding of the practice in our culture today is not that white students are not welcome or worthy of admission . . .”).

<sup>186</sup> LOUREY, *supra* note 157, at 19.

<sup>187</sup> See, e.g., Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2206 (2016) (describing the manner in which the University of Texas took account of race as one of many

building the constitutional case for anticlassification on public perceptions, which themselves are functions of constitutional litigation.

If subjective perceptions of legitimacy and worth are in practice variously affected by suspect classifications, it is hard to see why a categorical rule against them could be warranted. The Court would have to make an *empirical* weighing of the positive and negative reactions elicited by a government policy. Hence, when the Court in 2005 said that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” it has to be understood as making not just a normative but also an empirical claim.<sup>188</sup> Yet the relevant decision contained no empirical evidence and no weighing of the costs of demoralization against the benefits of recognition.<sup>189</sup> So the disparagement-centered explanation of the anticlassification rule is hard to sustain given observed empirical facts. But on that score, the jurisprudence is characterized by silence.

Accordingly, the logic of anticlassification must reflect a victim-independent judgment that there are normative grounds for objecting to the use of a specific criterion in official decision-making. These grounds cannot turn on the actual subjective experiences of those who perceive the government action.

The anticlassification concern, in this light, is better understood as being triggered by the occurrence of an impermissible criterion in the government’s decisional process, whether overt or not. It focuses on the *cognitive* content of governmental deliberation. In other words, it is as much a matter of “discriminatory intent” as taste-based discrimination and statistical discrimination.

Framed in these terms, the anticlassification rule might be better supported by the argument that impermissible classifications embody or elicit objectionable forms of official inten-

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“special circumstances” that themselves were only one of three prongs for deliberation—albeit not in a high-salience way).

<sup>188</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>189</sup> While the decision discussed the costs of racial classification, the benefits of recognition are not included in the analysis. *See id.* at 745 (“If the need for the racial classifications embraced by the school districts is unclear, even on the districts’ own terms, the costs are undeniable.”). Justice Thomas, in his concurrence, noted that some scholars believe that racial classifications result in educational benefits. Justice Thomas, however, found that the empirical evidence is inconclusive. *See id.* at 761 (Thomas, J., concurring) (“In reality, it is far from apparent that coerced racial mixing has any educational benefits.”).

tionality. Consistent with this intuition, some Justices have offered analogies to Nazi race laws when discussing racial classifications.<sup>190</sup> These usually emotive comparisons suggest that the Justices perceive some intrinsic, acontextual wrong in such classifications that goes beyond the mere subjective perceptions of those regulated by the law. Ascertaining whether this intuition is plausible is beyond my remit here, but it cannot go without comment that equating a racial gerrymander designed to create majority-minority districts in North Carolina to the 1935 Nuremberg race laws is hardly self-evident—except, perhaps, as evidence of a want of judgment on the speaker’s part.

Just as the boundaries of taste-based and statistical discrimination are fuzzy, so too the plausible domain of the anticlassification rule is not as clear as might first appear. Again, it is useful to consider the use of a formally permissible criterion that is predictably likely to track the use of an impermissible criterion (e.g., a claim that is made about race in relation to criminality). If the use of the formally impermissible criterion is so “demean[ing]”<sup>191</sup> as to be beyond the constitutional pale, then it seems at least worth asking whether a close proxy for that impermissible classification would trigger some of the same objections. For example, when the Court allows the loosening of Fourth Amendment protections in a “high crime area,” it is possible to discern an arguably objectionable proxy for race at work.<sup>192</sup> It is hard to see why this term should not also be condemned for the spillover stigmatic effect that results from its implicit invocation of race—just as it is hard to see why reasons for prohibiting the use of impermissible classifications as a proxy for licit ends do not spill over and apply to double-effect cases such as *Feeney*.<sup>193</sup> In this way, the logic of anticlassification is not easily confined as a matter of logic to cases in which the impermissible criterion appears in the gov-

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<sup>190</sup> See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (referring to the “First Regulation to the Reichs Citizenship Law of November 14, 1935” as well as the “Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa” (citations omitted)); cf. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (stating that majority-minority voting districting “bears an uncomfortable resemblance to political apartheid”).

<sup>191</sup> *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part).

<sup>192</sup> See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (allowing searches based on lower quantum of suspicion in a “high crime area”). For some evidence that the term “high crime area” is operationalized in racialized terms, see Jeff Fagan & Ben Grunwald, *Addicted to Wardlow* (June 2017) (on file with author).

<sup>193</sup> See *supra* text accompanying notes 166–73.

ernment's decisional process. Experience, of course, is another matter entirely.

D. The Intent to Promote One's Status by Denigrating Others: The Group-Status Production Theory of Discrimination

Neither taste-based discrimination nor statistical discrimination explain the manifold ways in which impermissible criterion are reflected in, and can motivate, the law. In the antebellum South, for example, races mixed physically because of the use of house slaves and because of white male sexual predations against African-American women.<sup>194</sup> Subsequently, neither laws barring miscegenation, nor criminal statutes imposing higher penalties on interracial rather than intraracial fornication, are readily explained by taste-based discrimination.<sup>195</sup> Indeed, to the extent that discrimination is modeled as an aversion to contact with another group, one might think that the law would need to use greater penalties against intraracial fornication so as to engender effective deterrence.

A third theory of discriminatory intent concerns state action that is animated not by disgust or by epistemic deficiency, but by the need to produce and reinforce status hierarchies between different social groups. As refined by Richard McAdams, the theory of group-status production understands discrimination as entailing "processes by which one . . . group seeks to produce esteem for itself by lowering the status of another group."<sup>196</sup> Esteem elicits more practical benefits such as the "set of assumptions, privileges, and benefits that accompany" membership in the high status group and that constitute a valuable asset to be "affirmed, legitimated, and protected by

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<sup>194</sup> See EUGENE GENOVESE, *ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE* 328, 429 (1993).

<sup>195</sup> For examples of such laws, see *Pace v. Alabama*, 106 U.S. 583, 584 (1883), which upheld a fornication statute that imposed greater penalties on interracial acts. See also Peter Wallenstein, *Interracial Marriage on Trial: Loving v. Virginia*, in *RACE ON TRIAL: LAW AND JUSTICE IN AMERICAN HISTORY* 177 (Annette Gordon-Reed ed., Oxford Univ. Press 2002) (reviewing history of miscegenation statutes in American law).

<sup>196</sup> Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1044 (1995); see also George A. Akerlof, *Discriminatory, Status-Based Wages Among Tradition-Oriented, Stochastically Trading Coconut Producers*, 93 J. POL. ECON. 265, 265–66 (1985) (offering a slightly distinct theory of discrimination focused on group status).

the law.”<sup>197</sup> On McAdams’s account of racial preferences, antidiscrimination law respecting racial identity is hence justified because it “rais[es] the costs of subordination . . . [to] induce people to switch to socially productive, or at least socially benign, means of acquiring status.”<sup>198</sup>

The canon of First and Fourteenth Amendment law contains traces of concern with group-status production. In the Equal Protection context, there are a number of decisions that are hard to elucidate without it. For example, in invalidating Virginia’s miscegenation statute, the Court relied not only on the fact that the law contained an explicit racial classification, but also on the “fact that Virginia prohibits only interracial marriages involving white persons[, which] demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”<sup>199</sup> A similar concern might be glimpsed in the Establishment Clause jurisprudence of endorsement—a non-intent-based test—insofar as it is concerned with the creation of “preferred,” and by implication disfavored, classes of citizens.<sup>200</sup>

Despite these hints, the theory of group-status production remains at the periphery of constitutional antidiscrimination law. The rare instances in which the Court understands a government action as part of a more general strategy of castemaking are outliers. A constitutional jurisprudence of status production would require stable and reliable tools for picking out measures intended to create hierarchical differences in status. As with dynamic accounts of statistical discrimination as a motor of social differentiation, it is not clear that the group-status production model is reconcilable with the narrowly transactional focus of most constitutional doctrine.

Perhaps the most plausible doctrinal entailment of the group-status production is what Reva Siegel calls the “antibalkanization” theory of Equal Protection, which “assesses the constitutionality of government action by asking about the kind of polity it creates.”<sup>201</sup> In particular, Siegel’s reconstruc-

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<sup>197</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993); see also DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991).

<sup>198</sup> McAdams, *supra* note 196, at 1078.

<sup>199</sup> *Loving v. Virginia*, 388 U.S. 1, 11 (1967); accord *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (distinguishing Virginia’s anti-miscegenation statute from sodomy prohibitions on the basis that the latter had a “racially discriminatory purpose”).

<sup>200</sup> See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (citation omitted).

<sup>201</sup> Siegel, *From Colorblindness to Antibalkanization*, *supra* note 176, at 1301.



tion of an antibalkanization theme, largely drawing on recent opinions by Justice Kennedy, draws attention to the possibility that remedies for racial injustice will themselves exacerbate intergroup resentment, and thereby entrench corrosive divisions within society.<sup>202</sup> In this fashion, it is conscious of competition for status between social groups, although it is focused on political consequences rather than discriminatory intent, and hence does not fit into my typology here.

It is nevertheless worth noting that antibalkanization may well be somewhat fragile as a model for judicial intervention. As Siegel notes, the logic of antibalkanization can lead judges to curtail the state's ability to remedy pervasive socioeconomic disparities.<sup>203</sup> In practice, this might leave society fractured and unsettled. This would be an ironic consequence in the Equal Protection Clause context, since the latter was crafted in response to deficient state protection against private discrimination.<sup>204</sup> Another problem is that judges are unlike economists working with Loury's nuanced model of underinvestment in human capital. They have no data, and only bare intuitions about when and how state action exacerbates racial fragmentation.

Given that the Justices tend to give only cursory and aphoristic recognition of this causal inference problem, it seems quite unlikely that they will accurately predict which instances of discrimination have pernicious, self-confirming effects in the long term without expert aid and a humble attentiveness to sociological evidence.

#### E. The Marginal Cases of Bad Intent: The Relation of Unconscious Bias and Structural Discrimination to Discriminatory Intent

The two final, and most marginal, theories of discriminatory intent concern unconscious bias and the neglect of structural forms of discrimination. To be very clear, I do not think that either of these is a core case of impermissible discriminatory *intent*. My reason for including them here is a bit more subtle: Both, in my view, are conceptually and practically con-

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<sup>202</sup> See *id.* at 1302–03 (arguing that antibalkanization “vindicates constitutional values by authorizing representative institutions to promote equality, while imposing on courts responsibility for constraining the form of political interventions so as to ameliorate resentments they may engender”).

<sup>203</sup> See *id.* at 1359.

<sup>204</sup> See CURRIE, *supra* note 63, at 349, 349 n.143; see also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1436–51 (1992).

gruent with core conceptions of discriminatory intent. They are the ambiguous limit cases of discriminatory intent in the sense that both turn on the risk that government decision-makers will take account of an impermissible ground of decision even in the absence of an explicit instruction or desire to do so. Hence, I lump them together here for convenience's sake.

Consider first implicit bias. A large body of psychological studies suggests that, at least with respect to race, “[i]mplicit biases[,] implicit attitudes and stereotypes . . . are both pervasive (most individuals show evidence of some biases), and large in magnitude.”<sup>205</sup> Studies of implicit bias extend to high-salience situations where the use of government authority is especially controversial. For example, psychological studies of police use of firearms using simulated targets of a different race suggest that unarmed African-American targets are erroneously shot more often than unarmed white targets. In contrast, armed white targets are mistakenly spared more often than armed African-American targets.<sup>206</sup> Studies of sentencing decisions find similar distortions.<sup>207</sup>

Implicit bias is, by definition, not conscious—and hence is distinct from the other strands of discriminatory intent canvassed above—but it is a function of cognitive processes and categories that determine intentional actions.<sup>208</sup> This psychological quality means that it is not cleanly distinct from other kinds of relevant intentionality. Moreover, taste-based discrimination that is costly to express openly may be rearticulated as implicit appeals to the aversive stereotypes. That is, there may be a sublimation of the discriminatory intent that is

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<sup>205</sup> Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010) (summarizing studies). *But see* F. Oswald et al., *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Societal Significance*, 108 J. PERSONALITY & SOC. PSYCHOL. 562, 565–67 (2015) (casting doubt on external validity of studies).

<sup>206</sup> Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1319 (2002). Analysis of aggregate data concerning the use of police force has generated some evidence of such bias in action. *See, e.g.*, Correll et al., *supra* note 22, at 207 (reporting findings from an empirical study, including a finding that police officers were quicker to shoot armed African-Americans than they were whites); Justin Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 CRIMINOLOGY & PUB. POL'Y 319, 324–26 (2017) (providing evidence of implicit bias in police killings of civilians).

<sup>207</sup> *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383–84 (2006).

<sup>208</sup> *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1504–08 (2005).

commonly taken as a conscious political strategy.<sup>209</sup> To the extent that implicit bias becomes a (sometimes conscious) substitute for overt taste-based discrimination in the political and public sphere,<sup>210</sup> there is an obvious case for considering its regulation under the rubric of discriminatory intent.<sup>211</sup>

In contrast, structural discrimination concerns the “interplay between individuals and the[ir] larger organizational environments in which they work.”<sup>212</sup> In its most common articulation, it is used to characterize the role of race in American society (although its terms are readily transposed to gender, sexuality, or ethnicity). Its principal theorists seek to describe and critique a “racialized social system” in which “economic, political, social, and ideological levels are partially structured by the placement of actors in racial categories or races.”<sup>213</sup> Importantly, those theorists point out that it is not easy to characterize social action within such a system as discriminatory *vel non*: When the regulatory principles of social status, and hence the governmental systems for allocating benefits or burdens on the basis of status or desert—presuppositions that in insolation would be quickly labeled discriminatory—are so pervasively and subtly broadcasted through the frames of social action, they cannot be avoided without con-

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<sup>209</sup> See TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 3–27 (2001) (discussing reliance by elected politicians and candidates upon implicit messages of racial subordination embedded into racially neutral sounding language).

<sup>210</sup> *But cf.* Gowder, *supra* note 1, at 340 (noting the simultaneous “social unacceptability and yet persistence of some explicitly racist views”).

<sup>211</sup> Another reason focuses on the culpable failure of state actors to address a well-known bias that is not immediately apparent, but available to inspection upon introspection. Given that it has long been clear that “private actors of good faith can voluntarily adopt best practices that decrease implicit bias and its manifestations,” it is not clear that the failure to act prophylactically is an innocent one. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494 (2005).

<sup>212</sup> Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 857 (2007).

<sup>213</sup> Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 469 (1996) (defining a “racialized social system” as one in which “economic, political, social, and ideological levels are partially structured by the placement of actors in racial categories or races”). There is a range of conceptual formulations of this system. Compare MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 84 (2d ed. 1994) (describing the racial order in the U.S. as “equilibrated by the state—encoded in law, organized through policy-making, and enforced by a repressive apparatus”), with MUSTAFA EMIRBAYER & MATTHEW DESMOND, *THE RACIAL ORDER* 88 (2015) (“Racial fields are organized in terms of the structure of distribution of different types of capitals or assets, the most important being specifically racial capital.”).

scious effort.<sup>214</sup> To show an improper bias on this view is to proceed without accounting for the ways in which a classification already organizes access to social, financial, and political resources. Intentions are thus understood not only in terms of means and ends, but also in terms of omissions and suppressions arising in an already racialized social structure.

Judicial doctrine under the First and the Fourteenth Amendments largely ignores implicit bias and structural exclusion.<sup>215</sup> Doctrine in both domains is neutral in respect to the specific ascriptive identity in play. Formally, that is, the doctrine is supposed to be applied evenhandedly whether the complaining litigant is Christian or Muslim, white or African-American.<sup>216</sup> Yet the thrust of both the implicit bias and structural exclusion theories is not to mistake surface neutrality for practically equal treatment. Each theory, in different ways, posits dynamic forces (psychological or social) that render formally neutral legal arrangements functionally inegalitarian. By resisting any asymmetries in the treatment of protected groups, however, constitutional doctrine sets its face against acknowledgement of both theories.

Yet it is far from clear that the theories of discriminatory bias that underlie the doctrine support this exclusion. Taste-based discrimination posits quite simply that a person “dislikes members of a minority group and does not want to associate with them.”<sup>217</sup> Becker’s model of labor markets characterized by taste-based discrimination, like most rational choice models, focuses on how preferences are expressed through market interactions. The model does not require market participants’ articulation or even acknowledgment of discriminatory intent. Conveying the same preferences in coded, yet legible, ways seems both possible and probable. Hence, there is no theoretic-

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<sup>214</sup> Cf. R. Richard Banks, Jennifer L. Eberhardt, & Lee Ross, *Discrimination and Implicit Bias in A Racially Unequal Society*, 94 CAL. L. REV. 1169, 1171 (2006) (“Pervasive racial inequality also complicates the question of what it would mean to be racially unbiased.”).

<sup>215</sup> The Court, however, has recognized the possibility of unconscious bias in construing statutory anti-discrimination schemes. In a recent decision construing the Fair Housing Act (“FHA”), for example, Justice Kennedy’s majority opinion observed that “disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

<sup>216</sup> *But see* Siegel, *From Colorblindness to Antibalcanization*, *supra* note 176, at 1287 (noting that white plaintiffs fare differently from minority plaintiffs in gaining access to the courts).

<sup>217</sup> Strauss, *Racial Discrimination in Employment*, *supra* note 158, at 1621.

cal reason to exclude implicit bias from a doctrine of discriminatory intent modeled on taste-based discrimination. And there is no dispute that discriminatory intent, for constitutional purposes, includes taste-based discrimination.

Similarly, there is no *a priori* reason for a doctrinal scheme crafted around statistical discrimination to exclude cases in which implicit bias has a dispositive causal effect. For example, there is powerful evidence from audit studies of private hiring decisions that employers use race as a proxy for criminality notwithstanding the availability of other information about skills and employment history.<sup>218</sup> Similar studies find that apparently gay applicants are treated differently than equally qualified heterosexual men at the threshold hiring stage, especially when employers seek “stereotypically male heterosexual traits.”<sup>219</sup> Yet these effects from statistical discrimination—in which negative inferences are drawn in respect to expected job performance from the possession of static, non-performative traits—do not in any way depend upon employer *awareness* of their stereotypical cognitive process. To the contrary, it seems plausible to posit that employers who do not recognize the stereotypical bases for their decisional process will be even more prone to fall back unconsciously on well-worn templates of social action in making decisions than those who are conscious of such stereotypes’ temptation. To the extent that statistical discrimination motivates the constitutional doctrine of discriminatory intent, therefore, there is no reason to exclude notions of implicit bias.

In short, the doctrinal boundary between conscious forms of discriminatory intent and unreflective forms—especially when a function of unconscious processes—cannot be derived from underlying theories of discriminatory intent. It is rather the Court that is responsible for gerrymandering the operative doctrinal conception of bias to carve out these consequential theories of discrimination in ways that want for theoretical justification.

#### F. Accounting for the Diversity of Discriminatory Intent

“Discriminatory intent”—which is a key organizing term in Equal Protection and the Religion Clause—is not a single concept. Rather, by drawing on economic, sociological, and psy-

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<sup>218</sup> See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 93–96 (2007).

<sup>219</sup> András Tilcsik, *Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 587–88 (2014).

chological studies, this Part has illuminated the plural conceptions of bias simultaneously at work in (or at the margins of) current doctrine. These conceptions of bias operate as complements in (or at the margins of) current doctrinal arrangements, rather than as substitutes: Different judicial applications of the Constitution's protections for vulnerable social groups alternatively invoke taste-based discrimination when invalidating municipal restrictions on Santeria, notions of statistical discrimination when policing political redistricting, an anticlassification logic when constraining affirmative action programs, and a grasp of group-status production dynamics when invalidating interracial marriage prohibitions.

One further reason for this heterogeneity is historical. Specific cases and accounts of the courts' role in American history play anchoring roles in judicial reasoning.<sup>220</sup> Definitional heterogeneity is unavoidable without abandoning canonical precedent and stories within the historical canon of antidiscrimination. The repudiations of explicit racial segregation in the Jim Crow South, of the legitimate establishment of a single national church, and of bars on interracial marriage—all these are elements of our constitutional canon. In each of these cases, different species of discriminatory intent are at work—including taste-based discrimination, group-status production, and anticlassification. The Court's jurisprudence is necessarily oriented by the concerns raised by these cases. As a result, it is likely to remain normatively plural.

Doctrine heterogeneity resulting from the plural ways in which intent can figure in government decision-making and historical precedent is not intrinsically problematic (although the law's current exclusion of unconscious bias lacks any adequate justification). But it would be better if the diversity of discriminatory intents were frankly acknowledged. Familiar debates about the permissibility of affirmative action, about when differential regulatory treatment of religion implicates a constitutional concept, and about the legality of seemingly evenhanded prohibitions on interracial and same-sex marriage and intercourse—all of these in part hinge on the question of *which* conception of discriminatory intent to prioritize. This question of taxonomy would be better confronted head on,

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<sup>220</sup> See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 987 (1998) (noting the important role of "canonical narratives" in constitutional jurisprudence); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244 (1998) (identifying cases that serve each as a "*locus classicus* of a major doctrine of constitutional law" and that thereby "continue to shape the law today").

rather than in the Court's current crab-wise, obfuscatory fashion.

At present, moreover, judges have discretion not only to move between different conceptions of discriminatory intent. They also contract or expand those conceptions across different cases. The boundaries between conceptions of unlawful intent are ambiguous and contestable. This gives judges a discretion that is rarely recognized and that operates without meaningful discipline—a discretion to which I now turn.

### III

#### THE DISCOVERY OF DISCRIMINATORY INTENT

This Part analyzes a second aspect of the judicial treatment of discriminatory intent. Focusing on decisions of the Supreme Court, I explore the complex implications of the straightforward fact that there exists a wide array of instruments for investigating allegations of discriminatory intent. My analysis here is organized around a taxonomy of the evidentiary tools employed to identify when discriminatory intent has played a role in government decision-making. These include the semantic context of an official directive (such as a law or executive order); the statements of officials; the context in which a policy was enacted, or its consequences once enacted; the results of depositions or interrogatories as elements of a pretrial discovery process; and statistical evidence derived from econometric analysis of the government's action.

It is a striking and pervasive feature of the cases that the permissibility and value of these materials is not framed as a matter of evidence law generally or the Federal Rules of Evidence in particular. To the contrary, the evidentiary weighing discussed in this Part exists at an angle to the latter body of law. As a result, my analysis trains on the discriminatory intent case law narrowly, without trying to account for larger evidence law questions.

The Supreme Court initially signaled its willingness to entertain a wide range of evidentiary strategies for identifying improper intent. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court recognized that the judicial task of discovering “whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”<sup>221</sup>

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<sup>221</sup> 429 U.S. 252, 266 (1977).

While *Arlington Heights* is now known largely for its “motivating factor” holding, and its concomitant rejection of the idea that bias must be the sole or “dominant” factor,<sup>222</sup> its approach to evidence may well be as, or more, consequential. The Court in that case canvassed a wide range of evidence, including disparate impact; “historical background,” including deviations from normal government procedure; “contemporary statements” by officials; and in “some extraordinary instances,” trial testimony of decision-makers under oath.<sup>223</sup> A similar approach is apparent in a roughly contemporaneous Establishment Clause case in which the Court was willing to take judicial notice of facts—such as Kentucky’s “plainly religious” motive for posting the Decalogue in all classrooms—evident from social context but hard to prove by traditional means.<sup>224</sup>

But this capacious and catholic approach to the discovery of discriminatory intent is honored more in the breach than in the observance. In practice, even though *Arlington Heights* remains formally ‘good’ law, the Court responds to different kinds of evidence in erratic and uneven ways. In respect to each species of such evidence, it is possible to identify instances in which the Court has been permissive. It is also possible to identify other instances in which it categorically rejects the same kind of evidence. Denying litigants license to introduce a species of evidence, the Court typically appeals to the costs of such permissions.<sup>225</sup> But these cost estimates are persistently based on fragile speculation, fail to account for alternative ways of dealing with putative costs, and ignore the relevance of other prohibitions on admissibility.<sup>226</sup> Perhaps the most acute example of such an interaction emerges in the criminal procedure domain, where the Court has separately, and without any cross-reference, resisted the two most important instruments for discovering illicit intent—the ordinary tools of discovery and the empirical study of overall patterns of state behavior.<sup>227</sup>

In working through the five species of evidence generally available to show discriminatory intent, I will emphasize two

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<sup>222</sup> See *id.* at 265–66.

<sup>223</sup> *Id.* at 266–68.

<sup>224</sup> See *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam). Other Establishment Clause cases employed a similarly latitudinarian approach to discovery. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 57 (1985) (relying on a range of testimonial and other sources to hold that Alabama’s moment-of-silence statute was motivated by a desire to promote religion).

<sup>225</sup> See *infra* subpart III.D.

<sup>226</sup> See *id.*

<sup>227</sup> See *infra* subparts III.D–E.



overarching points. First, I draw attention to the contrary treatment of the same kind of evidence in distinct cases. Second, I challenge the reasons given for intermittently excluding or disregarding evidence of improper motive, suggesting that the Court has either exaggerated the costs of allowing evidence to be considered or minimized the benefits from doing so. Working in tandem, these lines of arguments provide support for my ultimate argument in favor of a return to the more generous *Arlington Heights* approach in Part IV—an approach that does not rig doctrine to favor some claims of discriminatory intent over others.

### A. The Semantic Content of Laws and Regulations

The semantic content (or linguistic meaning)<sup>228</sup> of government action that is reduced to writing as a law or regulation (or as the transcript of an oral intercession by an official) seems an obvious and uncontroversial place to start the search for discriminatory intent. The logic of anticlassification in particular places great emphasis on semantic content, whereas the animus and group-status production theories treat it as less central. Perhaps as a consequence, there are relatively few formal legal measures today that explicitly incorporate a suspect classification. Race is explicitly mentioned only now in remedial measures employed in the secondary and tertiary education contexts designed to respond to the continued absence of African-Americans and other minorities (and even there, rarely so).<sup>229</sup> Religion is mentioned when a state, moved by Establishment Clause concerns, moves to bar religious groups' access to state funds or public forums.<sup>230</sup> Neither kind of measure fares well in court these days, reflecting the increasing vulnerability of explicit usages of formal categories.

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<sup>228</sup> See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 98 (2010) ("The semantic content of a legal text is simply the linguistic meaning of the text.").

<sup>229</sup> See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2206 (2016) (involving the University of Texas); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710–11 (2007) (involving the Seattle and Jefferson County school districts); *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003) (involving the University of Michigan).

<sup>230</sup> See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (involving Missouri's Scrap Tire Program). For similar results under a Free Speech rubric, see, for example, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001), which discussed New York law on the use of school facilities, and *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829 (1995), which discussed the University of Virginia's Guidelines for payments from its Student Activity Fund.

In some instances, moreover, courts have evinced careful sensitivity to textual clues that an impermissible classification provides a structuring principle from the law. For instance, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court invalidated a Floridian municipal ordinance that was “gerrymander[ed]” to prohibit Santeria ceremonies while permitting many other kinds of animal killing.<sup>231</sup> But in addition to looking at the irregular pattern of exceptions and inclusions, the Court also flagged the specific vocabulary used in the measure—such as the “use [of] the words ‘sacrifice’ and ‘ritual’”—as evidence that a discomfort with religion motivated the law.<sup>232</sup> Words matter not only for their narrow dictionary-defined content, but also for their unspoken, if readily available, connotations.

A similar linguistic footprint is easily found in the March 2017 travel ban promulgated by President Trump.<sup>233</sup> Like its precursor, that order contains a peculiar and otherwise inexplicable reference to “honor killing.”<sup>234</sup> That term is commonly used solely to apply to Islamic contexts, notwithstanding the tragic pervasiveness of intrafamilial violence against women in many cultures, as a means to pejoratively taint Muslim men as intrinsically violent.<sup>235</sup> A case that does not mention a protected class by name but by a terminological proxy that is easily discerned by the public—in effect, a rhetorical “dog whistle” that seeks to invoke a negative stereotype about a suspect classification<sup>236</sup>—is by logic no different from an instance in which the verbal specification of the targeted group is incrementally less occluded. It was a religious ban in form as well as colloquial name.

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<sup>231</sup> See 508 U.S. 520, 534 (1993) (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

<sup>232</sup> *Id.* at 533–34.

<sup>233</sup> See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

<sup>234</sup> *Id.* at 13,217; see also Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (“[T]he United States should not admit those who engage in acts of bigotry or hatred (including ‘honor’ killings . . .”).

<sup>235</sup> See Lila Abu-Lughod, *Seductions of the “Honor Crime”*, 22 DIFFERENCES 17, 18 (2011) (“Honor crimes are explained as the behavior of a specific ethnic or cultural community. The culture itself is taken to be the cause of the criminal violence. Thus the category stigmatizes not a particular act but entire cultures or ethnic communities.”); see also Inderpal Grewal, *Outsourcing Patriarchy: Feminist Encounters, Transnational Mediations and the Crime of ‘Honour Killings’*, 15 INT’L FEMINIST J. POL. 1, 2–3 (2013).

<sup>236</sup> See generally IAN HANEY-LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS 218–31 (2014) (exploring the use of coded appeals to racial animus in American politics).

But it would be a mistake to think that the infusion of a formal legal text or instruction with an impermissible classification will always be grounds for quick invalidation. A surprisingly large number of common government practices turn on the deployment of a suspect classification—and yet have remained beyond judicial purview. For example, even though race is a common trait employed in police suspect descriptions used by local, state, and federal law enforcement, federal courts have not expended significant effort in considering their constitutionality.<sup>237</sup> Challenges to race-specific suspect selection are routinely turned aside by the federal courts.<sup>238</sup> Similarly, the family law domain is characterized by “racial permissiveness” with officials routinely employing race to make decisions with large and immediate repercussions for particular individuals.<sup>239</sup> No explanation has been tendered for these exceptions. There is also no reason such gaps in judicial scrutiny cannot expand in the future.

Nevertheless, the semantic content of a law remains central in most other contexts. As a result, restrictions upon other mechanisms for proving discriminatory intent tend to make the semantic context of a law more important. Anticlassification theories fit most comfortably on a foundation of semantic meaning (and nothing else). Hence, isolating semantic meaning as the sole or preferred evidence of discriminatory intent is a way of collapsing the definition of discriminatory intent, and training solely upon anticlassification.<sup>240</sup> In this way, a judge can recalibrate the scope of constitutional prohibitions without changing the formal content of substantive constitutional doctrine.

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<sup>237</sup> See *supra* text accompanying note 163.

<sup>238</sup> See, e.g., *Monroe v. City of Charlottesville*, 579 F.3d 380, 387–90 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1740 (2010) (denying certiorari in a case exempting race-based suspect selection from equal protection scrutiny); *Brown v. City of Oneonta*, 221 F.3d 329, 333–34 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001) (denying the same); see also Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk As A Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2446 (2017) (discussing judicial refusals to account for the constitutional consequences of race’s use in policing).

<sup>239</sup> See Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 540–41 (2014) (“Constitutional challenges to these race-based actions have generally fared poorly, with courts typically (albeit not always) applying de minimis constitutional scrutiny.”); accord R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 904–08 (1998).

<sup>240</sup> Haney-López has argued that “Justices from *Feeney* to *McCleskey* were prepared to uphold the challenged practices with or without the animus standard. They never looked for governmental motives.” Haney-López, *supra* note 49, at 1858. As the main text makes clear, I think this is an exaggeration.

## B. Official Statements

It sometimes happens that an official responsible for a state action makes a statement to another person that provides prima facie evidence of an improper intent. It might seem that such a “statement against interest”<sup>241</sup> would be especially probative of the existence of one or another form of discriminatory intent, especially where animus and group-status production are suspected.<sup>242</sup> Indeed, such statements often figure prominently in constitutional discrimination cases. For example, in the 2017 North Carolina racial gerrymandering case discussed in the Introduction, the Court identified statements on the state-senate floor made by legislators responsible for mapmaking, that they felt they “must include a sufficient number of African-Americans” in the challenged district.<sup>243</sup> The Court further relied on trial testimony from another state legislator to the effect that mapmakers had expressed the same racial aim to him.<sup>244</sup>

In a similar vein, when ascertaining the “purpose” of the Defense of Marriage Act in *Windsor*, the Court looked to a House Committee Report that pointed to “traditional (especially Judeo-Christian) morality” as a basis for the measure.<sup>245</sup> In evaluating Alabama’s statute authorizing a daily moment of silence in schools, the Court also looked to the statements of the measure’s sponsors and took account of his confirmatory statements before the district court.<sup>246</sup> And in the recent challenge to juror discrimination under the Sixth Amendment, the Court declined to treat the jury as a sealed black box after evidence of improper motive had emerged.<sup>247</sup> Finally, such statements remain one of the few means of proving up the

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<sup>241</sup> Cf. Fed. R. Evid. 804(b)(3) (establishing hearsay exception for a statement against interest, which “a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability”).

<sup>242</sup> Much depends, though, on what one means by “interest.” It may be that an official appeals to invidious grounds because it is in his or her electoral interest, even though it works against the legality of the relevant position.

<sup>243</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017).

<sup>244</sup> See *id.* at 1476 (discussing trial testimony of Congressman Mel Watt).

<sup>245</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citing and discussing H.R. REP. NO. 104-664 (1996), reprinted in 1996 U.S.C.C.A.N. 2905).

<sup>246</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 57-58 (1985).

<sup>247</sup> See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (“[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the

presence of bias in the criminal justice system more generally.<sup>248</sup>

Nevertheless, there are ways to deflect the evidentiary force of statements that are immediately probative of unconstitutional intent. The Court can carve out categories of constitutional challenges for resolution without regard to such evidence, even when obvious and powerful proof of bias exists. By crafting exceptions strategically, the Court can render irrelevant otherwise probative materials in circumstances where other forms of evidence may be unlikely to emerge.<sup>249</sup>

An instructive example arises in the Establishment Clause context of challenges to features of the physical landscape created by the state with an explicitly religious message. Ordinarily, both the religious and the sectarian content of such measures are evident quite literally on the face of such monuments. Because their sponsors have no wish to shy away from sectarian endorsements, moreover, statements against constitutional interest are not uncommon. A plurality of the Court in a 2005 case concerning a stone inscription of the Decalogue on the grounds of the Texas State Capital, however, suggested that the purpose test employed in Establishment Clause jurisprudence was “not useful,” and instead, looked at “the nature of the monument and . . . our Nation’s history.”<sup>250</sup>

But why? The plurality opinion by Chief Justice Rehnquist did not explain why the concept of purpose—which, as we have seen, is employed across a wide range of other doctrinal and institutional contexts—was inapposite in respect to monuments. Indeed, given that such monuments are typically created at a specific moment after a specific sequence of state

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evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”).

<sup>248</sup> See, e.g., *Foster v. Chatman*, 136 S. Ct. 1737, 1747–55 (2016) (holding that the Georgia Supreme Court had made a “clearly erroneous” decision when it declined to find that prosecution’s use of preemptory strikes in a capital case was *not* animated by a discriminatory purpose in the face of lurid evidence to the contrary); see also *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). Outside the context of Equal Protection and the Religion Clauses, the Court has said that a “prosecutor’s disclosure of retaliatory thinking on his part, for example, would be of great significance” when adjudicating a constitutional claim. *Hartman v. Moore*, 547 U.S. 250, 264 (2006).

<sup>249</sup> Alternatively, courts can simply refuse to take notice of the use of, say, racially charged language in the enactment of a criminal statute—as David Sklansky argues they have done in regard to the former sentencing provisions for crack cocaine. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1303–04 (1995).

<sup>250</sup> *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (Rehnquist, C.J., plurality opinion).

actions and deliberations, they present straightforward cases for purpose analysis. By contrast, Chief Justice Rehnquist's substitute analytic framework is notable largely because it is inherently ambiguous (what constitutes the "nature" of a monument?) and open-ended (what parts of "our Nation's history" are relevant?).<sup>251</sup> The Court hence creates an exception to the purpose rule for cases in which probative evidence is likely to be easily and readily available—and fails to offer persuasive (or, indeed, any) reasons for its abrogation. Concern must arise about the deployment of shifting evidentiary rules to achieve substantive ends that the Court has not explicated or justified. It is a *sub rosa* way of expunging all forms of intent-focused analysis canvassed in Part II—including anticlassification analysis—from the constitutional lexicon where a historical religious majority favors a challenged practice.

Another argument for resisting judicial consideration of facially compromising statements focuses on the incentive effects of such a rule. In the juror bias case discussed above, Justice Alito's dissenting opinion thus celebrated the jury's ability "to speak, debate, argue, and make decisions the way ordinary people do in their daily lives."<sup>252</sup> In the challenge to the travel ban case, the government has argued in similar terms that campaign statements should not be admissible evidence of impermissible bias on the part of an elected official lest democratic debate be chilled.<sup>253</sup> But such incentive-based arguments are at best speculative and at worst specious.

Consider first the jury case. Justice Alito's key theoretical premise is that juries should work as miniature versions of the democratic polity. This is a claim that is flawed as a matter of both history and practice.<sup>254</sup> The "aim of a jury is explicitly epistemic," not representational.<sup>255</sup> Jury deliberations are not

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<sup>251</sup> Cf. B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705, 731 (2010) (concluding that "courts have not analyzed the constitutionality of brief official religious references, often referred to as ceremonial deism, in a thorough or nuanced way").

<sup>252</sup> *Peña-Rodríguez*, 137 S. Ct. at 874 (Alito, J., dissenting).

<sup>253</sup> See Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction and/or Temporary Restraining Order of the Executive Order at 28–32, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (No. 17-00361) ("Permitting campaign statements to contradict official pronouncements of the government's objectives would inevitably 'chill political debate during campaigns.'").

<sup>254</sup> See Melissa Schwartzberg, *Democracy, Judgment, and Juries*, in MAJORITY DECISIONS: PRINCIPLES AND PRACTICES 196, 196–97 (Stéphanie Novak & Jon Elster eds., 2014) (noting that jury selection has not, as a historic matter, been along democratic grounds).

<sup>255</sup> *Id.* at 196–97.

“ordinary” speech familiar from “daily lives.” Rather, they arise in a legally structured environment in which lay judgments are exhorted on specific questions of law and fact.<sup>256</sup> The existence of a pervasive bias against a certain group in “ordinary” society does not legitimate the recapitulation of that bias in jury deliberations. To the contrary, norms against the expression of irrelevant and distortionary tropes that characterize demotic speech promote the jury’s specialized epistemic and adjudicative functions.<sup>257</sup>

Similarly, a powerful critique could be mounted against the Government’s argument in the travel ban case respecting the admission of campaign speech. To begin with, candidates seeking to play on discriminatory sentiments among the public are unlikely to be chilled by the prospect of litigation (which might simply allow them to amplify their rhetoric and include federal judges among their targets). Where pre-election rhetoric tracks post-election action, moreover, there are good Bayesian grounds for concluding that the earlier rhetoric was not mere puffery. Finally, it is passing odd to reject evidence on the ground that candidates should not be understood to mean what they say prior to an election: It might instead be more compatible with the democratic commitments of the Constitution to make precisely the opposite assumption as a way of taking seriously the electoral structures created in Articles I and II. Those who urge the disregard of campaign statements implicitly treat the democratic process as little more than a cheap vaudeville—bright lights, thickly caked makeup, and naught of enduring substance.

More generally, it is hard to conceive of reasons to ignore statements—already made and available as proof—when their content provides *prima facie* evidence of improper intent. The exceptions to this rule, whether in the doctrine or offered in current cases, are unpersuasive and should be abandoned.

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<sup>256</sup> Note the tension between Justice Alito’s argument and arguments to exclude campaign statements in the travel ban case. Jurors’ statements do not count even if they arise within patterned legal structures; a candidate’s statements do not count because they do not arise within patterned legal structures.

<sup>257</sup> Justice Alito’s argument might alternatively be understood as follows: although naked expressions of bias (as occurred in *Peña-Rodriguez*) are never useful or proper, there is a grey area in which jurors might be chilled from discussing facts pertinent to a verdict. It is not at all obvious, however, that this domain exists, and it requires further speculation to conclude that the remote and uncertain prospect of judicial inquiry would have any effect at all on such juror behavior. Moreover, the benefits of discouraging invidious speech that has neither epistemic value nor normative content likely outweigh the fragile benefits of avoiding an evanescent chilling effect.

### C. Circumstantial Evidence: History and Consequences

Discriminatory intent is often inferable from circumstantial evidence that takes a variety of forms. The Court in *Arlington Heights*, for example, identified the “specific sequence of events” preceding the challenged decision, “[d]epartures from the normal procedural sequence,” and a more general category of “legislative or administrative history.”<sup>258</sup> A similar procedure was said to govern Establishment Clause challenges, which are evaluated within the “history of the government’s actions.”<sup>259</sup>

*Arlington Heights’* list is unfinished. A somewhat trivial missing item is the physical setting of a measure challenged on Establishment Clause grounds.<sup>260</sup> But more substantial and generalizable omissions exist. For instance, a mismatch between expected consequences and legitimate policy justifications can undermine the assumption that the latter motivated a law. In *Romer v. Evans*, for example, the Court concluded that Colorado’s Amendment 2, which prohibited most legislative, executive, or judicial action designed to protect homosexual persons from discrimination, “raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>261</sup> The outcome of *Romer* did not depend on a direct evaluation of the voting public’s intent. Instead, it was justified by the Court’s observation that Amendment 2 was “so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.”<sup>262</sup> *Romer* then rested on an inference from the means-ends rationality of a single policy measure—an index of bias typically unavailable when the ob-

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<sup>258</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977). This is not to say that any one of these factors is necessary. Indeed, the Court has resisted efforts to calcify the *Arlington Heights* factors in given contexts. See, e.g., *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (“[A] conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering . . .”). Even in the immediate wake of the *Arlington Heights* decision, moreover, the Court at times “disregard[ed] contextual evidence in unprincipled ways.” Haney-López, *supra* note 49, at 1843 (discussing *City of Memphis v. Greene*, 451 U.S. 100 (1981)).

<sup>259</sup> *McCreary Cty. v. ACLU*, 545 U.S. 844, 866 (2005); see *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (looking to the “text and history” of a policy challenged on Establishment Clause grounds).

<sup>260</sup> In a perhaps unintentionally comic line, the Court once declared with Solomonic seriousness that “the crèche stands alone” as a way of distinguishing earlier precedent. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 598 (1989).

<sup>261</sup> *Romer v. Evans*, 517 U.S. 620, 634 (1996).

<sup>262</sup> *Id.* at 632.



ject of the popular franchise is a person or a political party that represents a cluster of policies and values.

Context and consequences are likely to be of greatest salience when animus, statistical discrimination, or group-status production are at issue. They will generally matter less in anticlassification challenges. The doctrinal instruments for hiding context from judicial consideration therefore push toward an anticlassification analysis, while relegating other theories of discriminatory intent to the back-burner.

Perhaps the most important doctrinal barrier to serious consideration of context is the idea of deference to a putatively expert official, a deference that obviates the need to consider contextual clues that impermissible intent was at stake. Judges vary, however, in their willingness to exercise such deference across different contexts, often in unprincipled ways. The willingness to look beyond the reasons supplied for an official decision seemingly fluctuates in accord with judges' priors about a given class of officials.

The problem is not the preserve of one or the other ideological wing of the bench. On the one hand, liberal judges have evinced deference to university administrators' use of classifications and rules that raise concerns about the role of both race and religion. Endorsing a state university's imposition of a nondiscrimination requirement on all student groups that sought funding from the public fisc, for instance, a liberal majority of the Supreme Court underscored its "appropriate regard for school administrators' judgment" in determining how best to promote educational goals.<sup>263</sup> In dissent, Justice Alito highlighted facts tending to suggest that administrators had been hostile to the plaintiff student groups based on their religious nature.<sup>264</sup> By contrast, Justice Alito (as well as Justice Thomas), viewed the Trump travel ban through a Vaseline-smear lens of deference akin to the one they had criticized only a few years before.<sup>265</sup> More generally, conservative justices seem more comfortable embracing those who exercise

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<sup>263</sup> *Christian Legal Soc. Chapter v. Martinez*, 561 U.S. 661, 687 (2010).

<sup>264</sup> *See id.* at 717–18 (Alito, J., dissenting) (discussing failures of a university administrator to respond to requests for group registrations). For a parallel complaint about excessive deference to university administrators' judgments about race in the affirmative action context, see *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2215 (2016) (Alito, J., dissenting).

<sup>265</sup> *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089–90 (2017) (Thomas, J., concurring in part and dissenting in part) (asserting "the Government has made a strong showing that it is likely to succeed on the merits").

force—police or national security officials—as experts warranting deference.

The general question of deference to officials on the basis of expertise and political accountability is a large one.<sup>266</sup> But the specific question raised by these cases is quite narrow—and also rather easy to answer. When a judge must answer the factual question whether an agency official has acted on the basis of an unconstitutional motive, standard justifications for deference based on expertise and political accountability are not relevant. The policy expertise of, say, university administrators in the University of California system or career staffers to the National Security Council has no bearing on the question whether they acted with a discriminatory intent. There is no logical relation between expertise and a fair disposition toward vulnerable social groups. Nor does the logic of democratic accountability supply any reason to defer to an official's *factual* claim that they acted on the basis of proper motives rather than unlawful bias.<sup>267</sup>

At best, expertise may be relevant if a defendant official points to evidence that they in fact relied on their bespoke knowledge and skills in riposte to a bias allegation. But when evaluating the factual question whether a plaintiff's allegation, or this response, is a more persuasive account of historical events, there is no reason to favor *a priori* one side in that dispute.

More generally, there is a long-standing consensus among scholars that even expert administrative agencies have no special competence as to the specification of constitutional rules.<sup>268</sup> It follows from this position *a fortiori* that officials

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<sup>266</sup> For a crisp statement of this familiar point, and a collection of sources, see Emily Hammond Mezell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1765 (2012).

<sup>267</sup> The standard—and most powerful—explanation for counter-majoritarian protection of minorities defined on racial or religious grounds is that the democratic process does not work well to protect their interests. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 152 (1980) (expressing concern for minorities “barred from the pluralist’s bazaar”); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1296 (1982) (describing groups that need constitutional protection because they are “perpetual losers” in the political arena).

<sup>268</sup> See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 194 (1998) (“[C]ourts never defer to agencies in reading the Constitution.”); Michael Skocpol, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1517 (2017) (arguing that courts “should not defer to executive agencies when the underlying question is one of constitutional interpretation”); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 146 (2010) (“De novo review is appropriate when agencies are interpreting laws that

should obtain no particular deference when it comes to factual findings that are necessary predicates to the application of a constitutional antidiscrimination rule.<sup>269</sup> To grant such deference would create a special dispensation to violate constitutional rules when their application turned on questions of disputable fact.<sup>270</sup>

Once again, the reasons for categorically excluding or ignoring the evidence of discriminatory intent in the form of context and consequences—wholly prior to litigation—are at best fragile. Once again, it seems there is little reason to carve out distinct exceptions to how plaintiffs can go about proving an unlawfully discriminatory intent, especially when doing so disadvantages plaintiffs suffering under the various forms of discriminatory intent to varying extents.

#### D. The Mechanisms of Civil Discovery

Of course, in many cases, no smoking-gun statement by an official will be available.<sup>271</sup> And, often, the circumstances and consequences of policymaking will be empirically murky, their interpretation amenable to sharply conflicting takes. The consequences of statistical discrimination in particular will be often observationally equivalent to reliance on a permissible trait. No clear inference of improper motive may be discerned from semantic content, context, or immediate consequences. As a result, mundane mechanisms of civil discovery such as interrogatories, depositions, and document production may be especially important in substantiating the presence of discriminatory intent that takes the form of animus, group-status production, or statistical discrimination.<sup>272</sup>

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they do not have a special responsibility to administer, like the Constitution, the APA, or Title VII.”).

<sup>269</sup> In David Faigman’s influential typology, there are “facts peculiar to the dispute and which must be examined under the pertinent constitutional rule.” David L. Faigman, *“Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 553 (1991).

<sup>270</sup> A separate question is presented when an agency argues that a law is narrowly tailored to meet a compelling government interest. But that question of fact does not arise until after a discriminatory intent has been identified.

<sup>271</sup> See Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 112 (2012) (“Proof of intent is rarely direct. It is usually circumstantial, even multi-determined.”).

<sup>272</sup> See *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) (“Because employers rarely leave a paper trail—or ‘smoking gun’—[of] discriminatory intent . . . plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the [defendant’s] credibility . . .” (citations omitted)).

From the beginning of intent-focused antidiscrimination jurisprudence, however, federal courts have been preternaturally cautious about civil discovery against the government. The *Arlington Heights* Court, for example, described the use of trial testimony (although not discovery) as “extraordinary.”<sup>273</sup> Since then, the Supreme Court and lower courts have evinced a rising hostility to statutory discrimination cases more generally.<sup>274</sup> Perhaps with those cases in mind, the Justices have implemented a series of procedural changes, including to the well-pleaded complaint rule and the summary judgment regime.<sup>275</sup> These have had “a disparate impact on employment discrimination and civil rights cases” against both private and state actors, insofar as the latter tend to be more dependent on pretrial discovery than other species of cases.<sup>276</sup>

Nevertheless, civil discovery and trial testimony remain important ways to find evidence of discriminatory intent. For example, in a legal challenge to Alabama’s 2012 redistricting of its House and Senate seats, the Court looked to evidence from a sequence of depositions “to show that the legislature had deliberately moved black voters into . . . majority-minority districts.”<sup>277</sup> The dissent did not object to the legality of such depositions. It instead argued that more effective use of “discovery and trial” would be necessary to demonstrate that specific districts had been improperly drawn.<sup>278</sup>

By contrast, discovery is generally not available when the Court deems it likely to be costly or an infringement on the prerogatives of the executive branch. This perception has been most acute when the state acts coercively against specific individuals—a context in which animus and statistical discrimination are more likely to be present than group-status production or anticlassification concerns. In a series of cases cross-cut-

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<sup>273</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

<sup>274</sup> See Gertner, *supra* note 271, at 109 (reporting, based on author’s experience as a federal judge, that “[f]ederal courts . . . were hostile to discrimination cases”).

<sup>275</sup> See Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 523–24 (2010).

<sup>276</sup> *Id.* at 524–25.

<sup>277</sup> *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1266 (2015). For other discussions of the use of evidence yielded by civil discovery in racial gerrymander cases, see *Cooper v. Harris*, 137 S. Ct. 1455, 1475 (2017) and *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 452 (2006) (Stevens, J., concurring in part and dissenting in part).

<sup>278</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1277 (Scalia, J., dissenting).

ting the criminal law and immigration law fields—i.e., the modal forms of individuated coercive state action today—the Court has imposed functionally insurmountable barriers to discovery. For example, in the context of racially selective prosecution claims, the Court in *United States v. Armstrong* prohibited discovery unless a defendant can produce “some evidence that similarly situated defendants of other races could have been prosecuted, but were not.”<sup>279</sup> Of course, since such defendants were not prosecuted in federal court (and were unlikely to have been charged in state court), it will rarely be the case that documentary evidence of their existence will be available.<sup>280</sup> In the immigration-removal context, the Court has simply ruled out selective enforcement claims about “outrageous” discrimination.<sup>281</sup> In the visa-issuance context (where the relevant state actor is typically a consular official located extraterritorially), it has deferred to the “facially legitimate and bona fide” decisions of consular officials.<sup>282</sup>

These deference regimes, which regulate both access to pretrial discovery and to trial, are justified first, in terms of the deadweight costs of selective prosecution claims<sup>283</sup> and second, in terms of a constitutional worry about judicial interference with “a core executive constitutional function.”<sup>284</sup> But both of those justifications for constrained discovery are far weaker than first appearances might suggest.

Of course, constitutional antidiscrimination rules *should* constrain prosecutorial discretion.<sup>285</sup> The only question here is whether *discovery* imposes excessive costs. But it is not at all clear that permitting more extensive discovery would have such

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<sup>279</sup> *United States v. Armstrong*, 517 U.S. 456, 469 (1996). In the context of discriminatory use of preemptory strikes, a defendant can invoke a hearing but not discovery. See Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 346–47 (2007).

<sup>280</sup> See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 618–19 (1998).

<sup>281</sup> *Reno v. Am.-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 491 (1999).

<sup>282</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972); accord *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring).

<sup>283</sup> See *AADC*, 525 U.S. at 490; *Armstrong*, 517 U.S. at 465; see also *Wayte v. United States*, 470 U.S. 598, 608 (1985) (“Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”).

<sup>284</sup> *Armstrong*, 517 U.S. at 465.

<sup>285</sup> See *United States v. Batchelder*, 442 U.S. 114, 125 (1979). The immigration context presents distinct questions; for instance, there is a threshold question whether a specific individual benefits from constitutional protections.

costs. Although not an exact parallel, states' experiences with so-called "open file" policies are instructive. Several states have adopted various iterations of an open-file policy, by which defendants have broad access to materials in a prosecutor's files.<sup>286</sup> These policies, however, have not led to dramatic changes in clearance rates or case processing, perhaps because public defenders' resources tend to be sufficiently constrained so as to preclude their aggressive exploitation of open-file policies.<sup>287</sup> That is, allowing discovery by default does not impose deadweight costs that reduce the rate of prosecutions. State-level experience with open-file policies, therefore, undermine the Court's concern with the disruptive effect of increasing discovery of prosecutorial motivations. Compounding the minimal effect of greater discovery, it seems quite likely that judges would be reluctant to impose "extreme" sanctions such as the dismissal of charges even when evidence of bias did surface.<sup>288</sup> Hence, it is far from clear that more discovery would change the outcome of specific cases (even if it changes the mix of cases filed). Given that concerns about prosecutorial discretion are often taken as the paradigmatic case justifying limited evidentiary discovery, it is reasonable to worry that more peripheral cases will involve even weaker governmental anti-disclosure justifications.

Moreover, it is striking that the Court has cracked open, if only slightly, the jury room to allow inquiry into discriminatory intent, while keeping prosecutorial discretion shrouded from view. Juries have long been a vanishingly small part of the criminal justice system.<sup>289</sup> In contrast, prosecutors exercise vast authority as a result of their charging and plea bargaining authority on criminal justice matters.<sup>290</sup> Prosecutorial deci-

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<sup>286</sup> See Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 789 (2017) (noting variation in forms of open-file discovery).

<sup>287</sup> See *id.* at 796 (finding based on analysis of several states' experience that "open-file may not reduce the trial rate or speed up pleas").

<sup>288</sup> Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 254 (2017). Indeed, it is far from clear that courts can ever serve as robust supervisors of prosecutorial behavior. Their limited institutional capacity means such oversight will always be seriously incomplete. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1016 (2009) ("Conventional external regulation has failed to guide prosecutors. It cannot work well because outsiders lack the information, capacity, and day-to-day oversight to structure patterns of decisions."). Structural limitations of this sort further diminish defendants' incentives to use extensive discovery beyond what *Armstrong* and *Wayte* allow.

<sup>289</sup> See Bibas, *supra* note 288, at 961.

<sup>290</sup> See *id.* at 971 (describing the prosecutor's "dominant" role). This has long been the case. See Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM.

sions are also “important” sources of racial disparities, especially decisions about mandatory minimums.<sup>296</sup> To the extent that public confidence in the criminal justice system is a function of the actual influence of race-based decision making, current doctrine thus seems to have its priorities backward. Allowing greater discovery of prosecutors’ intent may deter what appears to be a significant effect of unconstitutional bias. It would also eliminate any marginal incentive for a prosecutor to use a plea bargain rather than a trial given the knowledge that jurors’ racial biases may be more readily exposed than prosecutors’.

### E. Statistical Evidence

The final kind of evidence useful for demonstrating unconstitutional discrimination is the output of econometric models that estimate either the causal effect of a suspect classification in government action or, alternatively, identify correlations between the distribution of that classification and the state’s imposition of costs on the public. Evidence of this sort is also useful to root out the use of impermissible criteria as proxies for other goals. By contrast, it is not needed in anticlassification challenges.

Judicial attitudes to statistical evidence of race discrimination have been inconsistent. On the one hand, judges embrace such evidence in the context of gerrymandering cases, where it helps tease out the correlations between districting and race, partisanship, and other relevant factors with precision.<sup>292</sup> On the other hand, the Court in *McCleskey v. Kemp* rejected the use of system-wide empirical evidence of racial disparities to demonstrate discriminatory intent on the part of a specific jury.<sup>293</sup> While *McCleskey* focused on the inference of intent from systemic characteristics—i.e., the role of race in the Georgia capital punishment system as a whole—to specific criminal proceedings, lower courts have extended its holding to the

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L. & CRIMINOLOGY 3, 3 (1940) (“The prosecutor has more control over life, liberty, and reputation than any other person in America.”).

<sup>296</sup> See Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 10 (2013). The same authors analyze the sources for racial disparities across the criminal justice process and identify prosecutors’ charging decisions as key to the production of those disparities. See Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1321–22 (2014).

<sup>292</sup> See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1477–78 (2017) (describing the introduction of expert econometric analysis).

<sup>293</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987).

quite different context of statistical evidence about the role of race in a single decision-maker's actions over time (e.g., a single district attorney over a number of years).<sup>294</sup> By contrast, challenges to policing policies, such as stop and frisk, have at times turned in part on statistical evidence that the distribution of police actions cannot be explained by the historical distribution of crimes, but are instead closely correlated to racial demographics.<sup>295</sup>

Judicial skepticism of econometric evidence of impermissible motives is unwarranted and unwise. To begin with, the *McCleskey* Court criticized the study of the Georgia capital punishment system presented in that case because it did not “prove that race enters into any capital sentencing decisions,” but only “show[s] . . . a likelihood” of this impermissible result.<sup>296</sup> This is true, but also irrelevant. Most sophisticated econometric analysis of a complex phenomenon characterized by multiple potential causal predicates will entail several model specifications, each of which assumes a different set of structural relationships between tested variables. The coefficients derived from such models—say, of race effects—are not an unmediated measure of causal or correlational effects. They require careful interpretation.<sup>297</sup> What the *McCleskey* Court took to be a criticism is thus a persistent quality of econometric evidence: It always and only “show[s] . . . a likelihood” of bias.<sup>298</sup> It is not “proof” in the same form as an inculpatory oral statement. But this is all the more reason *not* to dismiss it categorically. It is precisely because statistical evidence is almost never determinative on its own, but rather grist to a process of Bayesian inference that accounts for other factors, that its admission is not as disruptive and destabilizing as the *Mc-*

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<sup>294</sup> See John H. Blume et. al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1794–95 (1998).

<sup>295</sup> See, e.g., *Floyd v. City of New York*, 813 F. Supp. 2d 417, 435–36 (S.D.N.Y. 2011); see also Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's “Stop and Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASSN 813, 817–18 (2007) (presenting the econometric analysis relevant to *Floyd* in greater detail).

<sup>296</sup> *McCleskey*, 481 U.S. at 308.

<sup>297</sup> See, e.g., James B. Grace & Kenneth A. Bollen, *Interpreting the Results from Multiple Regression and Structural Equation Models*, 86 BULL. ECOLOGICAL SOC. AM. 283, 285–86 (2005) (describing the error of drawing inferences from unstandardized coefficients and exploring the inferences available based on standardized coefficients).

<sup>298</sup> As has long been known to legal scholars. Cf. Julia Lamber et al., *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 HASTINGS L.J. 553, 582 (1983).



*Clesky* Court feared (or perhaps, as catalytic as its proponents might hope).

A more promising approach to statistical evidence in the criminal justice context is reflected in a 1977 case in which the Court found proof of substantial deviations between a racial group's representation on juries and its presence in the population at large. This evidence, in conjunction with a jury selection system susceptible to abuse, was identified as a prima facie equal protection violation.<sup>299</sup> That is, econometric results provided a basis for inference—not proof per se—much like most other sorts of evidence. In that spirit, the judge tasked with investigating discriminatory intent should embrace statistical findings for their modest, but important, role of evidentiary support.<sup>300</sup> Their general exclusion in the criminal justice context after *McClesky* is especially unfortunate since that context is one in which animus and statistical discrimination are often best flushed out using econometric tools.

#### F. The State of (Evidentiary) Play

Scholars have to date paid little attention to the evolving strategies of proof available to litigants alleging discriminatory intent under the Constitution. But this has been a domain of dramatic and consequential change. This Part has demonstrated that granular shifts in these evidentiary doctrines can and do drive change over the forms and loci of justiciable discrimination, even as the Court makes no formal change to the substantive law of Equal Protection and the Religion Clauses.

The contrast with older doctrine is striking: When it enthroned intent as the axiomatic term in the Constitution's protection of vulnerable social minorities, the Court embraced a broad and varied range of evidentiary tools. This appropriately flexible approach has largely vanished in favor of a more erratic and haphazard methodology.

The Court has offered a range of justifications for refusing to attend to officials' public statements, declining to account for statistical evidence, and ignoring context and history. But these justifications have consistently been flawed. The case for

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<sup>299</sup> See *Castaneda v. Partida*, 430 U.S. 482, 494 n.13, 496–97 n.17 (1977).

<sup>300</sup> By contrast, courts increasingly allow, and even demand, econometric evidence when *agencies* act in the form of cost-benefit analysis. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (requiring agency quantification of costs, as well as benefits); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 226 (2009) (holding that the EPA was permitted to use cost-benefit analysis in the face of an ambiguous statute).

categorical exclusions from the evidentiary toolkit for proving discriminatory intent, therefore, is weak even if one limits the analysis to the considerations proffered by the Justices themselves.

#### IV

#### RECONSTRUCTING THE JUDICIAL TREATMENT OF DISCRIMINATORY INTENT

This Part develops two external critiques of current arrangements for discovering discriminatory intent based on its distributional and epistemic effects. It then articulates the basic elements of a more evenhanded doctrinal framework that accounts for the full range of conceptions of discriminatory intent. As importantly, the approach proposed here does not tilt the playing field away from any subset of meritorious discrimination claims.

My aim in this Part, to be clear, is not to recapitulate the hoary contest between anticlassificatory and alternate concepts of discriminatory intent. Rather, it is to demonstrate that a manageable, principled, and transparent doctrinal structure for evaluating both these and other kinds of discrimination claims is within reach. It could be used instead of current arrangements for discovering discriminatory intent—even as disagreement persists about which conception of discriminatory intent to prioritize.

##### A. The Substantive Effects of Evolving Rules for Discovering Bias

A threshold consequence of changes to the evidentiary approaches to discriminatory intent has been to make certain conceptions of intent increasingly immune from constitutional scrutiny. By opening, closing, or narrowing different evidentiary pathways by which a party asserting a constitutional right might be able to demonstrate an improper motive, the judiciary nudges the burden of constitutional constraint from one institution to another.

Consider an example of the way in which the doctrine pushes judicial scrutiny between different loci of potential discrimination: Large institutions such as schools and universities necessarily operate through the internal promulgation of written regulations and guidance to discrete officials. Their reliance on such guidance—say, when determining admissions or regulating student groups—means they necessarily depend on written commands between hierarchically-situated officials.

The semantic context of such commands is almost always going to be available as evidence in discriminatory intent cases and now will almost always be amenable to discovery.

By contrast, in the criminal justice context, smaller prosecution offices may not need to formalize orders in writing. And if impermissible criteria are invoked in internal documents, it is unlikely that these will be flushed out through litigation after *Armstrong*. Moreover, judicial skepticism about statistical evidence bars the indirect demonstration of impermissible considerations in prosecutorial decisions. Hence, although *McCleskey* and *Armstrong* do not cite each other, they have an important interaction insofar as they simultaneously block the two most important pathways to proving up impermissible intent in the criminal justice context.

This means that it is harder (all else being equal) to discriminate in the school than in the prison or the prosecutor's office. But why should this be so? It is difficult to see how this differential is justified from a normative perspective, especially given what is known about the extent of racial bias in the criminal justice system.<sup>301</sup>

More broadly, the doctrine's prioritization of evidence of semantic content over circumstantial, statistical, or testimonial evidence acts as a subsidy for anticlassification claims in relation to claims based on alternate conceptions of discriminatory intent.<sup>302</sup> One exception is that anticlassification logic loses its force in the criminal law context. This is because the Court has been unwilling to rule on the constitutionality of race-based investigative decisions even when they shade into the use of race as a general proxy for criminal suspicion.<sup>303</sup> On the other side of the ledger, most other claims of discriminatory intent are set up to fail given the lack of relevant evidentiary tools. Again, there is an exception: Where a potentially discriminatory animus or statistical discrimination is the work of an institutional body, and is challenged through post hoc civil litigation—think of the affirmative action or the racial gerrymandering cases—the Court has been willing to entertain

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<sup>301</sup> See sources cited *supra* note 291.

<sup>302</sup> Reva Siegel identifies *Washington v. Davis* as the origin of this phenomenon. See Siegel, *Equality Divided*, *supra* note 48, at 9, 15–23. In contrast, I have argued that it comes later and is a function of the more granular evidence rules documented in Part III.

<sup>303</sup> See *supra* text accompanying note 238 (citing cases); Huq, *supra* note 238, at 2452–56 (criticizing application of Equal Protection rules in the criminal context).

wide-ranging civil discovery to explore how and when impermissible classifications have come into play.<sup>304</sup>

Three more general points emerge from this bird's-eye view. First, the net result of these doctrinal trends is that legislative bodies are more likely to see their work closely scrutinized for bias than executive branch actors. Second, where discretionary policy decisions are not executed through written instructions, but instead via case-by-case determinations (as is the case with prosecutors often and police almost always), it will be harder to prove a discriminatory intent. Third, it is easier to challenge a non-coercive than a coercive policy (i.e., one in the criminal, national security, or immigration contexts), even though the latter entail more immediate and harmful invasions of bodily integrity and liberty.

All this means that as the context of a discriminatory intent challenge moves from legislative handling of a regulatory issue to the exercise of dispersed executive discretion over state coercion, antidiscrimination norms lose their deterrent force. In part, this means not only that courts are more likely to enforce anticlassification norms than other conceptions of discriminatory intent. It also means that the animus and statistical discrimination conceptions are unevenly and somewhat erratically implemented. Hence, what Ian Haney-López condemns as binary “intentional blindness” to bias against minorities grounded on the deliberate refusal to look inside the “minds of government officials,” may be understood also as the results of uneven calibration of different evidentiary implements.<sup>305</sup>

This doctrinal arrangement has two troubling implications. First, it will lead judges to recognize some forms of intent, but not others, as a predicate to their remediation. It hence creates winners and losers among those subject to unconstitutional discrimination. The winners will tend to be social majorities. For the modal form of race-conscious decision-making that is easiest to challenge under this evidentiary dispensation is the codified affirmative action program that promotes the interests of minorities. Establishments that reflect an explicit preference for religious majorities, moreover, are often insulated from review by a doctrinal lens that focuses on tradition rather than semantic content.<sup>306</sup>

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304 See sources cited *supra* note 298.

305 Haney-López, *supra* note 49, at 1853–54.

306 See *supra* text accompanying note 245.

In contrast, the species of discrimination that matter most to racial and religious minorities—in particular, the improper use of discretion by police, prosecutors, and immigration officials—receive the most circumscribed judicial attention as a result of doctrines that preclude the acquisition or consideration of the most probative forms of evidence. It is true that racial gerrymanders receive more capacious attention and “holistic analysis,”<sup>307</sup> but challenges to the use of race in redistricting have an ambiguous distributive effect. When deployed like challenges to affirmative action, they are a means to amplify as well as limit minority voting power. As a result, the evidentiary framework for taking stock of constitutional discriminatory intent tilts against the minority groups and in favor of racial and religious majorities. Rather than being counter-majoritarian, the constitutional law of antidiscrimination tracks the interest of socially dominant groups with impressive precision. It has become an instrument of redistribution from marginalized minority groups to socially powerful majority groups—a symptom, rather than a cure, of the pathologies of hierarchical exclusion that are regrettably common in American history.

Second, the effect of this uneven distribution of judicial resources does not end with the allocation or denial of remedies. Courts are not the only means of remedying social wrongs, but they play a central role in the American context. In particular, the Supreme Court has come to play a dominant role in national life. It enjoys a deep reservoir of sociological legitimacy among the American public.<sup>308</sup> The Court’s rulings on constitutional matters—and by implication, the Court’s implicit judgments about what matters and what does not matter for constitutional compliance—therefore likely shape, at least to some extent, the public’s understanding of the normatively freighted question of whether the Constitution is being followed or violated.<sup>309</sup>

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<sup>307</sup> *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017).e

<sup>308</sup> See, e.g., Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992) (documenting Court’s deep reservoir of public legitimacy); Jeffery J. Mondak & Shannon I. Smiley, *Dynamics of Public Support for the Supreme Court*, 57 J. POL. 1114, 1124–25 (1997) (“Public support for the Supreme Court tends to be both high and stable—aggregate traits that seemingly reveal an institution largely insulated from short-term shifts in public preferences.”).

<sup>309</sup> For evidence of this effect in Establishment Clause cases, see Valerie J. Hoekstra & Jeffrey A. Segal, *The Shepherding of Local Public Opinion: The Supreme Court and Lamb’s Chapel*, 58 J. POL. 1079, 1079, 1096–97 (1996), and Michael A. Unger, *After the Supreme Word: The Effect of McCreary County v. ACLU* (2005)

By selectively shining its spotlight on the existence of discrimination in some domains and not others, the Court helps define what might be called *our common constitutional landscape*. This is our shared sense of the landscape of constitutional rights and wrongs that characterize the polity at a given moment. Uneven allocation of judicial search expenditures makes some kinds of wrongs more salient, and hence more plausible problems for political redress, than others, even if their salience is not supportable on more empirically robust grounds. What follows has been usefully labeled “hermeneutical injustice” by the philosopher Miranda Fricker. This is a phenomenon in which “some significant area of one’s social experience [is] obscured from collective understanding owing to persistent and wide-ranging hermeneutical marginalization.”<sup>310</sup> The doctrine for discovering discriminatory intent, on this view, does not merely fail to redress extant wrongs. It also perpetrates an independent moral harm by reinforcing the nonrecognition of the wide range of discriminatory harms that fall predictably on racial and religious minorities.<sup>311</sup> In so doing, it may well be that our constitutional doctrine of antidiscrimination is likely to “induce indifference, fatalism, and passive injustice.”<sup>312</sup> Paradoxically, constitutional equality doctrine itself may sustain and perpetuate the very structural inequalities it purports to heal.

One final implication of an emphasis upon the hermeneutical quality of the Court’s interventions in social life is that the mechanisms whereby different interest groups can mobilize in federal court have meaningful distributive consequences. By assigning to different factions different shares of the scarce resource of litigation as a means of focusing public attention,

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*and Van Orden v. Perry* (2005) on *Support for Public Displays of the Ten Commandments*, 36 AM. POL. RES. 750, 766–77 (2008). For like evidence on gay rights, see James W. Stoutenborough, Donald P. Haider-Markel & Mahalley D. Allen, *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419, 430 (2006), which explains that “Supreme Court decisions can have a significant impact on public opinion in the area of gay civil rights.” For skepticism of this effect, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 424 (2004), which focuses on the school desegregation cases.

<sup>310</sup> MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER & THE ETHICS OF KNOWING* 154 (2007) (emphasis omitted). A paradigmatic example is the failure to recognize sexual harassment until the 1970s. See *id.* at 149–50.

<sup>311</sup> Across American history, for example, racism has been mutative, taking various forms and flowing variously through both state-sanctioned and social sinews. It was “not fully codified into laws” until the twentieth century. GEORGE M. FREDERICKSON, *RACISM: A SHORT HISTORY* 100 (rev. ed. 2015).

<sup>312</sup> JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 126 (1990).

the law of Article III standing and the various devices for the collective resolution of legal questions in federal court ought to be understood as allocative instruments. They determine who can speak, and have become, for better or worse, the gatekeepers of the quintessential American platform for rendering legible the moral wrongs of society.<sup>313</sup>

### B. Reconstructing the Judicial Toolbox in Discriminatory Intent Cases

But there is no reason to stick with the current asymmetries in doctrinal allocations. It is possible to imagine an alternative doctrinal regime that furnishes a more level playing field than current arrangements. The key to this improvement is implicit in Part III's argument. I spell it out here in detail.

To begin with, it requires principled and consistent judicial explanations for the choice among possible conceptions of discrimination. There are necessarily multiple ways in which race can figure in government decision-making. The Court should acknowledge this diversity and its implications more frankly. Most importantly, diverse forms of impermissible intent will be amenable to different kinds of evidentiary approaches. Current law, with its lacunae and limitations on evidence acquisition, implicitly favors some conceptions of unconstitutional intent over others. A better approach would involve a frank recognition on judges' part of the compelling need for a deep and diverse evidentiary toolkit in dealing with unconstitutional discrimination. It would also entail the abolition of the existing bespoke exceptions, based on deference, hostility to numbers, or a blinkered conception of the relevant transactional frame. All relevant, otherwise-admissible evidence should always be acquired and considered in searching for discriminatory intent. Categorical exclusions and caveats should be uniformly abandoned—including judicial resistance to evidence of unconscious bias and the bench's culpable failure to account for pervasive, structural discrimination.

This approach is warranted on more pragmatic grounds too. A constitutional rule concerning official intent must cover a wide range of institutional and policy contexts. In this regard, it is dissimilar from elements of the Bill of Rights that speak to the discrete and relatively isolated phenomenon such

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<sup>313</sup> My aim here has not been to explain how these asymmetries arose, but it is perhaps worth noting that majoritarian capture of the instruments of progressive redistribution to redress historical injustices is nothing particularly new in American history.

as the criminal trial.<sup>314</sup> An intent-based regime under either the Equal Protection Clause or the Religion Clause must be flexible enough to apply to collective bodies of legislators, citizens engaged in lawmaking through initiatives or referenda, apex officials (such as governors and presidents) charged with the formulation of general policy, and also line-level officials (such as police officers and prosecutors) responsible for the front-line interactions between the state and members of the polity. Moreover, the Constitution's protection of vulnerable minorities extends across different policy domains. Most importantly, it applies to both coercive and noncoercive policy choices.

This institutional and policy variety means that there will inevitably be heterogeneity of institutional form so far as constitutional antidiscrimination rules are concerned. Each distinct institutional actor has its own processes for deliberating on facts and law. Each has its own devices for intervening in the world. It is not plausible to think that the same version of discriminatory intent, and the same instruments for isolating such intent, will be relevant in the thick of street policing, the struggle of legislators to carve up new districts, and the efforts of administrators and teachers to allocate educational resources fairly and efficiently. Given this variety, it is not sensible to constrain artificially the choice of evidentiary instruments. Rather, the full toolkit for discovering discriminatory intent recognized in *Arlington Heights* should avail with no categorical exclusions or presumptions of disfavor.

There is, nevertheless, one arguable exception to this logic in relation to the judicial review of legislative action. This concerns judicial reliance on voters' preferences. It is extremely hard in most instances to connect voters' preferences on a specific policy to their action in the voting booth, and then to the behavior of elected actors. The analysis of polling data can point toward a rough demographic profile of a majority coalition.<sup>315</sup> But even sophisticated analysis will not, except in the

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<sup>314</sup> See, e.g., U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

<sup>315</sup> See Jonathan T. Rothwell & Pablo Diego-Rosell, *Explaining Nationalist Political Views: The Case of Donald Trump* 1 (November 2, 2016), <https://ssrn.com/abstract=2822059> (finding that "living in racially isolated communities with worse health outcomes, lower social mobility, less social capital, greater reliance on



most unusual cases of single-issue campaigns, isolate public sentiments on specific issues. Moreover, many people in practice rely on their religious convictions when voting.<sup>316</sup> Accounting for these preferences in a constitutional calculus might constrict legitimate public political deliberation in untenable ways.<sup>317</sup> Accordingly, it will ordinarily be the case that evidence of voters' intentions will not be relevant to an understanding of the "intent" of a law in this context.<sup>318</sup>

But this exclusion may well not be problematic. In contrast to most administrative actions or exercises of executive discretion, legislators' actions tend to be relatively public and high visibility. Well-developed arrangements for lobbying and influencing legislators also already exist. It might hence be thought that legislation (as opposed to executive actors, especially when dispersed and relatively unsupervised) requires the least constitutional supervision. As a result, exclusion of one source from which to infer the motive behind legislation is not problematic.

Otherwise, however, the time is ripe to return to a more evenhanded and catholic evidentiary apparatus in grappling with the many varieties of discriminatory intent barred under the Equal Protection and Religion Clauses.

#### CONCLUSION

The granular ways of implementing grand, abstract ideas such as 'discriminatory intent' turn out to be highly consequential on the ground. They shape the practical sense of constitutional guarantees. My aim here has been to tease out an array of clashing and contesting ideas that lie behind that seemingly unitary concept of discriminatory intent. Such conceptual diversity might well be beneficial, if it works to capture the various ways in which impermissible classifications find their way into government decision-making. Yet we must take care to avoid an evidentiary apparatus that skews the alloca-

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social security income and less reliance on capital income, predicts higher levels of Trump support").

<sup>316</sup> See Brad Lockertbie, *Race and Religion: Voting Behavior and Political Attitudes*, 94 Soc. Sci. Q. 1145, 1155 (2013) (finding that "there are meaningful differences [in voting] across religious groups in the United States").

<sup>317</sup> For an illuminating treatment, see Kent Greenawalt, *Religion and Public Reasons: Making Laws and Evaluating Candidates*, 27 J.L. & POL. 387, 405 (2012), who writes that "[f]or many people, their religious convictions and affiliation are an important part of who they are."

<sup>318</sup> An exception to this resistance may be warranted when the public is motivated by animus. See *supra* text accompanying note 144.

tion of judicial resources away from some deserving litigants toward others. Achieving that level playing field requires no dramatic doctrinal fix. What it entails is rather a return to the appropriately capacious and flexible way in which the Court initially proposed to discover unconstitutional discriminatory intent when that notion first seized the Justices' imagination. It is, therefore, a rare instance that justifies a return to first principles by appeal to forward-looking considerations.