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Judging Discriminatory Intent

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Forthcoming in 103 *Cornell Law Review* – (2018)

Abstract

The Constitution's protection of racial and religious groups is organized around the concept of discriminatory intent. The Supreme Court, however, has never provided a crisp, single definition of 'discriminatory intent' applicable across institutions and among policy contexts. Instead, current jurisprudence tacks among several competing conceptions. Amplifying doctrinal complexity, the Court has taken conflicting approaches to the practical, and consequential, question of how to go about substantiating impermissible motives with admissible evidence. Although the Court's pluralistic conception of intent is plausible and perhaps even unavoidable, its lack of any principled approach to the practical question of how to sift and weigh evidence of unconstitutional motive is not defensible. Instead, the current doctrinal apparatus for the discovery of discriminatory intent has hidden regressive effects as between different plaintiffs and between different defendants. It further influences the available flow of information about discrimination in ways that compound and entrench those distributive effects. I suggest a revised doctrinal framework that acknowledges conceptual pluralism in the constitutional law of antidiscrimination, but that reorients the evidentiary framework for demonstrating discrimination intent to mitigate the presently distorted allocation of judicial resources.

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Judging Discriminatory Intent

Introduction

“Discriminatory intent” is a central term in the judicial interpretation of constitutional clauses requiring the equal treatment of persons notwithstanding race, ethnicity, or religion.¹ The centrality of intent is not apparent from the text of the First Amendment’s Religion Clauses or the Fourteen Amendment’s Equal Protection Clause.² Indeed, it is possible to imagine a jurisprudence of constitutional immunity for natural persons from invidious discrimination that does not hinge upon the subjective, psychological state of the defendant state actor.³

The central role of intent in the doctrinal articulation of individual rights against unconstitutional discrimination is a surprisingly recent doctrinal phenomenon. 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.”⁴ The *Palmer* Court’s declaration, to be sure, is carefully calibrated. It carefully skirted prior judicial accountings of legislative intent in early twentieth century federalism⁵ and Establishment Clause⁶ domains, while putting to one side prior judicial challenges to the racially discriminatory actions of specific

¹ 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 petitioner 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, i.e., if “the omission of these synagogues were intentional”); accord 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”).

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

³ For a leading example of such a theory, see Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); see also David Alan 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).

⁴ *Palmer v. Thompson*, 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) (“The 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.” (citation omitted)).

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

⁶ See, e.g., *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”); *Board of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243 (1968) (looking at the “purpose” of a measure to ascertain compliance with the Establishment Clause).

officials.⁷ 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.

Nevertheless, the *Palmer* Court's suspicions have proved 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.⁸ The Justices subsequently underscored in categorical terms that officials must not act on the basis of a preference for one religious denomination.⁹ Two years after *Palmer*, Equal Protection jurisprudence began to change course when the Court in a critical school desegregation case cautioned against any impermissible "[p]urpose or Intent to segregate."¹⁰ And three years after that, in the landmark decision of *Washington v. Davis*, it held that a "discriminatory racial purpose" was "necessary" to state an Equal Protection violation.¹¹ 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,¹² it pivoted sharply in early 1990s to a standard in which discriminatory intent played a central role.¹³ As 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 prove up an allegation of improper motivation? The federal judiciary has not homed in upon a single definition of discriminatory intent, or a consistent approach to the evidentiary tools through which it is substantiated. Instead, studied ambiguity in doctrinal formulations means that judges have acquired a large measure of discretion in resolving constitutional discrimination cases. Their leeway flows from an implicit ability to tack between different conceptions of discrimination, and further between various mechanisms by which its allegation can be substantiated. The aim of this Article is to offer a cartography of discriminatory intent's

⁷ Cases that are difficult to explain without accounting for intent include *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (invalidating oddly shared boundary drawn around the city of Tuskegee as motivated by race); *Hunter v. Erikson*, 383 U.S. 386, 391 (1969) (invalidating housing ordinance that placed a "special burden" on racial minorities). Indeed, some of the first Equal Protection cases concerned discriminatory enforcement of the laws. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating conviction of a Chinese national prosecuted in a pattern of discriminatory enforcement of a San Francisco ordinance concerning laundries).

⁸ *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."

⁹ *Larson v. Valente*, 456 U.S. 228, 254 (1982) (condemning a state rule because of its "express design—to burden or favor selected religious denominations")

¹⁰ *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973).

¹¹ 426 U.S. 229, 240 (1976).

¹² *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹³ 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 *Employment Div., Dep't of Human Res. of Oregon 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").

competing strands, and to offer a critique of the way in which those threads are presently woven together.

The idea that simple doctrinal terms can mask deep disagreement is hardly novel. While few should be surprised that ‘discrimination’ has been productive of dissonance, an illustrative range of its divergent judicial uses from the summer of 2017 is helpful to motivate the analysis.¹⁴ Three are from the Supreme Court. One is from a state trial court, but usefully illustrates a legal question about discrimination that the Justices rarely entertain.

- In March 2017, the Supreme Court rejected a long-standing prohibition on post-trial inquiry into juror behavior to hold that a Colorado trial court should have allowed testimonial evidence that a juror relied on “racial stereotypes or animus to convict a criminal defendant.”¹⁵ The dissenting Justices agreed that such discriminatory intent was pernicious and unconstitutional, but argued that the stability of the common-law rule against impeaching jurors outweighed the costs of verdicts tainted by such intent.¹⁶ Had the dissenters prevailed, cases where a biased juror does not reveal her bias until the eve of verdict would have lacked any airing of discriminatory intent’s role.
- In a second decision, 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.¹⁷ No Justice blinked at the use of trial testimony this time. Nor did they abjure statistical evidence (even though it had previously been repudiated in the criminal context).¹⁸ But unlike the jury bias case, however, 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.
- To see the absence of judicial inquiry into discriminatory intent, it is necessary to look beyond the Supreme Court. 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 Philandro Castillo.¹⁹ Although race loomed large in public debate about the incident—one of many high-profile police shootings of Africa-Americans—the

¹⁴ My analysis focuses on constitutional, rather than statutory antidiscrimination, jurisprudence. Different frameworks of burden-shifting have developed, and the kinds of evidentiary issues addressed in Part III that arise in considering government action do not arise.

¹⁵ *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

¹⁶ *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 . . .”).

¹⁷ *Cooper v. Harris*, 137 S. Ct. 1455, 1475 (2017).

¹⁸ 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).

¹⁹ 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>.

prosecution's case rested on evidence from an expert in police force,²⁰ and featured neither testimonial nor empirical inquiry into Officer Yanez's potential biases. For instance, jurors heard nothing about experimental psychology data that points towards a persistent but unconscious racial differential in police willingness to shoot.²¹ As a result, the trial process marginalized the potential role of race in police violence cases.

- 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.²² Because the so-called 'travel ban' had been challenged on Establishment Clause grounds for establishing a religious preference, the case presented the question 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 (and arguably explicitly embraced as) the one promised during the campaign.²³ Despite the use of 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 Office Yanez, testifying.²⁴

These cases—all from a single four-month period in 2017—suggest judicial use of the term discriminatory intent is widespread. Yet they also pivot on quite different conceptions of discriminatory intent. Bias can be invidious; neutral and functional; a matter of the classifications used by state actors; or perhaps implicit and unconscious. Moreover, the cases are suggestive of uncertainty in regard to the evidentiary strategies that may be employed to surface relevant motivation. Official statements, statistics, extrinsic circumstances, and the routine tools of discovery such as depositions and interrogatories—all these float in and out of view.

It should not surprise anyone that ideas of 'discrimination' and 'discriminatory intent' should prove controversial. To the extent they are entangled with notions of equality, it has long been clear that the latter is "itself ... many different notions, each an

²⁰ 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/>.

²¹ 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 PSYCH. COMPASS 201, 207 (2014) (concluding on the basis of several experimental studies that police have a "prepotent tendency to shoot" African-American subjects, but exploring ways this tendency can be managed through training).

²² Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977.

²³ *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2086 (2017) (per curiam). The Court here uses 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.

²⁴ *Id.*

element in its grammar.”²⁵ A recent wave of philosophical reflection on the term discrimination, moreover, has revealed a range of possible understandings of the term. These efforts have not led to a focus on intent in the constitutional sense. 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.²⁶ Benjamin Eidelson concurs that “core cases of wrongful discrimination” involve acts that “manifest disrespect for the discriminatees as persons.”²⁷ 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.”²⁸ In somewhat similar terms, Sophie Moreau offers a liberty-based account of antidiscrimination law as a protection of “deliberative freedom” to make decisions about how to live “insulated from pressures stemming from extraneous traits.”²⁹ When sophisticated exegetes of the moral right of discrimination diverge so widely, we should not be surprised when Justices—who are walled apart by both partisan and jurisprudential disagreements—should come to vest a single term with many different meaning.

My aim in this Article is hence neither to adjudicate between competing philosophical accounts of discrimination nor to castigate the Justices for their inconstancy. 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 the end, the Article maps out two sources of judicial discretion in constitutional doctrine.³⁰ The first involves the *kind* of discriminatory intent alleged. The second concerns the *manner* in which it is proved or refuted in different institutional contexts. How courts translate and then implement the general idea of discriminatory intent determines how and when norms embedded in the First and

²⁵ DOUGLAS RAW, 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”).

²⁶ 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) (“[D]iscrimination is wrong when it is demeaning. . . . Demeaning has two parts, which I call 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.”).

²⁷ BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT 6 (2015).

²⁸ TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 91 (2015).

²⁹ Sophia Moreau, *What Is Discrimination?*, 38 PHIL. & PUB. AFF. 143, 147 (2010).

³⁰ 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, 1159 (2017) (advocating a recklessness model); Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, U. ILL. L. REV. 1, 13-14 (2013) (suggesting that a negligence standard has not been adopted). This is a distinct normative inquiry from the taxonomical analysis I pursue here.

Fourteenth Amendment check official action.³¹ Accordingly, by carefully parsing the ways in which these ‘what’ and ‘how’ questions have been answered, it is possible to develop a better understanding of the normative choices implicit in the present doctrine—and in particular to identify a set of distributive consequences.

Consider first what the term ‘discriminatory intent’ means when it comes to traits such as race, ethnicity, alienage, and gender.³² The term is commonly used interchangeably with words like motivation, purpose, and animus. It can profitably be understood to encompass legal theories of antidiscrimination account for the mental state of the alleged malefactor. Intent is hence commonly understood as distinct from, and even at war with a consequence-focused conception of disparate impact.³³ In this Article, I use the term ‘discriminatory intent’ to capture any theory of antidiscrimination liability that turns on the psychological processes of the alleged discriminator. This means that my taxonomy and analysis capture as much of the law as possible. Moreover, it enables consideration of the extent to which core conceptions of discrimination are related to what at first blush might seem unrelated concepts, such as a ‘colorblind’ anticlassification rule.

With that in mind, the seemingly simple concept of discriminatory intent can be disaggregated into at least five distinct strands. First, perhaps the most intuitive meaning of discriminatory intent is action taken as a result of “a bare congressional desire to harm

³¹ 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].” *Hefferman 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. Now 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 content this function is explicit in doctrinal formulations, or that judges directly ascertain the motives of official actors. *Id.* Similarly, 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. Oregon*, 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.

³² The idea of discrimination also arises under the Dormant Commerce Clause. *See, e.g.*, *South Cent. Bell Telephone Co. v. Alabama*, 526 U.S. 160, 169 (1999). 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.

³³ 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. 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).

a politically unpopular group,”³⁴ or another aversive view of the group. Second, constitutional scrutiny can also be triggered when a suspect classification is used not out of a desire to harm, but because it is a more efficient source of information about how to achieve a licit goal than readily available alternatives. Race, for example, might be thought to predict partisan identity. Or religion can be taken as a proxy for terrorism risk. (This is distinct from the idea that a licit trait might be employed as a proxy for an impermissible criterion). 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.³⁵ The latter is easy to view as focused on the content of the law, rather than the quality of decision-makers intentions.³⁶ 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 is also necessarily concerned with the quality of official intentions, in addition to the content of legal texts. Fourth, an impermissible classification can work a marker of the boundary between two hierarchically arranged social groups even when applied in a seemingly neutral and even-handed way. This ‘social group polarization’ approach illuminates several early decisions concerning laws that formally applied in even-handed ways, but 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 failure to account for structural inequalities.

These different conceptions are 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. Each of these aforementioned conceptions, as a result, can be glimpsed at work in the Court’s constitutional jurisprudence of discriminatory intent. 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 raise substantial normative questions because it can reflect differential evaluation of the importance of discrimination-related harms depending on the identities of the perpetrator and the state actor.

There is a second reason why the jurisprudence of discriminatory intent remains unpredictable. The presence of discriminatory intent can be proved up in one of a number of ways. Five evidentiary tactics stand out. 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, she 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, it some

³⁴ *United States Department of Agriculture v Moreno*, 413 US 528, 534 (1973).

³⁵ 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.”).

³⁶ *Cf. id.* (identifying intentional discrimination as a supplement case that might “also” count as a violation of the anticlassification principle, and not a core case).

cases the motivations of the relevant government actor can be directly probed using 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 in the mid-1970s, when intent was first coming into its doctrinal ascendancy, the Court has since backpedalled, albeit in fits and starts, and without any 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. This untheorized and sub rosa reorientation of constitutional antidiscrimination law should provoke concern not only because it 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. Further, I will argue, the Courts reallocation of evidentiary resources reflects flawed institutional and predictive judgments.

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,³⁷ or the cyclic resurgence of contestation about affirmative action.³⁸ 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 public sphere. Their influence on officials empowered with the enormous discretionary authorities of government today cannot be dismissed out of hand. In this context, rigorous and fair-minded thinking about how to define and discover discriminatory intent is surely warranted.

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.³⁹ Questions of how

³⁷ See Roland G. Fryer, Jr, *An Empirical Analysis of Racial Differences in Police Uses of Force* 3 (July 2016), http://scholar.harvard.edu/files/fryer/files/main-july_2016.pdf (identifying racial disparities in use of police force, but not police shootings).

³⁸ 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&rref=us&action=click&pgtype=Homepage&module=well-region®ion=bottom-well&WT.nav=bottom-well> (noting renewed interest among political branches for enforcing limits on affirmative action).

³⁹ 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, 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. In addition, Richard Fallon has offered a searching critique of the idea of legislative intent more generally. 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

discriminatory intent is defined and proved tend to be ancillary and subordinate to a larger critique of the ideological orientation of the doctrine.⁴⁰ In contrast, the only extended study of the manner by which judges discover discriminatory intent is almost twenty-years old.⁴¹

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 observation that ‘intent’ is 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 on the evidentiary instruments available for identifying impermissible motives. One inference that follows from the taxonomy is the absence of any obvious or neutral work 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 critique of the Court’s observed choices on the basis of their distributive and epistemic effects—that is, the way in which they allocate scarce judicial resources between different victims of discrimination, and the way in which they have the potential to shape public understandings of discrimination’s moral harm.

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, e.g., 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 (2015).

⁴⁰ 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, 1815-6. Unlike Haney-López, I do 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.

⁴¹ See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 *GEO. L. REV.* 279 (1997). Selmi’s central claim is that “the Court has only seen discrimination, in the most overt or obvious situation—situations that could not be explained on any other basis than race.” *Id.* at 284. 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. 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 that foreseeable harms should be treated as intentional. Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 *HARV. C.R.-C.L. L. REV.* 517, 519-20 (2010).

I. The Rise and Rise of Discriminatory Intent

This Part recapitulates 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. I discuss case-law on other suspect classifications and fundamental rights only insofar as they are pertinent to the ascendancy of intent.

A. The Equal Protection Clause.

Enacted later, but interpreted quicker than other parts of the Constitution, the Equal Protection Clause 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.⁴² There was nothing inevitable about this doctrinal move. The Court’s first major interpretation of the Clause, in the 1879 case of *Strauder v. West Virginia*, did not hinge on intent.⁴³ *Strauder* concerned a state statute that limited jury service to “white male persons . . . twenty-one years of age.”⁴⁴ Invalidating the conviction of an African-American man under this regime, the Court found the failure of formal equality on the face of the statute to violate the Constitution’s “immunity from inequality of legal protection” without looking at its drafters’ intentions.⁴⁵ It was the “statute,” the Court explained, that “discriminated” in the sense of unevenly extending the protection of state law.⁴⁶ Later cases suggested that the complete exclusion of African-Americans from juries could be prima facie evidence of a constitutional violation,⁴⁷ and that defendants were constitutionally entitled to introduce evidence of such exclusion.⁴⁸ But the analytic focus of jury exclusion cases did not pivot far before the Court imposed increasingly stringent evidentiary requirements that effectively foreclosed *Strauder* challenges.⁴⁹

Seven years after *Strauder*, however, in *Yick Wo v. Hopkins*, the Court was presented with a habeas petition from a Chinese national convicted under a San Francisco municipal ordinance for the licensing of laundries.⁵⁰ Although the petitioner attacked the

⁴² 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.

⁴³ 100 U.S. 303 (1879).

⁴⁴ *Id.* at 308 (citation omitted).

⁴⁵ *Id.* at 310.

⁴⁶ *Id.* For an extension of this logic, see *Pace v. Alabama*, 106 U.S. 583, 584 (1883) (rejecting a challenge to a statute that imposed higher penalties on inter-racial 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 offense, to any greater or different punishment”).

⁴⁷ *Neal v. State of Delaware*, 103 U.S. 370, 397 (1880).

⁴⁸ *Carter v. State of Texas*, 177 U.S. 442, 449 (1900).

⁴⁹ 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).

⁵⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 356 (1886)

ordinance both on its face and as applied, the Court focused solely on the motives behind the exercise of prosecutorial discretion.⁵¹ The Justices focused on how the ordinance had been enforced against Chinese nationals, but not non-Chinese, to draw an inference about the “hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified.”⁵² Absent evidence of discriminatory intent, the Court was to clarify in a later case (again, involving regulatory consistency in San Francisco), no Equal Protection challenge would stand.⁵³ *Stauder* and *Yick Wo* thus reflect distinct doctrinal potentialities embedded in the Equal Protection Clause.⁵⁴

Yick Wo’s immediate implications, as is well known, 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 nonetheless forestalled inquiry into the motives of state actors by suggest that any “badge of inferiority” flowing from segregation arise “because the colored race chooses to put that construction upon it.”⁵⁵ In so doing, *Plessy* undercut arguments about official intent by placing blame for racial stratification on “social preferences” and the “general sentiment of the community.”⁵⁶ Since the Justices then likely approved of racial segregation as public policy,⁵⁷ they were hardly likely to perceive improper motive at work at work in Louisiana’s segregation of railroad passengers.⁵⁸

Only in the late twentieth century, as the Court worked though the implications of the majestic generalities of *Brown v. Board of Education*⁵⁹ did the role of intent came to the fore once more. *Brown* repudiate *Plessy*’s conclusion that de jure segregation had no direct impact on African-Americans’ “status in the community.”⁶⁰ But otherwise the Court’s opinion in *Brown* did not clarify “which conception of discrimination [the Court]

⁵¹ *Id.* at 373.

⁵² *Id.* at 374.

⁵³ *Ah Sin v. Wittman*, 198 U.S. 500, 508 (1905) (noting that petitioner had failed to show that there were non-Chinese-owned establishments that had been spared enforcement).

⁵⁴ The theme of normative pluralism runs like through the best historical scholarship on the Fourteenth Amendment’s enactment. 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”); accord DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 349 & n.143, 350 n.148 (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 *Stauder* and *Yick Wo*.

⁵⁵ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

⁵⁶ *Id.* at 551.

⁵⁷ Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 332 (1998).

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

⁵⁹ 347 U.S. 483 (1954).

⁶⁰ *Id.* at 494.

embraced, or how far the principle of [Equal Protection] extended.”⁶¹ 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.”⁶² Only when the city of Jackson, Mississippi, closed its public swimming pools to avoid court-ordered integration was the Court confronted with a state action clearly motivated by an improper animus and also evenhanded in its semantic content and effect.⁶³ A closely divided Court held that the “bad motives” of the measures legislative supporters did not bear on its constitutionality.⁶⁴

This rule did not endure. Faced with a turn by lower courts to a disparate impact standard,⁶⁵ the Court in 1976 in *Washington v. Davis* held that “the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”⁶⁶ Much criticized as the time, *Washington* explicitly rested on a concern about the destabilizing effects of a constitutional effects rule. But the fact the Court had a clear idea of what it disfavored did not mean it understood the alternative approach standard it was embracing.⁶⁷ Indeed, because the Justices in *Washington* faced a record with no evidence of such invidious purpose,⁶⁸ they had no need do no more than reject a disparate impact standard (albeit without, necessarily rejecting evidence of a disparate impact as probative of a discriminatory intent). It had no need to reckon with the different ways an impermissible classification might figure in a decisional process.

Nor did the cases that followed immediately on *Washington v. Davis*’s heels elucidate those questions. Instead, the Court initially took a sweeping view of the kinds of evidence admissible to demonstrate discriminatory intent⁶⁹—an element of the doctrine I shall explore at greater length below—and a narrow view of when the Constitution was violated in cases of mixed motives.⁷⁰ But it became rapidly apparent that the Court’s

⁶¹ David Strauss, *Discriminatory Intent and Taming of Brown*, 59 U CHI. L. REV. 935, 947 (1989) [hereinafter “Strauss, *Discriminatory Intent*”].

⁶² Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 296 (1991).

⁶³ *Palmer v. Thompson*, 403 U.S. 217 (1971).

⁶⁴ *Id.* at 225; for early critical commentator 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.

⁶⁵ See, e.g., *Davis v. Washington*, 512 F.2d 956 (D.C. Cir. 1975), *rev’d*, 426 U.S. 229 (1976); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm.*, 482 F.2d 1333 (2d Cir. 1973).

⁶⁶ *Washington v. Davis*, 426 U.S. 229, 240 (1976).

⁶⁷ *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 . . .”). For early criticism, see Theodore Eisenberg, *Disproportionate Impact or Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977).

⁶⁸ 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.

⁶⁹ See, e.g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Castaneda v. Partida*, 430 U.S. 482 (1977).

⁷⁰ See *Personnel Admr. v. Feeney*, 442 U.S. 256, 279 (1979) (proof of discriminatory purpose requires showing that 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

approach to allegations of unconstitutional bias against a protected group were not bound by any disciplining procedure or logic. Instead, they could oscillate abruptly between cases. An example of such inconsistency is the different treatment of circumstantial evidence can be 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,⁷¹ while the other generated a careful tallying of such clues.⁷² Unsurprisingly, the two cases yielded different results.

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 encumbering sense of a fixed point of analytic departure, the Supreme Court developed a doctrinal framework in which subtly distinct notions of intent played a role. Within the race context, the Court increasingly devoted its scarce resources to the government's use of "race-based measures" that classified using race on their face.⁷³ 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.'"⁷⁴ As we shall see in Part II, its approach to allegations of improper bias against minorities has oscillated wildly, yielding inconsistent results across cases.⁷⁵ In a different line of cases, it has emphasized that "a bare ... desire to harm a politically unpopular group" is a governmental motive that clashes with the Equal Protection Clause.⁷⁶ And in the context of rules that overtly classify by gender, after some wobbling,⁷⁷ the Court has settled into

narrowed the kinds of intention that counted for the constitutional purposes by excluding cases in which racial effects were anticipated but 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 39, 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.

⁷¹ *Mobile v. Bolden*, 446 U.S. 55, 73 (1976) (describing evidence of bias as most tenuous and circumstantial). *But see* Selmi, *supra* note 41, 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).

⁷² *Rogers v. Lodge*, 458 U.S. 613, 625-26 (1982) (carefully accounting for evidence of bias and invalidating Burke County, Georgia's redistricting scheme).

⁷³ *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.").

⁷⁴ *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)).

⁷⁵ *See infra* Part II.B.

⁷⁶ *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973); *see also Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., 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. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (describing the bare desire to harm as an "improper animus or purpose"); *accord Romer v. Evans*, 517 U.S. 620, 634 (1996).

⁷⁷ For example, the Court that pregnancy discrimination in state insurance coverage fell outside the compass of Equal Protection was 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* fails to inquire into stereotypes or impermissible intent, placing it in the category of disparate impact cases (although one that was likely wrongly decided even on those terms).

the practice of asking whether a legal distinction is “in reliance on [s]tereotypes about women's domestic roles.”⁷⁸

Hence, while the idea of “discriminatory intent” has since 1976 served as an organizing principle in Equal Protection jurisprudence, the Court has not hewed to a clear and specific understanding of such “intent.” 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. And yet other lines of case 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 diverse since 1976.

B. The Religion Clauses

Government motive—and in particular an intention to discriminate either for or against religion, or between denominations—has loomed large since the inception of Establishment Clause jurisprudence. It has also come to play an increasing pivotal role in Free Exercise cases since the early 1990s. As in the Equal Protection context, the Court has identified the government actor’s intentions as analytically pivotal, rather than its consequences, or its impingement on some fixed and discernable “immunity” that a private individual can assert under the Constitution.⁷⁹ 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.’ But still the doctrine at its core maintains, albeit as one element of many, an idea that certain motivations are unconstitutional because they entail a discrimination on religion-related grounds.⁸⁰

⁷⁸ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017) (citing *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (expressing similar concern about laws based on “archaic and overbroad generalizations”); accord *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring). The intent requirement in gender Equal Protection jurisprudence has traveled a crooked path. Klarman, *supra* note 62, 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. *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 (1968). *Michael M.*, 450 U.S. at 472 n.7.

⁷⁹ 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.”).

⁸⁰ My reading of the doctrine differs from others who find intentionality only in very recent Supreme Court doctrine. Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 302 (2015) (dating the role of intent in Establishment Clause analysis to the 2015 case of *Town of Greece v. Galloway*).

Until 1947, the Supreme Court had decided only two Establishment Clause cases. Neither of those left any enduring impact upon the law.⁸¹ In its first major engagement with the Clause, the Court upheld a decision by Ewing Township, New Jersey, to provide free transportation to all non-profit schools, including sectarian ones.⁸² 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.”⁸³ Fourteen years later, upholding Maryland’s Sunday closing laws, the Court subtly reformulated the doctrinal test to train upon the “purpose and effect” or challenged laws.⁸⁴ 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.”⁸⁵ And by 1971, the requirement of “a secular legislative purpose” seemed a touchstone of Establishment Clause analysis.⁸⁶ In many cases, this litmus test for constitutionality resulted in a close examination of the state’s proffered justifications for a statute—often involving some form of aid to sectarian educational institutions—to ascertain whether they were pretextual, rather than an exposition of what how “purpose” in this context was conceptualized or ascertained.⁸⁷ In other cases, the Court disapproved of government action on the ground that it was intended “to endorse or disapprove of religion.”⁸⁸

Purpose plays a role now in two 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 case concerns the posting of the Ten Commandments in classrooms, but there are endless variants.⁸⁹ 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 concern a mental state of ‘discrimination,’ that is, in roughly the same way affirmative action. The latter trigger strict scrutiny not because they are taken to be animated by a hatred of Caucasians, but rather “because racial characteristics so

⁸¹ Both involved federal spending on sectarian institutions. *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (sectarian schools); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (religiously affiliated hospital).

⁸² *Everson v. Bd. of Ed. of Ewing Township*, 330 U.S. 1 (1947)

⁸³ *Id.* at 316.

⁸⁴ *McGowan v. State of Md.*, 366 U.S. 420, 445 (1961).

⁸⁵ *Sch. Dist. of Abington Twp., Pa. 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. *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.”).

⁸⁶ *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); *accord Mueller v. Allen*, 463 U.S. 388, 394, (1983); *Wolman v. Walter*, 433 U.S. 229, 236 (1977).

⁸⁷ *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.”); *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 687 (1970) (endorsing proffered reasons).

⁸⁸ *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

⁸⁹ *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.”); *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.”).

seldom provide a relevant basis for disparate treatment”⁹⁰ Establishment Clause scrutiny of positive religious distinctions, by analogy, can be understood as constitutional suspect in part because such classifications are also “so seldom ... relevant.”

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.⁹¹ The defendant counties had initially posted large, prominently visible replicas of the Decalogue in courtrooms. Once challenged, they twice change their exhibits to include an increasing plurality of secular images, including the Magna Carta and the Declaration of Independence.⁹²

Writing for a plurality, Justice Souter rejected the counties’ submission that the idea of purpose was too inchoate to be operationalized by citing cases—including *Washington v. Davis*—in which purpose was a touchstone of constitutional validity.⁹³ An understanding of “official objective emerges from readily discoverable fact,” argued Justice Souter, pointing to the various contextual clues that could illuminate such purpose. At the same time, he conceded that a strategic governmental actor could obscure her motive, but contended that this posed no conclusive concern. In the Establishment Clause, Souter argued, “secret motive stirs up no strife and does nothing to make outsiders of nonadherents.”⁹⁴ This might be read to suggest that the Establishment Clause is necessarily under-enforced. Alternatively, it might be understood to connote that the Clause 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 is more plausible. To 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.”⁹⁵ Justice Souter’s statement simply acknowledges that fact. More substantively, imagine a case in which official 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 official produce persuasive 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.⁹⁶

⁹⁰ *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)).

⁹¹ *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

⁹² *Id.* at 851-56.

⁹³ *Id.* at 861.

⁹⁴ *Id.* at 863.

⁹⁵ Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 585 (2011) (footnote omitted).

⁹⁶ For the concept of endorsement, see, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (asking 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

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 the funds from nonmembers.⁹⁷ In so doing, explained the Court, the statute drew “explicit and deliberate distinctions between different religious organizations” depending on age and size.⁹⁸ The Court could have limited its analysis to the face of the statute, and indeed some commentators treat *Larson* as a case about “religious classifications” alone.⁹⁹ But it 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.’”¹⁰⁰ A denominational preference, therefore, exists not only when there is facial discrimination, but also when there is an intent or “design” to “burden or favor selected religious denominations.”¹⁰¹

The path of Free Exercise doctrine has been more erratic, and the emergence of discriminatory intent—foreshadowed somewhat in cases such as *Larson*—came later. 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.”¹⁰² Its

they are insiders, favored members of the political community”); see also *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 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 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. *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas J. dissenting from denial of certiorari).

⁹⁷ *Larson v. Valente*, 456 U.S. 228, 230 (1982) (describing Minnesota Charitable Solicitation Act, Minn. Stat. §§ 309.50–309.61).

⁹⁸ *Id.* at 246 n.23.

⁹⁹ E.g., Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 324 (1995).

¹⁰⁰ *Larson*, 456 U.S. at 254. In other cases involving a denominational preference challenge, however, the Court did limit itself to the face of the statute. *Hernandez v. C.I.R.*, 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. *Children’s Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000).

¹⁰¹ For similar statements that seem to turn on government intent, see *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–9 (1989) (“It 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.’”); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989) (“Whatever 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”).

¹⁰² *Reynolds v. United States*, 98 U.S. 145, 164 (1878). But see *Murdoch v. Commonwealth of Pennsylvania*, 319 U.S. 105, 112 (1943) (invalidating municipal license tax on the same of religious pamphlets as an improper “condition to the pursuit of” religious activities). It is noteworthy here that *Reynolds* and *Murdoch* alike involved religious minorities—Mormons and Jehovah’s Witnesses—that were at the time subject to considerable public contempt and discrimination. 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

contemporary revival began with the 1963 decision of *Sherbert v. Verner*, in which the Court invalidated a South Carolina unemployment compensation statute that excluded those who declined employment on a Saturday—a measure with an unequivocal “secular purpose,” as the dissenting Justice Harlan noted.¹⁰³ *Sherbert* marked the beginning of a sequence of Free Exercise decisions focused on the *effects* of challenged laws.¹⁰⁴ 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.¹⁰⁵ 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.”¹⁰⁶

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.¹⁰⁷ In *Employment Division v. Smith*, the Court rejected Free Exercise protection from the incidental burdens on religious liberty created by neutral, generally applicable rules.¹⁰⁸ 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.¹⁰⁹ As in *Washington v. Davis*, judicial rejection of a test focused on consequences turned on its anticipated destabilizing consequences rather than the merits of a competitor doctrinal measure.¹¹⁰ 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

(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.

¹⁰³ *Sherbert v. Verner*, 374 U.S. 398, 421 (1963) (Harlan, J., dissenting).

¹⁰⁴ See, e.g., *Frazer v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 832 (1989); *Hobbie v. Unemp’t Appeals Comm’n*, 480 U.S. 136, 137 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 709 (1981).

¹⁰⁵ *McDaniel v. Paty*, 435 U.S. 618 (1978).

¹⁰⁶ *Id.* at 641.

¹⁰⁷ See Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1264 (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 (2016); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (applying RFRA to 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. *Hosana-Tabor Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 709 (2012). Neither of these lines of doctrine hinges on intent.

¹⁰⁸ 494 U.S. 872, 879 (1990).

¹⁰⁹ 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; Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 138–39 (1992).

¹¹⁰ *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.

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” and hence in violation of the Free Exercise Clause.¹¹¹

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

In both the Equal Protection and the First Amendment Religion Clause contexts, the Supreme Court has moved from a focus on effects to an analysis trained in government’s discriminatory intent or purpose. 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 conservative over the last few decades, the purpose-focused strand of Establishment Clause has come under increasing pressure, with one Justice even suggesting that denominational preferences could be acceptable provided they tracked the historical dominance of certain faiths.¹¹² 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 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,¹¹³ programs of state aid that predictably promote sectarian institutions,¹¹⁴ and official representations that endorse and promote religion.¹¹⁵

This partial congruence between the doctrinal treatments of race and religion is by no means an obvious or inevitable development. Although religion is sometimes

111. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32, 546 (1993); *id.* at 534 (“The Free Exercise Clause protects against governmental *hostility* which is masked, as well as overt” (emphasis added)).

¹¹² *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 888–94 (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.

¹¹³ *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding rotating prayers at the beginning of town’s meetings).

¹¹⁴ *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 653–54 n.2 (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).

¹¹⁵ 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 race as opposed to religion). The Court, however, has recently stated to narrow this difference. *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).

enumerated as one of the suspected classifications under the Equal Protection Clause,¹¹⁶ antidiscrimination norms about race and religion have developed along doctrinally separate tracks. In part, this is because the historical circumstances of extreme racial stratification has a distinctive role in American history with no precise religious parallel (although the twentieth century was woefully replete with examples of similarly extreme subjugations of religious minorities in other parts of the world). Nevertheless, the design of an antidiscrimination norm in respect to religion raises a question of symmetry akin to the one that has haunted the question of racial equality. Given the existence of identifiable and stable minority and majority groups, that is, should the jurisprudence distinguish the different ways in which religious classifications can enter government decision-making? The following Part explores the range of ways in which the idea of a discriminatory intent can be understood—generating a taxonomy that illuminates not only this question but the larger contours of antidiscrimination norms under the Constitution.

II. The Diversity of Discriminatory Intent

‘Discriminatory intent’ is not a unitary concept, but protean and plural. By looking at the species of intent the Court has recognized, the kinds that it has rejected, and the kinds 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 make one of several forms, and has thus failed to grapple with the imperative of maintaining a diversity of evidentiary approaches. Its selectivity over evidentiary methods—which cannot be justified as an effort to match evidentiary tools to the various forms of observed discriminatory intents—generates highly problematic outcomes.¹¹⁷

This Part steps back from the case-law and provides a general taxonomy of ‘discriminatory intent’ by drawing on economics, political science, and psychological literature. 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, an important pay-off from this 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 understood as focused on the quality and content of officials’ cognitive processes. A second payoff is that each conception of discriminatory intent has fuzzy boundaries. It is far from clear what cases falls within

¹¹⁶ See, e.g., *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 596 (1895) (Field, J., concurring) (suggesting that religion is a suspect classification), *aff'd on reh'g*, 157 U.S. 429 (1895), *superseded on other grounds by constitutional amendment*, U.S. Const. amend. XVI. The issue remains unsettled in most courts of appeals. *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 affiliation¹⁰ trigger heightened scrutiny under the Equal Protection Clause.” (footnote omitted)).

¹¹⁷ See *infra* Part IV.A.

each one. When the Court draws distinctions about what is inside and what beyond the constitutional pale, the reasons for these divisions can hence 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 an influential “definition” of discriminatory intent that turned on “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.¹¹⁸ The counterfactual “reversing the groups” seems to avoid direct inquiry into mental states, and instead call 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), the counterfactual inquiry 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.¹¹⁹ 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.¹²⁰ A judge would then be required to decide whether the official was moved by some-kind of race-specific reason. She would therefore have to decide not only which sorts of race-specific reasons count for constitutional purposes, but also would have to estimate their casual effect on the relevant decision. Reversing the groups—at least when precisely applied to the transaction at stake—therefore simply requires the judge to ask if an improper intent is at work. What ‘counts’ as an improper intent remains to be determined.¹²¹ The “reversing the groups” lens, even in its simplest form, hence serves as an analytic frame for, rather than as a resolution of, the difficult question of how to define discriminatory intent.

¹¹⁸ Strauss, *Discriminatory Intent*, *supra* note 61, 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).

¹¹⁹ Strauss, *Discriminatory Intent*, *supra* note 61, at 971.

¹²⁰ Audit studies employing testers in retail and housing contexts employ this assumption. See, e.g., Ian Ayres & Peter Siegelman, *Race and Gender in New Car Bargaining*, 85 AM. ECON. REV. 304 (1995) (finding race and gender effects by audit studies). *But see* James J. Heckman, *Detecting Discrimination*, 12 J. ECON. PERSPS. 101, 102 (1998) (noting “fragility” of findings from audit studies given “alternate assumptions about unobserved variables and the way employment markets work”).

¹²¹ Strauss asserts that this captures both conscious and unconscious intent, but it could also captures instances in which officials make different decisions because changing ascriptive identify changes the social welfare effects of a decision. *Id.* 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. 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.”).

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.”¹²² 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 co-workers.¹²³ 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.”¹²⁴ Of course, the absence of market dynamics, and its substitution by democratic pressures, means that no similar sorting effect can be counted on to work in government.¹²⁵

Taste-based discrimination translates into the lexicon of constitutional doctrine as “animus.” A measure may hence be invalid because its adoption was “born of animosity toward the persons affected.”¹²⁶ 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.”¹²⁷ 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 constitutional infirm ground.¹²⁸ Alternatively, amicus may enter into the constitutional analysis not because the decision-maker is biased, but rather because she 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.¹²⁹

¹²² GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 14-15 (2d ed. 1971)

¹²³ *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) (viewing “discrimination against” as an “aversion to association” with certain groups).

¹²⁴ John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1422 (1986).

¹²⁵ 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 because he attends to both the intent to harm, and the intent to avoid, or to deny benefits, out of aversive sentiments.

¹²⁶ *Romer v. Evans*, 517 U.S. 620, 634 (1996).

¹²⁷ *United States v. Windsor*, 33 S. Ct. 2675, 2693 (2013).

¹²⁸ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541 (1993).

¹²⁹ *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*, in the sense that the custody decision was based on an estimate on the expected welfare of the child under different familial arrangements. The race of the parent, on this view, operated as a proxy for welfare.

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. 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 Becker predicted.¹³⁰ But in *Windsor*, the effect of the challenged measure was not, as Becker theorized, centrally 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 and thereby to reduce contact with them. Nevertheless, its main effect was not to promote *physical* separation from gays and lesbians, but rather to delegitimize same-sex unions.

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.¹³¹ At the same time, it also 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.”¹³² 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 embed forms of contempt and subordination that render it a form of animus. That question about the perimeter of the “animus” form of discriminatory intent remains unexplored.¹³³

¹³⁰ *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985).

¹³¹ 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).

¹³² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). For a moral argument that seems to fall within this category, see John. 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 (1997) (concluding that it is not).

¹³³ Perhaps the closest decision on point is *Bob Jones University 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. 461 U.S. 574, 581 (1983) (describing policies). This suggests that animus embedded in the rhetorical and ideological matrix of a legible faith system remains nonetheless animus.

B. Impermissible Criteria as Proxies for Licit Ends: The Problem of Statistical Discrimination (with Attention to 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.¹³⁴ 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, and as a result 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.¹³⁵ Studies of labor markets confirm that observed racial differential in wages is due in part to such "statistical discrimination."¹³⁶

A central difference between taste-based discrimination and statistical discrimination is that the first concerns a *state of desire* while the second concerns a *state of belief*.¹³⁷ 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, one that provides a basis for action toward an end that itself has no impermissible content. These two categories are not absolutely distinct from one another. 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.¹³⁸ 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 aversive thinking). 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, should not be assumed to be acoustically separate from each other.

¹³⁴ 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. PERS. 91, 96 (1998).

¹³⁵ 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").

¹³⁶ 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. 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).

¹³⁷ Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 476 (1992) (drawing this distinction).

¹³⁸ 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.

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 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 terms, 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.¹³⁹ Her claim here may be that statistical discrimination is seldom effective, while taste-based discrimination is so capable of being hidden, that a prophylactic rule is required. Neither the Court nor commentators, however, have ever substantiated either element of Justice O'Connor's logic (or appealed to the argument above that taste-based and statistical discrimination shade into each other). Nor is either element of Justice O'Connor's claim obviously true. The fact that race (for example) seems to provide information for employers¹⁴⁰ suggests that it may be epistemically useful in other policy contexts. 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 subordinate class (e.g., African-Americans in the labor market) can expect to receive lower returns on investments in education.¹⁴¹ 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.¹⁴² 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, cause behavior that renders them increasingly true over time. It is not at all clear that doctrine under the First and the Fourteenth Amendment, however, evince any such consciousness of the 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.

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

¹³⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (citation and quotation marks omitted).

¹⁴⁰ See List, *supra* note 136, at 49-50.

¹⁴¹ GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 87-88 (2002).

¹⁴² *Id.* at 179-84; see also 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."); Arrow, *The Theory of Discrimination*, *supra* note 135, at 24-27 (noting the possibility of such adaptive human capital investments).

seems to divide cases that are more alike than different.¹⁴³ On the one hand, where race is used as a proxy for partisanship in the redistricting context, the Constitution is squarely implicated.¹⁴⁴ Similarly, when race is deployed as a proxy for risk when managing a carceral population, that decision also elicits strict scrutiny.¹⁴⁵ And when gender is used as a proxy for a trait, based on some stereotype about men and women, the relevant law receives heightened scrutiny.¹⁴⁶ 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.¹⁴⁷ 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),¹⁴⁸ this lacuna is a significant one.

Not only is the justification for a constitutional prohibition on statistical discrimination unclear, its current borders are also problematic. The case in which the normatively salient trait is used as a proxy for a licit end is distinct, but related in interesting ways, to the case in which 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 largely upon a protected class. What makes this case interesting is the contingent fact of a high correlation between the lawful classification selected and the impermissible classification. For example, 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 are both ones in which a reasonable decision-maker cannot but be aware that her decision is predicated on a criterion that is functionally indistinguishable—and, indeed, perhaps from the outside observationally equivalent to—a decision based on the impermissible criterion.¹⁴⁹

¹⁴³ 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.

¹⁴⁴ *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (“[The] use of race as a proxy” for “political interest[s] inhibit[ed]”); *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.”).

¹⁴⁵ *Johnson v. California*, 543 U.S. 499, 505 (2005).

¹⁴⁶ *United States v. Virginia*, 518 U.S. 515 (1996).

¹⁴⁷ R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1080 (2001).

¹⁴⁸ 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).

¹⁴⁹ This problem is distinct from the cases in which statistical discrimination and animus turn out to be observationally equivalents. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 791 (1994).

In such cases, the Court has found no constitutional infirmity.¹⁵⁰ The latter rule, first announced in *Personnel Administrator v. Feeney*, a case involving the gendered effects of veterans' employment-related benefits, tracks the Aquinian doctrine of double effect that was reintroduced to modern philosophy by Philippa Foot whereby an "oblique" intention in respect to an impermissible end is not usually fatal.¹⁵¹

But should all cases of double-effect be ranked as outside the domain of constitutional concern given their distinction from instances of statistical discrimination? Setting aside the difficult proof problems that might arise in determining what criterion an official decision-making in fact employed, the question is a more different one than generally realized. There are commonalities as well as differences between the *Feeney* scenario and impermissible uses of statistical discrimination. Neither case involves a goal that itself has an impermissible character. 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 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 different from the decision to use a functional substitute for race, but the moral quality and consequences of those decisions track each other closely.¹⁵²

Even accepting the salience of this distinction, it is generally recognized in both legal and philosophical treatments of intention in double-effect cases that there is no hard and fast boundary between direct and oblique intentions. Philosophers do not excuse the terrorist, for example, on the ground that he intended only political change, whereas the deaths he caused were merely obliquely intended.¹⁵³ 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."¹⁵⁴ 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.¹⁵⁵ 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 described by *Feeney*

¹⁵⁰ *Personnel Admr. v. Feeney*, 442 U.S. 256, 279 (1979).

¹⁵¹ 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).

¹⁵² Both *Washington v. Davis* and *Employment Division 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.

¹⁵³ G.E.M. Anscombe, *War and Murder*, reprinted in MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS 280-81 (James Rachels ed., 1971).

¹⁵⁴ Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1155 (2003).

¹⁵⁵ 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 that the consequence will inevitably follow from it, though not desiring that consequence.").

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.¹⁵⁶ To my knowledge, courts have not engaged in this inquiry.

To the extent the double effect doctrine itself provides a basis for the rule, moreover, a powerful challenge by T.M. Scanlon to that argument 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.¹⁵⁷ As I understand it, Scanlon's framing would not necessarily treat the veterans benefit case differently from the use of race as a proxy for carceral risk (although, depending of the specific justificatory facts available, 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 merely by dint of their history or present circumstances that the mere fact of their deployment can never be justified in terms of the balance of costs and benefits.¹⁵⁸ These concerns support an "anticlassificatory" approach to Equal Protection or the Religion Clause. This 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, although 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."¹⁵⁹ 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

¹⁵⁶ *Feeney* recognized this problem but provided a non sequitor 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." *Personnel Admr. 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.

¹⁵⁷ T.M. SCANLON, MORAL DIMENSIONS 1-37 (2008); *see also* Fallon, *supra* note 39, at 564-65 (discussing Scanlon's approach). I am grateful to Andrew Verstein for discussion of this point.

¹⁵⁸ There might also be a deontic justification for an anticlassification rule. That is, it is always a *per se* wrong for an official to take account of a suspect classification in their reasoning. This argument would require, of course, some explanation of why suspect classifications are wrong regardless of consequence. *See infra* text accompanying note 171 for a discussion of one possibility.

¹⁵⁹ 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*"].

concern that reflects a concern with misguided statistical discrimination.¹⁶⁰ In the Religion Clause context, the Justice has 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.¹⁶¹ Formal neutrality entails that financial aid be distributed in under terms that make no distinction between religious and nonreligious entities and would prohibit regulatory exceptions exclusively drawn for religious actors. Both of these positions are found in the current jurisprudence.¹⁶² There are, however, many other areas of jurisprudence that formal neutrality does not explain.¹⁶³

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 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 concern with reasons an official has for acting—i.e., her intentions—and not the formal content of the law. Consistent with this, it would seem that in most cases a government classification cannot be challenged unless it is actually *applied* by an official to a litigant: The mere fact of its existence is (rarely) enough.¹⁶⁴

Moreover, the most forcefully tendered alternative justification for an anti-classification rule, which is framed in terms of its effects on citizens, rather than officials’ intentions, is not plausible. Speaking of the Equal Protection Clause, Justice Thomas has

¹⁶⁰ 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).

¹⁶¹ 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).

¹⁶² 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-only 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).

¹⁶³ See, e.g., *Hosana-Tabor Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 709 (2012) (creating a regulatory exception for some religious entities).

¹⁶⁴ For example, in racial gerrymandering cases, voters who live outside the allegedly gerrymandered district generally lack Article III standing. *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (citing *United States v. Hays*, 515 U.S. 737, 744-745 (1995)). Establishment Clause cases are a limited exception to this general rule. See, e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005) (Rehnquist, C.J., plurality op.).

thus 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 demeans us all.”¹⁶⁵ (As an aside, note that although this is victim-focused language, the italicized language is couched in terms of intentionality—it does not train on the semantic quality of the relevant law or regulation—even as the final clause is focused on the experience of those subject to classifications).

Yet taken as a literal account of subjective experiences of those subject to impermissible classifications, Justice Thomas’s assertion simply cannot be true. It is plain even from a perusal of the U.S. Reports that members of the polity have widely divergent responses to different government acts even when they do not implicate a suspect classification.¹⁶⁶ Not all members of the polity feel demeaned when a racial or religious classification is deployed. Indeed, it is not even clear that 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).¹⁶⁷ 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 thing nor a bad thing.”¹⁶⁸ The appeal of anticlassification thus cannot turn 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.¹⁶⁹ In practice, there is something troublingly circular about building the constitutional case for anticlassification on public perceptions which are themselves functions of constitutional litigation.

If subjective perceptions of legitimacy and worth are in practice differentially 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 stated that “[t]he way to stop discrimination on the basis of race is to stop discriminating

¹⁶⁵ *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 in Color-Blind”*, 44 STAN. L. REV. 1, 3-7 (1991).

¹⁶⁶ 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”); 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).

¹⁶⁷ 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.”).

¹⁶⁸ LOURY, *supra* note 141, 1t 19.

¹⁶⁹ *See, e.g., Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2206 (2016) (describing the manner in which the University of Texas took account of race as one of many “special circumstances” that themselves were only one of three prongs for deliberation—albeit not in a high-salience way).

on the basis of race,” it has to be understood as making a normative rather than an empirical claim.¹⁷⁰ But the relevant decision contained no empirical evidence, and no weighing of the costs of demoralization against the benefits of recognition. Hence, the disparagement-centered explanation of the anticlassification rule is hard to sustain given observed empirical facts.

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 regardless of the actual subjective experiences of those who perceive the government action. The anticlassification concern, therefore, is better understood as being triggered by the occurrence of an impermissible criterion in the government’s decisional process whether overt or not. It is therefore best understood as focusing 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 intentionality. Consistent with this intuition, some Justices have offered analogies to Nazi race laws when discussing racial classifications.¹⁷¹ These highly 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 good judgment.

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 “demeaning”¹⁷² as to be beyond the constitutional pale, then it seems probable that a close proxy for that impermissible classification would elicit at least some of the same objections. For example, when the Court allows the loosening of Fourth Amendment protections in “high crime neighborhood,” it is possible to discern an arguably objectionable proxy for race at work.¹⁷³ It is hard to see why this term should not also be

¹⁷⁰ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

¹⁷¹ 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” as well as the “Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa” (citations omitted)); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (stating that majority-minority voting districting “bears an uncomfortable resemblance to political apartheid”).

¹⁷² *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part).

¹⁷³ *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (allowing searches based on lower quantum of suspicion in “high crime neighborhoods”). For some evidence that the term “high crime neighborhood” is

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*.¹⁷⁴ 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 government’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 can be 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.¹⁷⁵ Subsequently, neither laws barring miscegenation, nor criminal statutes imposing higher penalties on interracial rather than intraracial fornication, can be readily explained by taste-based discrimination.¹⁷⁶ Indeed, to the extent that discrimination is modeled as an aversion to contact with another group, one might think that the law would warrant greater penalties for intraracial fornication so as to engender effective deterrence.

A third theory of discriminatory intent seeks to explain state action that 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 legal scholar Richard McAdams, a 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.”¹⁷⁷ 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 the law.”¹⁷⁸ On McAdams’s account of racial preferences, anti-discrimination 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.”¹⁷⁹

operationalized in racialized terms, see Jeff Fagan and Ben Grunwald, *Addicted to Wardlow* (June 2017) (on file with author).

¹⁷⁴ See *supra* text accompanying notes 149 to 157.

¹⁷⁵ See EUGENE GENOVESE, *ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE* 328, 429 (1993).

¹⁷⁶ *Pace v. Alabama*, 106 U.S. 583, 584 (1883) (invalidating fornication statute that imposed greater penalties on interracial acts); 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).

¹⁷⁷ 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 (1985) (offering a slightly distinct theory of discrimination focused on group status).

¹⁷⁸ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991).

¹⁷⁹ McAdams, *supra* note 177, at 1078.

The canon of First and Fourteenth Amendment law contains traces of concern with group status production. Even if it is not at all clear that the model (theoretically acute as it is) provides much guidance for formulating a doctrine of discriminatory intent, it is not clear that the doctrine can ignore 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.”¹⁸⁰ A similar concern might be intimated 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.¹⁸¹

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 caste-making are outliers, not path-marking harbingers of the jurisprudence’s future. 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 the dynamic accounts of statistical discrimination as a motor of social differentiation, it is not clear that the group status production model can be squared with the limited transactional focus of constitutional doctrine.

Perhaps the most plausible doctrinal entailment of the group status production can be glimpsed in 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.”¹⁸² In particular, Siegel’s account of an anti-balkanization theme, largely in recent opinions of Justice Kennedy, draws attention to the possibility that remedies for racial injustice will themselves exacerbate intergroup resentment, and thereby entrench corrosive divisions within society.¹⁸³ In this fashion, it is conscious of competition for status between social groups, although it is focused on consequences rather than discriminatory intent, and hence does not fit into my typology here.

It is nevertheless noting that the normative appeal of 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 in ways that do more in practice to fracture society than

¹⁸⁰ *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”).

¹⁸¹ *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (citation omitted).

¹⁸² Siegel, *From Colorblindness to Antibalkanization*, *supra* note 159, at 1301.

¹⁸³ *Id.* at 1302-03 (arguing that anti-balkanization “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”).

remedies for racial injustice do.¹⁸⁴ This would be an ironic consequence in the Equal Protection Clause context, since the latter was crafted in response to deficient state protection against social discrimination.¹⁸⁵ Moreover, unlike economists working with Lourey's nuanced model of underinvestment in human capital, judges in constitutional cases have 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.

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 can be accounted a core case of impermissible discriminatory *intent*. My reason for including them here is more subtle: Both, in my view, are conceptually and practically congruent with core conceptions of discriminatory intent. They are the ambiguous limit cases of discriminatory intent. Finally, 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.”¹⁸⁶ 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 different race suggest that unarmed African-American targets are erroneously shot more often than unarmed white targets, while armed white targets are mistakenly spared more often than armed African-American targets.¹⁸⁷ Studies of sentencing decisions find similar distortions.¹⁸⁸

¹⁸⁴ *Id.* at 1365.

¹⁸⁵ CURRIE, *supra* note 54, at 349 & n.143; accord John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433-51 (1992).

¹⁸⁶ 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., *Predicting Ethnic and Racial Discrimination with the IAT: Small Effect Sizes of Unknown Societal Significance*, 108 J. OF PERSONALITY & SOC. PSYCHOL. 562 (2015) (casting doubt on external validity of studies).

¹⁸⁷ *See, e.g.*, 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 21, at 207; Justin Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 CRIMINOLOGY & PUB. POL. 319, 319-20 (2017).

¹⁸⁸ *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383-34 (2006).

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. As such, 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—a sublimation of the core kind of discriminatory intent that is often purposed as a conscious political strategy.¹⁸⁹ To the extent that implicit bias becomes a (sometimes conscious) substitute for overt taste-based discrimination in the political and public sphere,¹⁹⁰ there is an obvious case for considering its regulation under the rubric of discriminatory intent.¹⁹¹

In contrast, structural discrimination concerns the “interplay between individuals and the[ir] larger organizational environments.”¹⁹² 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 “political, social, and ideological levels are partially structured by the placement of actors in racial categories or races.”¹⁹³ Importantly, those theorists point out that social action within such a system cannot be easily characterized 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 isolation would be quickly labeled discriminatory are so pervasively and subtly brocaded though the frames of social action that they cannot be avoided without conscious effort.¹⁹⁴ 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

¹⁸⁹ 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).

¹⁹⁰ *But cf.* Gowder, *supra* note 1, at 340 (noting the simultaneous “social unacceptability and yet persistence of some explicitly racist views”).

¹⁹¹ 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).

¹⁹² Tristin K. Green, *A Structural Approach As Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 857 (2007)

¹⁹³ 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 “political, social, and ideological levels are partially structured by the placement of actors in racial categories or races”). There are 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*, at 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 orders are structured in terms of the distribution of different kinds of capitals or assets, the most important being racial capital.”).

¹⁹⁴ *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.”).

understood not only in terms of means and ends, but also in terms of omissions and suppressions.

Judicial doctrine under the First and the Fourteenth Amendment largely ignores implicit bias and structural exclusion.¹⁹⁵ It also implicitly rejects their premises. Doctrine in both domains is neutral in respect to the specific ascriptive identity in play. Formally at least, the doctrine is supposed to be applied even-handedly whether the complaining litigant is Christian or Muslim, white or African-American.¹⁹⁶ Yet the thrust of both of both implicit bias and structural exclusion theories is that surface neutrality should not be mistaken for practically equal treatment. Each theory, albeit 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 thus sets its face against acknowledgement of both theories.

Yet it is far from clear that the theories of discriminatory bias that underlying the doctrinal fabric 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.”¹⁹⁷ 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 discriminatory intent to be articulated, or even acknowledged. It seems both possible and probably that the same preferences can be conveyed in coded, yet effective, ways. Hence, there is no theoretical 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, encompasses 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.¹⁹⁸ 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.”¹⁹⁹ Yet these effects from statistical

¹⁹⁵ The Court, however, has recognized the possibility of unconscious bias in construing statutory anti-discrimination scheme. 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 Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015)

¹⁹⁶ *But see* Siegel, *From Colorblindness to Antibalkanization*, *supra* note 159, at 1287 (noting that white plaintiffs fare differently from minority plaintiffs in gaining access to the courts).

¹⁹⁷ Strauss, *Racial Discrimination in Employment*, *supra* note 142, at 1621.

¹⁹⁸ DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 93-96 (2007).

¹⁹⁹ András Tilcsik, *Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 587-88 (2011).

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 as plausible to posit that employers who do not recognize the stereotypical bases for their decisional process will fall back unconsciously on well-worn templates of social action in making decisions. To the extent that statistical discrimination motivates the constitutional doctrine of discriminatory intent, therefore, there is no reason why notions of implicit bias should be excluded.

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 Religion Clause—is not a single concept. Rather, by drawing on economic, sociological, and psychological studies, this Part has illuminated the plural conceptions of bias simultaneously at work in current doctrine. These conceptions of bias operate at complements in (or at the margins of) current doctrinal arrangements, rather than 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.²⁰⁰ Definitional heterogeneity cannot be avoided without abandoning canonical precedent and stories within the historical canon of antidiscrimination. The repudiation of explicit racial segregation in the Jim Crow South, establishment of a single church, bars on interracial marriage are all parts of our constitutional canon. In each case, it is plausible to see different species of discriminatory intent 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. Although the argument from canonical precedent explains why the Court is unlikely to pick only one of the variations of discriminatory intent identified in Part II, it does not illuminate the manner in which choices between those species of intent are made in specific cases.

²⁰⁰ 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”).

Doctrine heterogeneity resulting from the plural ways in which intent can figure in government decision-making and historical precedent is not intrinsically problematic (although its exclusion of unconscious bias lacks adequate justification). But it would be better if the diversity of discriminatory intents were 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 even handed prohibitions on interracial and same-sex marriage and intercourse—all these in part hinge on the question of *which* conception of discriminatory intent should be prioritized. This question would be better confronted head on, rather than in the Court’s current crab-wise fashion.

At present, moreover, judges have discretion not only to move between different conceptions of discriminatory intent, but also contract or expand those conceptions across different cases because their boundaries are ambiguous and contestable—a discretion that is rarely recognized and now 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 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 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 Corporation*, the Court recognized that the judicial task of discovering “whether invidious intent was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”²⁰¹ While *Arlington Heights* has come to be known largely for its “motivating factor” holding (and its concomitant rejection of the idea that bias must be the sole or “dominant” factor²⁰²), its approach to evidence may well be as or more consequential.

²⁰¹ See, e.g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

²⁰² *Id.*

The Court in that case canvassed a wide range of evidence, including disparate impact, “historical background,” including deviations from normal government procedure, “contemporaneous statements” by officials, and in “some extraordinary instances” trial testimony of decision-makers under oath.²⁰³ 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.²⁰⁴

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 Height* remains formally ‘good’ law, the Court evinces an erratic and uneven response to various kinds of evidence. In respect to each species of such evidence, it is possible to identify instances in which the Court has been permissive, and 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. But its cost estimates are persistently based on fragile speculation, fail to account for alternative ways of dealing with the costs, and remain blind to interactions with other prohibitions on admissibility. 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.

In working through the five species of evidence generally available to show discriminatory intent, I emphasize two 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 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 the next Part—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)²⁰⁵ 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.

²⁰³ *Id.* at 266-68.

²⁰⁴ *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam). Other Establishment Clauses 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).

²⁰⁵ 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.”).

Perhaps as a consequence, there are relatively few formal legal measures today that explicitly incorporate a suspect classification. Race is explicitly mentioned 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.²⁰⁶ Religion is mentioned when a state, moved by Establishment Clause concerns, moves to bar religious groups' access state funds or public forums.²⁰⁷ Neither kind of measure fares well in court these days, reflecting the increasing vulnerability of explicit usages of formal categories.

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 to proceed.”²⁰⁸ 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 words the “use of the words ‘sacrifice’ and ‘ritual’”—as evidence that a discomfort with religion motivated the law.²⁰⁹ Words matters not only for their narrow dictionary-defined content, but also for their unspoken but readily available connotations.

A similar linguistic trace is found in the March 2017 travel ban promulgated by President Trump²¹⁰ Like its precursor, that order contains a peculiar and otherwise inexplicable reference to “honor killing.”²¹¹ 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 Muslims as a group as intrinsically violent.²¹² A case in which a protected class is not mentioned 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

²⁰⁶ See, e.g., *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016) *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

²⁰⁷ See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). For similar results under a Free Speech rubric, see, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

²⁰⁸ 508 U.S. 520, 534 (1993) (citing *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

²⁰⁹ *Id.* at 534-35.

²¹⁰ Exec. Order No. 13780, “Protecting the Nation from Foreign Terrorist Entry Into the United States,” 82 Fed. Reg. 13209 (Mar. 6, 2017).

²¹¹ *Id.* at § 11.iii; see also Executive Order 13769, “Protecting the Nation From Foreign Terrorist Entry Into the United States,” 82 Fed. Reg. 8977 (Jan. 27, 2017).

²¹² 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.”); accord Inderpal Grewal, *Outsourcing patriarchy: Feminist encounters, transnational mediations and the crime of ‘honour killings,’* 15 *INT’L FEMINIST J. POL.* 1 (2013).

classification²¹³—should by logic be treated no differently from an instance in which the verbal specification of the targeted group is incrementally less occluded.

But it would be a mistake to think that the infusion of 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 a suspect classification’s deployment—and yet have remained beyond judicial purview. For example, I have already observed that 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.²¹⁴ Challenges to race-specific suspect selection are routinely turned aside by the federal courts.²¹⁵ 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.²¹⁶ No explanation is tendered by judges for these exceptions. There is also no reason such gaps in judicial scrutiny cannot expand in the future.

Nevertheless, semantic content of 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 to train solely upon anticlassification.²¹⁷ In this fashion, it is possible to recalibrate constitutional prohibitions without changing substantive constitutional doctrine.

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

²¹³ 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).

²¹⁴ See *supra* text accompanying note 147.

²¹⁵ See, e.g., *Monroe v. City of Charlottesville*, 579 F.3d 380 (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 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001) (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).

²¹⁶ 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)

²¹⁷ 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 40 at 1858. As the main text makes clear, I think this is an exaggeration.

might seem that such a “statement against interest”²¹⁸ would be especially probative of the existence of one or other form of discriminatory intent, especially where animus and group status production are suspected.²¹⁹ 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 made by legislators responsible for mapmaking on the state senate floor that they felt they “must include a sufficient number of African-Americans” in the challenged district.²²⁰ The Court further relied on trial testimony from another state legislator to the effect that mapmakers had expressed the same racial aim to him.²²¹

Similarly, in ascertaining the “purpose” of the Defense of Marriage Act in *Windsor*, the Court looked to a House Report that pointed to “traditional (especially Judeo-Christian) morality” as a basis for the measure.²²² 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.²²³ And in the recent challenge to juror discrimination under the Sixth Amendment, the Court declined to treat the jury as a sealed black box even after evidence of improper motive had emerged.²²⁴ Finally, such statements remain one of the few means of proving up the presence of bias in the criminal justice system more generally.²²⁵

Nevertheless, there are ways to deflect the evidentiary force of statements that are on their face probative of unconstitutional intent. The Court can carve out categories of constitutional challenges to be resolved without regard to such evidence, even when obvious and powerful proof of bias. By crafting exceptions strategically, the Court can

²¹⁸ 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”).

²¹⁹ 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.

²²⁰ *Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017).

²²¹ *Id.* at 1476 (discussing trial testimony of Congressman Mel Watt).

²²² *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citing and discussing H.R.Rep. No. 104–664 (1996)).

²²³ *Wallace v. Jaffree*, 472 U.S. 38, 57–58 (1985).

²²⁴ *Pena-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 evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”).

²²⁵ See, e.g., *Foster v. Chatman*, 136 S. Ct. 1737, 1747–55 (2016) (that the Georgia Supreme Court had made a “clearly erroneous” decision when it declined to find that prosecution use of preemptory strikes in a capital case was *not* animated by a discriminatory purpose in the face of lurid evidence to the contrary); accord *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).

render irrelevant otherwise probative materials in circumstances where other forms of evidence may be unlikely to emerge.²²⁶

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 is evident (quite literally) on the face of such monuments. Because their sponsors have no wish to shy away from religious and even sectarian endorsement, 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.”²²⁷

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 actions and deliberations, they present straightforward cases for purpose analysis. By contrast, Chief Justice Rehnquist’s substitute analytic frame is notable largely because it is inherently ambiguous (what constitutes the “nature” of a monument?) and its open-endedness (what parts of “our Nation’s history” are relevant? Should it include the persistent of religious minorities, such as Catholics, Mormons, and Jehovah’s Witnesses, for example?).²²⁸ Where the Court offers 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.

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.”²²⁹ In the challenge to the travel ban case, the government has argued in parallel terms that campaign statements should not be admissible evidence of impermissible bias on the part

²²⁶ 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. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1303 (1995).

²²⁷ *Van Orden v. Perry*, 545 U.S. 677, 786 (2005) (Rehnquist, C.J., plurality op.).

²²⁸ Accord 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”).

²²⁹ *Pena-Rodriguez*, 137 S. Ct. 855 at 874 (Alito, J., dissenting).

of an elected official lest democratic debate be chilled.²³⁰ But such incentive-based arguments are at best speculative and at worst specious.

Consider again 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 history and practice.²³¹ The “aim of a jury is “explicitly epistemic,” not representational.²³² Jury deliberations are not “ordinary” speech familiar from “daily lives.” Rather, they arise a legally structured environment in which lay judgments are exhorted on specific questions of law and fact.²³³ 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 function.²³⁴ 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.²³⁵ Those who urge the disregard of campaign statements implicit treat the democratic process little more than a cheap vaudeville—bright lights, thickly caked make-up, and nought 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

²³⁰ Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for a Preliminary Injunction and/or Temporary Restraining Order of the Executive Order in *IRAP v. Trump*, 857 F.3d 554 (4th Cir.), 2017 WL 1047713, at 28-32 (2017) (“Permitting campaign statements to contradict official pronouncements of the government’s objectives would inevitably ‘chill political debate during campaigns.’”).

²³¹ 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).

²³² *Id.* at 197.

²³³ 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.

²³⁴ Justice Alito’s argument might alternatively be understood as follows: Although naked expressions of bias (as occurred in *Pena-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 or normative content likely outweigh the fragile benefits of avoiding an evanescent chilling effect.

²³⁵ For an extended treatment, see Kate Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, - TEX. L. REV. - (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2981475.

improper intent. The exceptions to this rule, whether in the doctrine or offered in current cases, are unpersuasive and should be abandoned.

C. Circumstantial Evidence: History and Consequences

Discriminatory intent can often be inferred 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 and administrative history.”²³⁶ A similar procedure was said to govern Establishment Clause challenges, which are evaluated within the “history of the government's actions.”²³⁷

Arlington Height's list can be supplemented. A somewhat trivial example concerns the physical setting of a measure challenged on Establishment Clause grounds.²³⁸ But more substantial and generalizable examples 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 gays homosexual persons from discrimination, “raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”²³⁹ 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.”²⁴⁰ *Romer* hence rested on an inference from the means-ends rationality of a single policy measure—an index of bias typically unavailable when the object 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 issue. They will matter relatively little in anticlassification challenges. The doctrinal instruments for occluding context

²³⁶ *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-69 (1977). This is not to say that any one of these factors is necessary. Indeed, the Court has resisted efforts to calcify the *Arlington Height* factors in given contexts. See, e.g., *Bethune-Hill v. Virginia 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 40, at 1843 (discussing *City of Memphis v. Greene*, 451 U.S. 100 (1981)).

²³⁷ *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005); *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).

²³⁸ In a perhaps unintentionally comic line, the Court once declared with Solomonic seriousness that “the creche stands alone” as a way of distinguishing earlier precedent. *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 598 (1989)

²³⁹ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

²⁴⁰ *Id.* at 632.

from judicial consideration hence are ways of raising the salience of anticlassification, while relegating the role of animus and remaining theories of discriminatory intent.

Perhaps the most important doctrinal impediment to the serious consideration of context is the idea of deference to an expert official. Judges vary, however, in their willingness to exercise such deference across different contexts. 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 federal courts. 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' judgments" in determining how best to promote educational goals.²⁴¹ In dissent, Justice Alito highlighted facts tending to suggest that administrators had been hostile to the plaintiff student groups based on their religious nature.²⁴² By contrast, Justice Alito (as well as Justice Thomas), viewed the Trump travel ban through a lens of deference akin to the one they had criticized only a few years before.²⁴³ It might be anticipated that liberal Justices, like judges in the circuit courts, would take a different view.

The question of deference to officials on the basis of expertise and political accountability is a large one, which has spawned enormous literatures.²⁴⁴ But the question raised by these cases is in fact quite narrow—and rather easy to answer. When a judge must ascertain whether an agency official has acted on the basis of an unconstitutional motive, the standard arguments for deference from expertise and from political accountability are not relevant. The policy expertise of, say, university administrators in the University of California system or career staffs in the National Security Council are independent of whether they acted with a discriminatory intent. *There is no logical relation between expertise and a fair disposition toward vulnerable social groups.* Nor does democratic accountability give any reason to defer to an official's *factual* claim that she acted on the basis of proper motives rather than unlawful bias.²⁴⁵ At best, expertise

²⁴¹ *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 687 (2010).

²⁴² *Id.* at 717-18 (Alito, J., dissenting) (discussing failures of 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. University of Texas at Austin*, 136 S. Ct. 2198, 2215 (2016) (Alito, J., dissenting).

²⁴³ *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2090 (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").

²⁴⁴ 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)

²⁴⁵ 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. 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*,

may be relevant if a defendant official points to evidence that she in fact relied on her bespoke knowledge and skills in riposte to a bias allegation. But in evaluating the factual question whether a plaintiff's allegation, or this response, is more 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 constitutional law.²⁴⁶ It follows from this position a fortiori that official should obtain no particular deference when it comes to factual findings that are necessary predicates to the application of a constitutional antidiscrimination rule.²⁴⁷ To grant such deference would, in general, mean the creation of a special dispensation to violate constitutional rules when their application turned on questions of disputable fact.²⁴⁸

Once again, the reasons for categorically excluding or ignoring the evidence of discriminatory intent that is available in 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.²⁴⁹ And often, the circumstances and consequences of policy-making 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. Hence, no clear inference of improper motive may be discerned from semantic content, context, or immediate consequences. As a result, the ordinary mechanisms of civil discovery such as interrogatories, depositions, and document production, may be especially important in substantiating the presence of

91 YALE L.J. 1287, 1296 (1982) (describing groups that need constitutional protection because they are “perpetual losers of the political arena”).

²⁴⁶ See, e.g., 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 they do not have a special responsibility to administer, like the Constitution, the APA, or Title VII.”); 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.”).

²⁴⁷ In David Faigman’s influential typology, there are “facts-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).

²⁴⁸ A separate question is presented when an agency argues that a law is narrowly tailored to meet a compelling government objection. But that question of fact does not arise until after a discriminatory intent has been identified.

²⁴⁹ Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 112 (2012) (“Proof of intent is rarely direct. It is usually circumstantial, even multidetermined.”).

discriminatory intent that takes the form of animus, group status production, or statistical discrimination.²⁵⁰

From the beginning of intent-focused antidiscrimination jurisprudence, however, 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.”²⁵¹ Since then, the Supreme Court and lower courts have evinced increasing hostility to statutory discrimination cases more generally.²⁵² Perhaps with those cases in mind, the Justices have pressed a series of procedural changes, including to the well-pleaded complaint rule and the summary judgment regime, of late. 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.²⁵³

Nevertheless, civil discovery and trial testimony remain important pathways to evidence about discriminatory intent, and have yielded instrumental evidence in a number of cases. 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.”²⁵⁴ The dissent did not object to the legality of such depositions, but instead argued that more effective use of “discovery and trial” would be necessary to demonstrate that specific districts had been improperly drawn.²⁵⁵

By contrast, discovery is generally not available when the Court deems it likely to be costly or to infringe 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-cutting the criminal law and immigration law field—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

²⁵⁰ *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)).

²⁵¹ *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977).

²⁵² See Gertner, *supra* note 249, at 109 (reporting, based on author’s experience as a federal judge that “[f]ederal courts ... were hostile to discrimination cases”).

²⁵³ 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, 524–25 (2010).

²⁵⁴ *Alabama 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 (U.S. 2017); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 452 (2006) (Stevens, J., concurring in part).

²⁵⁵ *Alabama Legislative Black Caucus*, 135 S. Ct. at 1277 (Scalia, J., dissenting).

were not.”²⁵⁶ Of course, since such defendants by stipulation 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.²⁵⁷ In the immigration removal context, the Court has simply ruled out selective enforcement claims about “outrageous” discrimination.²⁵⁸ 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 fida” decisions of consular officials.²⁵⁹

These deference doctrines, which regulate both access to pretrial discovery and access to trial, are justified first in terms of the deadweight costs of selective prosecution claims,²⁶⁰ and second in terms of a constitutional concern about judicial interference with “a core executive constitutional function.”²⁶¹

But both of those justifications for constrained discovery are far weaker than first appears. To begin with, it is worth underscoring that there is no doubt that constitutional antidiscrimination rules constrain prosecutorial discretion.²⁶² Rather, it is not at all clear that permitting more extensive discovery has the costs that the *Armstrong* Court intimates. 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.²⁶³ 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.²⁶⁴ That is, allowing discovery by default does not impose deadweight costs that reduce the rate of prosecutions. State-level experience with open file, therefore, undermines 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 if and

²⁵⁶ *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. Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 346–47 (2007).

²⁵⁷ Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 618-19 (1998).

²⁵⁸ *Reno v. Am.-Arab Anti-Discrimination Comm.* (“AADC”), 525 U.S. 471, 491 (1999).

²⁵⁹ *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972); accord *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring).

²⁶⁰ *AADC*, 525 U.S. at 492; *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 decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”)

²⁶¹ *Armstrong*, 517 U.S. at 465.

²⁶² *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.

²⁶³ Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 789 (2017) (noting variation in forms of open-file discovery).

²⁶⁴ *Id.* at 796 (finding based analysis of several states’ experience that “open-file may not reduce the trial rate or speed up pleas”).

when evidence of bias surfaces.²⁶⁵ Hence, it 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 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. In contrast, prosecutors exercise vast authority as a result of their charging and plea bargaining authority on criminal justice matters.²⁶⁶ Prosecutorial decisions are also “important” sources of racial disparities, especially decisions about mandatory minimums.²⁶⁷ 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 trial given the knowledge that jurors’ racial biases may be more readily exposed than prosecutors’.

E. Statistical Evidence

The final kind of evidence that can be deployed to demonstrate unconstitutional discrimination is the output of econometric models that estimate either the causal effect of a suspect classification on 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 most useful to uncover animus and unconscious bias, but it can also be used to root out the use of impermissible criteria as proxies for other goals. By contrast, it is not needful in anticlassification challenges.

Judicial attitudes to statistical evidence of race discrimination have been inconsistent at best. On the one hand, such evidence is embraced in the context of

²⁶⁵ 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. 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.

²⁶⁶ Bibas, *supra* note 265, 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. L. & CRIMINOLOGY 3, 3 (1940) (“The prosecutor has more control over life, liberty, and reputation than any other person in America.”).

²⁶⁷ Sonja B. Starr & M. Marit Rehani, *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. Marit Rehani & Sonja B. Starr, *Racial disparity in federal criminal sentences*, 122 J. POL. ECON. 1320, 1321-22 (2014).

gerrymandering cases, where the correlations between districting on the one hand and race, partisanship, and other relevant factors can be teased out with precision.²⁶⁸ On the other hand, the Court in *McCleskey v. Kemp* rejected the use of system-wide evidence of racial disparities to demonstrate discriminatory intent on the part of a specific jury.²⁶⁹ While *McCleskey* focused on the inference of intent from system-level characteristics—i.e., the role of race in the Georgia capital punishment system as a whole—to a specific criminal proceedings, lower courts have extended its holding to the 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).²⁷⁰ 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 can be closely correlated to racial demographics.²⁷¹

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 system presented in that case because it did not “prove that race enters into any capital sentencing proceeding,” but only “show[s] a likelihood” of this impermissible result.²⁷² 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, but require interpretation.²⁷³ 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.²⁷⁴ 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 *McCleskey* Court feared (or, as catalytic as its proponents might hope).

²⁶⁸ See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1477-78 (2017) (describing introduction of expert econometric analysis).

²⁶⁹ *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987).

²⁷⁰ John H. Blume et. al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1794 (1998).

²⁷¹ See, e.g., *Floyd v. City of New York*, 813 F. Supp. 2d 417 (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. ASS'N 813, 817-18 (2007) (presenting the econometric analysis relevant to *Floyd* in greater detail).

²⁷² *McCleskey*, 481 U.S. at 308.

²⁷³ 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).

²⁷⁴ As has long been known to legal scholars. Julia Lamber et al., *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 HASTINGS L.J. 553, 582 (1983).

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.²⁷⁵ That is, econometric results provide 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.²⁷⁶ Their near-categorical exclusion in the criminal justice context since *McClesky* is especially unfortunate since that context is one in which animus and statistical discrimination are likely to figure in troubling ways that can best be 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: Upon its installation of 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.

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 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 an even-handed doctrinal framework that accounts for the full range of conceptions of discriminatory intent but does not implicitly tilt the playing field away from a subset of meritorious discrimination claims. My aim here, 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

²⁷⁵ *Castaneda v. Partida*, 430 U.S. 482, 494 n.13, 496-97 n.17 (1977),

²⁷⁶ By contrast, courts increasingly allow, and even demand, econometric evidence when *agencies* act in the form of cost-benefit analysis. *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).

claims is within reach. It should be employed in lieu 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 demonstrate an improper motivation, 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 hard to see how this differential can be justified, especially given what is known about the extent of bias in the criminal justice system.²⁷⁷

More broadly, with one exception, 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.²⁷⁸ The exception is that anticlassification loses its reforming force in the criminal law context. This is because the Court has been unwilling to rule on the constitutionality of race-based decision even when they shade into the use of race as a

²⁷⁷ See sources cited in *supra* note 267.

²⁷⁸ Reva Siegel identifies *Washington v. Davis* as the origin of this phenomenon, see Siegel, *Equality Divided*, *supra* note 39, 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.

general proxy for criminal suspicion.²⁷⁹ 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—with one exception again: This is where a potentially discriminatory animus or statistical discrimination is the work of an institutional body, and can be challenged through post hoc civil litigation—think of the affirmative action or the racial gerrymandering cases—the Court has been willing to entertain wide-ranging civil discovery to explore how and when impermissible classifications have come into play.

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. Hence, 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 force. In part, this means not only that anticlassification norms are more likely to be enforced 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 based on deliberate refusal to look inside the “minds of government officials,” may be better understood as the results of uneven calibration of different evidentiary implements.²⁸⁰

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 programs that promotes the interests of minorities. Establishments that reflect an explicit preference for religious majorities, moreover, will often be insulated from review by a doctrinal lens that focuses on tradition rather than semantic content.²⁸¹

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 limited 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

²⁷⁹ See *supra* text accompanying note 215 (citing cases); Huq, *supra* note 215, at 2452-56 (criticizing application of Equal Protection rules in the criminal context).

²⁸⁰ Haney-López, *supra* note 40, at 1853-54.

²⁸¹ See *supra* text accompanying note 222.

analysis,”²⁸² but challenges to the use of race in redistricting are ambiguous in their distributive effect. Like challenges to affirmative action, they can be deployed as means to amplify as well 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 countermajoritarian, the constitutional law of antidiscrimination tracks the interest of socially dominant groups with impressive—and economically regressive—precision. It has become an instrument of redistribution from marginalized minority groups to socially powerful majority one—a symptom, rather than a cure for 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.²⁸³ 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.²⁸⁴

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*, or the shared mental 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,” 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.”²⁸⁵ The doctrine for

²⁸² *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017).

²⁸³ See, e.g., Jeffery J. Mondak & Shannon I. Smithey, *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 shift in public preferences.”); 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).

²⁸⁴ 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); Michael A. Unger, *After the Supreme Word: The Effect of McCreary County v. ACLU (2005) and Van Orden v. Perry (2005) on Support for Public Displays of the Ten Commandments*, 36 AM. POL. RES. (2008). 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) (“Supreme Court opinions 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) (focusing on the school desegregation cases).

²⁸⁵ MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER & THE ETHICS OF KNOWING* 154-55 (2007). A paradigmatic example is the failure to recognize sexual harassment until the 1970s. *Id.* at 149-50.

discovering discriminatory intent, in short, 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.²⁸⁶ In this fashion, our constitutional doctrine of antidiscrimination is likely to “induce indifference, fatalism, and passive injustice.”²⁸⁷

One implication of an emphasis upon the hermeneutical quality of the Court’s interventions in social life is the mechanisms whereby different interest groups can mobilize in federal court have meaningful distributive consequences. By allocating among different factions different shares of the scare resource of litigation as a prism for the focusing of public attention, 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—determining who can speak in which (for better or worse) has become the distinctive American platform for rendering legible the moral wrongs of society.²⁸⁸

B Reconstructing the Judicial Toolbox in Discriminatory Intent Cases

Current asymmetries in doctrinal allocations need not, however, be maintained. It is possible to imagine an alternative doctrinal regime that furnishes as a more level playing field than current arrangements. The key to this is implicit in Part III’s argument: To begin with, it requires principled and consistent explanations for the choice among possible conceptions of discrimination. There are necessarily multiple ways in which race can figure in government decision-making, but 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 of the compelling need for a deep and diverse evidentiary tool-kit in dealing with unconstitutional discrimination. It would also entail the abolition of the existing bespoke exceptions, based on deference, hostility to statistics, or a blinkered conception of the relevant transactional frame. All relevant 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 culpable failures to account for structural discrimination.

This approach is warranted on more pragmatic grounds too. A constitutional rule concerning the permissible species of official intent must of necessity 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 isolate phenomenon of the criminal

²⁸⁶ 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. 2-15).

²⁸⁷ JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 126 (1990).

²⁸⁸ 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.

trial.²⁸⁹ An intent-based regime under either the Equal Protection Clause or the Religion Clauses must be flexible enough to apply to collective bodies of legislators, citizens engaged in law-making through initiatives or referenda, apex officials (such as governors and presidents) charged with the formulation of general policy, and line-level officials (such as police officers and field office personnel) 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, and 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 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. The latter often reflect voters' preferences. It is extremely hard, however, to connect voters' preferences on a specific policy to their action in the voting booth, and then to the behavior of elected actors. Polling data can be decomposed to generate analyses of the demographic profile of a majority coalition.²⁹⁰ But even sophisticated analysis will not, except in the most unusual cases of single-issue campaigns, isolate public sentiments on specific issues. Moreover, people in fact rely on their religious convictions when voting. Accounting for these preferences in a constitutional calculus might constrict legitimate political deliberation in untenable ways.²⁹¹ Accordingly, certain kinds of intent evidence must be handled with care when it comes to legislative decisions.²⁹²

²⁸⁹ 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.”)

²⁹⁰ 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 social security income and less reliance on capital income, predicts higher levels of Trump support”).

²⁹¹ For an illuminating treatment, see Kent Greenawalt, *Religion and Public Reasons: Making Laws and Evaluating Candidates*, 27 J.L. & POL. 387, 405 (2012) (“For many people, their religious convictions and affiliation are an important part of who they are.”).

²⁹² An exception to this resistance may be warranted when the public is motivated by animus. See text accompanying *supra* note 129.

Evidence of popular sentiment to understand the purpose of legislative, in short, presents unique problems. 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) required 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 even-handed 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 in which grand, abstract ideas such as 'discriminatory intent' are implemented turns out to be highly consequential to the practical meaning of constitutional guarantees. My aim in this Article has been to tease out the clashing and contesting ideas that lie behind that seemingly unitary concept of discriminatory intent. Such 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 care must be taken to avoid an evidentiary apparatus that skews the allocation of judicial resources away from some deserving litigants to others. Achieving that level playing field requires no dramatic doctrinal fix—but 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 hold of the Justices' imagination. It is, therefore, a rare instance in which a return to first principles can be justified by appeal to forward-looking considerations.