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The Myth of Equal Protection

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It is a myth that equal protection doctrine protects women and people of color. It is a myth, first, in the sense that it is a fiction. Although the Supreme Court claims to enforce the equality rights of all, it is unwilling to combat the contemporary inequality of women and people of color. It is also a myth in a second sense: it is a political myth or legitimating story. The Court relies on the fiction that it protects women and people of color to justify a broad new vision of equality for religious conservatives that, perversely, is not available to women and people of color. More perverse, the Court invokes this new vision of equality to invalidate federal, state, and local laws that do real work to promote race and gender equality.

Understanding the reality of equal protection doctrine clarifies debates about the Supreme Court's power. The Court's present power over constitutional equality enforcement depends, in large part, on the claim that the Justices have a superior capacity and willingness to protect minority rights. While the myth of equal protection bolsters this defense of the Supreme Court's power, the reality of equal protection contradicts it. It shows that the Court does not protect minority rights evenhandedly but instead subordinates the rights of minority groups it disfavors to the rights of minority groups it favors. This selective protection and subversion of minority rights cannot justify the Court's continued displacement of democratic will. On the contrary, it reveals a democratic legitimacy problem with this power that invites reform.

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INTRODUCTION

The Equal Protection Clause did not protect Amber Nicole Thurman. It did not stop Georgia from enacting an abortion ban so strict that doctors waited until her organs were failing to provide her life-saving care.¹ So, the twenty-eight-year-old Black mother died a preventable death.² The Equal Protection Clause did not protect Nicole Guerrero. It did not stop Texas prison officials from ignoring the Latina inmate's cries for help as she labored for nearly twelve hours alone in a jail cell.³ So, her newborn died from medical neglect.⁴ The Equal Protection Clause did not protect Brittany Watts, another Black woman. It did not stop a hospital from turning her away, bleeding and in pain, because doctors were too scared of Ohio's abortion ban to treat her.⁵ Nor did it stop prosecutors from arresting and charging her with abuse of a corpse when she later suffered a stillbirth at home.⁶ The Equal

1. Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother's Death Was Preventable*, PROPUBLICA (Sep. 16, 2024), <https://www.propublica.org/article/georgia-abortion-ban-amber-thurman-death> [perma.cc/8VEF-KBLR].

2. *Id.* (noting that a maternal mortality authority determined that Amber's death was likely preventable because earlier access to a dilation and curettage (D&C) would likely have saved her life).

3. Alexa Garcia-Ditta, *The Truth About How Pregnant Women Are Treated in Texas County Jails*, TEX. OBSERVER (Aug. 19, 2015), <https://www.texasobserver.org/pregnant-inmates-treated-texas-county-jail/> [web.archive.org/web/20260328180644/https://www.texasobserver.org/pregnant-inmates-treated-texas-county-jail/].

4. *Id.* (noting that medical experts believe that Nicole's baby would have survived if she had been born in a hospital with access to medical care).

5. Jericka Duncan, Rachel Bailey & Hilary Cook, *Brittany Watts, Ohio Woman Charged with Felony After Miscarriage at Home, Describes Shock of Her Arrest*, CBS NEWS (Oct. 21, 2024), <https://www.cbsnews.com/news/brittany-watts-the-ohio-woman-charged-with-a-felony-after-a-miscarriage-talks-shock-of-her-arrest/> [web.archive.org/web/20260220012815/https://www.cbsnews.com/news/brittany-watts-the-ohio-woman-charged-with-a-felony-after-a-miscarriage-talks-shock-of-her-arrest/].

6. *Id.*

Protection Clause did not protect Samantha Casiano. It did not stop Texas from forcing the Latina mother to continue a doomed pregnancy after a fatal fetal diagnosis.⁷ So, she was unable to “release [her] daughter . . . to heaven” and instead watched her die four hours after birth.⁸ The list of women and people of color that the Equal Protection Clause has failed to protect goes on.

In one way, it is easy to explain why the Equal Protection Clause did not protect these women of color. The Supreme Court has crafted an equal protection doctrine that does not recognize the harms they experienced. The Court has held, for example, that a law’s effects are not particularly relevant to equal protection analysis.⁹ Thus, it did not matter that the pregnancy regulations that harmed Amber, Nicole, Brittany, and Samantha impose severe physical, economic, and dignitary harms on women.¹⁰ Nor did it matter that these women were more vulnerable to these harms because of their race. Sure, Black women like Amber are much more likely to die from pregnancy-related complications than White women.¹¹ Yes, women of color like Nicole are more likely to be incarcerated while pregnant.¹² True, women of color like Brittany are more likely to be criminalized for pregnancy

7. Rebecca Wright, *Her Baby Was Going to Die. Abortion Laws Forced Her to Give Birth Anyway*, CNN (Mar. 31, 2024), <https://www.cnn.com/interactive/2024/03/health/texas-abortion-law-mother-cnnphotos/> [perma.cc/2E3U-DCQP].

8. *Id.*

9. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (holding that a law that had a severe disparate effect on women’s employment opportunities was permissible because equal protection doctrine requires proof that lawmakers had a discriminatory purpose); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (rejecting an equal protection challenge to an employment test that disqualified a disproportionately high number of Black applicants on the ground that racially disparate effects are generally not enough to support an equal protection claim).

10. When a state denies a woman an abortion, for example, she is more likely to face lasting economic insecurity, domestic violence, and worse health outcomes. ADVANCING NEW STANDARDS IN REPRODUCTIVE HEALTH, INTRODUCTION TO THE TURNAWAY STUDY (2022) [hereinafter *Turnaway Study*], <https://www.ansirh.org/sites/default/files/2022-12/turnawaystudyannotatedbibliography122122.pdf> [perma.cc/2Z5J-H6VJ]. International human rights bodies have recognized that denying women access to abortion offends their dignity, autonomy, and equality, and can be characterized as “gender-based violence, torture, and/or cruel, inhuman and degrading treatment.” OFF. OF THE HIGH COMM’R FOR HUM. RTS., INFORMATION SERIES ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS: ABORTION, 1 (2020), https://www.ohchr.org/sites/default/files/INFO_Abortion_WEB.pdf [perma.cc/FW4G-EQ32].

11. Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2021*, NAT’L CTR. FOR HEALTH STATS. 1 (Mar. 2023), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.pdf> [perma.cc/47UD-EPDD].

12. Nicolette Wolfrey, *Bulletin: Incarceration Harms Moms and Babies*, NAT’L P’SHIP FOR WOMEN & FAMS. (June 2021), <https://nationalpartnership.org/report/incarceration-harms-moms-and-babies/> [perma.cc/6NUX-DGXY] (noting that Black and Latina women are far more likely to be imprisoned than white women, including at childbearing ages).

loss¹³ and self-managed abortion.¹⁴ And, Latinas like Samantha are more likely to have babies with fatal birth defects than White women.¹⁵ But, the Court assures us, the fact that a policy uniquely harms racial minorities does not mean it violates the Constitution. Nor did it matter in these cases that the respective state's actions devalued the lives and suffering of women like Amber, Nicole, Brittany, and Samantha. Equal protection doctrine, the Court insists, bars policies that reflect race- or gender-based animus, not devaluation.

In other ways, however, it is hard to explain why the Equal Protection Clause did not protect these women of color. First, this result is incongruous with the story the Supreme Court tells about its role in enforcing constitutional equality rights.¹⁶ In case after case, the Court insists that it is ardently committed to enforcing the equality of all, including women and racial minorities.¹⁷ When faced with the inequality of women and people of color, however, the Court does not remedy it.¹⁸ Although there may be a technical explanation for this inaction, it conflicts with the self-congratulatory tale that the Court is a champion of equality for all. Second, the Court's insensitivity to the equality claims of women and people of color is difficult to reconcile with its sensitivity to the equality claims of religious conservatives.¹⁹ In religious equality cases, the Court aggressively intervenes to protect religious conservatives from the very same harms that it requires women and people of color to endure.²⁰ The Court readily infers discrimination, for example, when it perceives that a law negatively affects religious conservatives.²¹ It also forbids policies that devalue religious interests.²² When it comes to religious equality, that is, the doctrinal niceties that justify the Court's noninterference with policies that harm women and people of color melt away.

The stories of Amber, Nicole, Brittany, and Samantha, and the doctrinal contradictions they reveal, point to a central myth of constitutional equality law.

13. DOROTHY ROBERTS, *KILLING THE BLACK BODY* 150–201 (1999) (describing states' long history of policing and criminalizing Black women's conduct while pregnant); Greer Donley & Jill W. Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1663, 1704–09 (2022) (noting that women of color will likely be disproportionately criminalized for pregnancy loss in the wake of *Dobbs* because they are disproportionately likely to experience stillbirth and miscarriage and to be policed during pregnancy).

14. Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 50 (2022) (“*Roe*’s demise creates circumstances under which black people, who disproportionately rely on abortion services, will be over-represented among those who are exposed to criminal punishment for attempting to self-manage their abortions.”).

15. Lynn M. Almi, Danielle M. Ely, Elizabeth C. Ailes, Rahi Abouk, Scott D. Grosse, Jennifer L. Isenburg, Debra B. Waldron, & Jennita Reefhuis, *Infant Mortality Attributable to Birth Defects — United States, 2003–2017*, 69 MORBIDITY & MORTALITY WKLY. REP. 26, 27 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6902a1-H.pdf> [perma.cc/U2VM-D46B] (noting that Hispanic women have a 26% higher rate of infant mortality attributable to birth defects than White women).

16. See *infra* Part I.

17. See *infra* Section I.A.

18. See *infra* Section I.B.

19. See *infra* Part II.

20. See *infra* Section II.A.

21. *Id.*

22. *Id.*

This myth is that equal protection doctrine protects women and people of color. This claim is a myth, first, in the sense that it is a fiction.²³ While the Supreme Court professes to enforce the equality rights of all, it is substantively unwilling to combat the inequality that women and people of color experience today.²⁴ This means that the Court today extends a broad new vision of judicially enforced equality to religious conservatives that is unavailable to women and people of color. Even worse, the Supreme Court increasingly invokes this broad vision of religious equality to invalidate federal, state, and local laws that do important work to promote the equality of women and people of color.²⁵ This means that constitutional equality doctrine actively undermines race and gender equality.

The claim that equal protection doctrine protects women and people of color is also a myth in a second sense: it is a political myth.²⁶ Political myths are different from other stories not in their content, but in their function.²⁷ Political myths shape individuals' understandings of political conditions.²⁸ When wielded to defend existing arrangements of power, political myths can serve a potent legitimating function.²⁹ The claim that equal protection doctrine protects women and people of color fits this description. It is a narrative that, true or not, invites the public to understand the Court's patterned enforcement of race, gender, and religious equality in a particular way. Specifically, this myth recasts an increasingly skewed equality law as the neutral result of applying longstanding, trans-substantive equality rules to a changing social reality—one in which religious conservatives are the primary victims of discrimination. In doing so, this political myth legitimates a constitutional equality doctrine that retrenches race and gender inequality.

By casting this warm glow on the Court's equality decisions, the myth of equal protection distorts our constitutional politics. This political myth, in particular, distorts debates about the Supreme Court's power. By suggesting that the Court is a neutral enforcer of race, gender, and religious equality, this myth supports the view that limiting the Court's power—either directly or indirectly—threatens the equality of all minority groups. This myth is potent because it appeals to one of the most

23. CHRISTOPHER FLOOD, *POLITICAL MYTH: A THEORETICAL INTRODUCTION* 45 (1996) (“Common usage equates the term *myth* with falsehood or illusion.”).

24. *See infra* Part I.

25. *See infra* Part II.

26. *See infra* Part II.

27. *See* CHIARA BOTTICI & BENOÎT CHALLAND, *THE MYTH OF THE CLASH OF CIVILIZATIONS* 15 (2010) (defining a political myth as a story that “grants significance to the political conditions and experiences of a social group”); *see also* Jonathan Z. Smith, Kees W. Bolle & Richard G.A. Buxton, *Myth*, *ENCYC. BRITANNICA* (Oct. 10, 2025), <https://www.britannica.com/topic/myth> [web.archive.org/web/20260305080512/https://www.britannica.com/topic/myth] (distinguishing political myths from other myths, such as religious myths or myths of origin).

28. *See* BOTTICI & CHALLAND, *supra* note 27, at 20 (“Political myths provide fundamental cognitive schemata for the mapping of a social world . . . enabl[ing] us to come to terms with . . . the world we live in.”); *see also* FLOOD, *supra* note 23 (noting that a political myth need not be “true” but must serve a particular function).

29. Joanne Esch, *Legitimizing the “War on Terror”: Political Myth in Official-Level Rhetoric*, 31 *POL. PSYCH.* 357, 364 (2010) (describing political myths' legitimating function).

prominent defenses of judicial power: a minority-protective theory of judicial review. As it stands, the Supreme Court claims ultimate authority to interpret the equality guarantees of the Constitution and invalidate laws contrary to its interpretations. The Supreme Court, that is, claims the power to displace the equality judgments of political majorities with its own. While this distribution of power may seem undemocratic, constitutional theorists have argued that it is justified by judges' superior capacity and willingness to protect minority rights.³⁰ Academics³¹ and popular commentators³² have invoked this minority-protective defense of judicial review as a reason to be wary of Supreme Court reform proposals that would directly or indirectly threaten the Court's power.³³

30. See *infra* notes 229–42 and accompanying text.

31. See, e.g., PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 153 (2021), https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376063/168144.pdf [perma.cc/QMX7-WX4N] [hereinafter *Presidential Commission Report*] (“[C]ritics of proposals to disempower the courts worry that such reforms might undermine protections for individual rights, particularly minority rights”); RANDY E. BARNETT, THE UNCONSTITUTIONALITY OF SUPREME COURT “REFORM”: PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES PANEL 5: “COMPOSITION OF THE SUPREME COURT” 1 (2021) (arguing that Court reform “would destroy the Supreme Court as a protector of our rights and liberties from majoritarian infringement”); Rachel Bayefsky, *Judicial Institutionalism*, 109 CORN. L. REV. 1297, 1323 (2024) (cautioning against disempowering the Supreme Court because “[t]o lose the safeguard of the federal judiciary would be to neuter a potential source of protection for minorities’ rights.”); see also Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1738–39 (2021) (“The most common objection to disempowering reforms to the Supreme Court focuses on the need for it to protect . . . minority rights against hostile majorities.”).

Even some academics who generally support Court reform caution against reforms that would directly or indirectly limit the Court's power on this ground. See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 167 (2019) (arguing against disempowering reforms on the ground that it is possible that “political actors have become so accustomed to being reined in by courts that, once set free, they would trample important rights”); Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 82 (2022) (arguing against Court-packing on the ground that it would undermine the power of a Court that “is more likely to hold governmental institutions accountable for violations of the constitutional rights of individuals and groups that lack political power than are legislatures or executives”); Laurence H. Tribe, *Constrain the Court—Without Crippling It*, N.Y. REV. BOOKS (Aug. 17, 2023) (arguing that disempowering the Supreme Court is ill-advised because of it would “abandon[] the idea of an independent guardian of . . . minorities”).

32. See, e.g., David French, *Supreme Court Reform Is in the Air*, N.Y. TIMES (Oct. 10, 2024), <https://www.nytimes.com/2024/10/10/opinion/harris-supreme-court.html> [web.archive.org/web/20250725085030/https://www.nytimes.com/2024/10/10/opinion/harris-supreme-court.html] (cautioning against Court-packing proposals because “majorities do not always want to protect minority rights”); Ruth Marcus, *Schumer’s Presidential Immunity Fix Will Only Make Things Worse*, WASH. POST (Aug. 13, 2024), <https://www.washingtonpost.com/opinions/2024/08/13/immunity-supreme-court-schumer/> [perma.cc/KYA6-VUDG] (arguing against jurisdiction-stripping on the ground that they might lead to later encroachments of minority rights).

33. Ryan Doerfler and Samuel Moyn contrast “disempowering” reforms—such as jurisdiction stripping, supermajority voting requirements, or legislative overrides—with “personnel” reforms—such as judicial term limits, adding seats to the Supreme Court, or rotating the judges that sit on Supreme Court panels. Doerfler & Moyn, *supra* note 31, at 1720–21. As Daniel Epps and Ganesh Sitaraman observe, however, some “personnel” reforms, like Court packing, would likely reduce the Court's power, too. Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J. F. 821, 837 (2021). This Article thus declines the use the term “disempowering reforms,” but instead refers to all reforms that would directly or indirectly limit the Supreme Court's power.

This Article clarifies our constitutional politics by challenging the myth of equal protection and the vision of judicial power it supports. Time and again, the Supreme Court insists that it is concerned with the equality of women, people of color, and religious people alike. Time and again, it claims to apply the same equality principles to all three groups. In practice, however, the Court does not protect women and people of color. Instead, it affirmatively subordinates them to religious conservatives. This selective protection and subversion of minority rights cannot justify the Court's power to displace democratic will. On the contrary, it suggests that this power lacks democratic legitimacy.³⁴

Understanding the reality of equal protection doctrine clarifies debates about the Supreme Court's power in two ways. First, this reality undermines the most common objection to judicial reform efforts that threaten the Court's power: the worry that limiting the Court's power might imperil minority rights. The reality of equal protection doctrine shows that this fear both overestimates the Court's current protection of minority rights and underestimates its present role in limiting these rights. Second, the reality of equal protection highlights a democratic legitimacy problem with the Court's present exercise of its power over constitutional equality law. The Court's equality decisions, simply put, do not satisfy the requirements of a minority-protective theory of judicial review. Absent an alternative theory of judicial power, this provides reason to embrace reforms that would shift power over constitutional equality law to more democratic actors.

By uncovering the myth of equal protection and its consequences, this Article makes three principal contributions. First, this Article shows that religious equality jurisprudence has become a powerful contemporary tool of racial and gender subordination. Critical race and feminist scholars have long argued that equal protection doctrine is inadequate to protect women and people of color.³⁵ They have also noted that some strands of equal protection doctrine undermine existing equality protections for women and people of color.³⁶ These scholars, however,

34. See *infra* Part III.B.2.

35. See, e.g., Bridges, *supra* note 14, at 34–108 (arguing that the Roberts Court, including through its equal protection jurisprudence, only protects people of color from forms of discrimination that virtually do not exist anymore); Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection*, 129 YALE L.J. F. 108, 116–22 (2019) (noting that equal protection doctrine, and antidiscrimination law generally, is incapable of registering intersectionality and thus the equality claims of Black women); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1848–59 (2012) (arguing that equal protection doctrine makes it virtually impossible for people of color to win constitutional race equality claims); Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 116–26 (2022) (arguing that the Supreme Court has adopted an anti-Black constitutionalism that, among other things, insulates the oppression of Black and Brown people from constitutional challenge); Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1431–60 (2004) (arguing that equal protection doctrine fails to protect Latinos from many forms of discrimination); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–46 (1997) (explaining how equal protection doctrine does not protect women or people of color from many forms of discrimination).

36. Many scholars have noted, for example, that a colorblind theory of race-based equal protection (i.e., one that posits that all government consideration of race is discriminatory) undermines

have not yet identified how First Amendment law relies on and complements these developments. This Article shows how equal protection and free exercise doctrine work together to entrench and retrench race and gender inequality.

Second, this Article offers a new criticism of recent religious equality jurisprudence. Law and religion scholars have already critiqued this doctrine on various internal grounds, arguing that it is unbounded,³⁷ unworkable,³⁸ unevenly applied,³⁹ inconsistent with precedent,⁴⁰ and rooted in religious preferentialism.⁴¹ By using an external reference point—equal protection doctrine—to evaluate First Amendment doctrine, this Article reveals a different critique that is not visible from an internal perspective. When contextualized within broader constitutional equality

the equality of people of color. *See, e.g.,* Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 165 (2024) (noting that there is a threat that colorblindness will soon deem it “unconstitutional for government actors to notice a racial disparity and try to reduce it, even with race-neutral tools”); *see also* Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 184–85 (1994) (explaining how colorblindness bars the government from using “the best proxy we have for race-based disadvantage—race—to try to alter its presence in the body politic”); Yuvraj Joshi, *The Law of Racial Resentment*, 72 UCLA L. REV. 424 (2025) (noting that the Supreme Court’s colorblindness decisions pose a “threat . . . to a multiracial democracy”).

Scholars have also argued that a resurgence of a “real difference” theory of sex-based equal protection (i.e., one that posits that discrimination based on supposed differences between women and men is permissible) threatens the equality of women. *See, e.g.,* Jessica A. Clarke, *Scrutinizing Sex*, 92 U. CHI. L. REV. 1, 4–5 (2025) (noting that courts have begun to embrace “biological difference” reasoning in equal protection cases and explaining how this trend threatens women’s equality); Naomi Schoenbaum, *Rethinking Sex as Biology Under Equal Protection*, 58 U.C. DAVIS L. REV. 905, 928–33 (2024) (noting how a resurgence of “real difference” reasoning in transgender rights cases threatens women’s equality).

37. Andrew Koppelman, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2297 (2023) (noting that the new religious equality law creates “a mechanical rule declaring that a burden on religion is invalid whenever the state fails to pursue its goals relentlessly”); Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 851–69 (2022) (noting that the new religious equality law affords judges very broad discretion and permits absolutist approaches).

38. Zalman Rothschild, *The Impossibility of Religious Equality*, 125 COLUM. L. REV. 453, 457 (2025) (arguing that the new religious equality is “practically unworkable and conceptually incoherent”).

39. Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2335–40 (2023) (arguing that the discretion that the new religious equality doctrine affords judges will likely lead them to apply these protections selectively); Elizabeth Sepper, *Free Exercise of Abortion*, 49 BYU L. REV. 177, 196–206 (2023) (noting that conservative scholars and advocates have already begun to argue that the new religious equality doctrine should not apply to pro-life religious believers and explaining why this is inconsistent); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2462 (2021) (noting that recent religious equality decisions “reveal[] a particular formation of religious preferentialism”).

40. Alan E. Brownstein & Vikram David Amar, *Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context*, 54 LOY. U. CHI. L.J. 777, 793–94 (2022) (arguing that the new religious equality doctrine is inconsistent with precedent); James M. Oleske, Jr., *Free Exercise Uncertainty: Original Meaning? History and Tradition? Pragmatic Nuance?*, 70 WAYNE L. REV. 137, 150–51 (2024) (arguing that the most-favored-nation rule creates an unprincipled end-run around free exercise precedent).

41. Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199, 208–27 (2025) (arguing that recent First Amendment doctrine, including the new religious equality law, generates systematic preferences for religious individuals and institutions).

doctrine, free exercise doctrine becomes legible as both a symptom and a driver of a wider judicial legitimacy crisis. This judicial legitimacy problem should worry even those who support broad religious equality protections. It suggests that these protections, as currently implemented, defy foundational principles of democracy and self-government.

Third, this Article advances a growing literature surrounding Supreme Court reform by connecting it with a recent body of civil rights scholarship. One of the primary obstacles to Court reforms, according to skeptics, is the possibility that they will reduce the Court's power and thus undermine minority rights.⁴² This concern, however, rests on an account of judicial behavior that recent scholarship suggests is dubious. Such scholarship shows that, in recent years, the Supreme Court has treated religious equality claims more favorably than race and gender equality claims, all without a neutral doctrinal or theoretical explanation.⁴³ This Article draws on and expands that scholarship. By offering a broader account of doctrinal and theoretical inconsistencies in constitutional race, gender, and religious equality jurisprudence, it illustrates that the Court does not use its power to enforce minority rights impartially. Instead, the Court uses its power to subordinate minority groups it disfavors and to superordinate minority groups it favors. This pattern suggests that there is far less downside and far more upside to Supreme Court reforms—including those that threaten the Court's power—than skeptics suspect. It also reveals that the Court protects minority rights in ways that lack democratic legitimacy.

This Article, ultimately, does not purport to resolve all debates about Court reform. Rather, it urges that it is time to rid these debates of the pernicious myth of equal protection. This myth encourages submission to a system of constitutional equality enforcement that tolerates and produces substantial racial and gender inequality. By challenging this myth of equal protection, this Article provides the tools to limit its influence on our constitutional politics and to more frankly assess the Court's role within our constitutional system.

This Article proceeds in three Parts. Part I argues that the notion that equal protection doctrine protects women and people of color is a fiction. Part II shows

42. See sources cited *supra* note 31.

43. Luke A. Boso, *Religious Liberty, Discriminatory Intent, and the Conservative Constitution*, 2023 UTAH L. REV. 1023, 1026–29 (2023) (noting that the Court has applied a more lenient discriminatory purpose standard in the free exercise context than in the equal protection context, and arguing that this reflects Christian preferentialism); Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 19–46 (2022) (noting that the Supreme Court has made it easier for free exercise plaintiffs to challenge unintentional discrimination than equal protection plaintiffs and arguing that this difference relies on a dubious vision of religious persecution); Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. 1493, 1519–36 (2023) (noting that the Supreme Court is much more attentive to a law's effects in the free exercise than in the equal protection context and arguing that this is inconsistent with equality doctrine and theory); René Reyes, *Religious Liberty, Racial Justice, and Discriminatory Impact: Why the Equal Protection Clause Should be Applied at Least as Strictly as the Free Exercise Clause*, 55 IND. L. REV. 275, 308–16 (2022) (arguing that the Court's liberalized approach to disparate impacts in the free exercise context should also apply in the equal protection context); Tebbe, *supra* note 39, at 2474–75 (explaining that the Court could apply its new theory of religious equality to race-based equal protection claims, but has not done so).

how this fiction serves a political function: first, it legitimates a broad new vision of judicially enforced equality rights for religious conservatives that is unavailable to women and people of color; second, it helps undermine laws that promote race and gender equality. Part III shows how recognizing the reality of equal protection doctrine provides reason to reform the Supreme Court, including in ways that limit its power.

I. THE FICTION OF EQUAL PROTECTION

The notion that equal protection doctrine protects women and people of color is a myth, first, in the sense that it is a fiction. This myth is one of the Supreme Court's own telling. The Supreme Court, which has crowned itself primary enforcer of the Equal Protection Clause, takes every opportunity to declare its commitment to enforcing the equality of all under the Constitution. This rhetoric, however, disguises the Supreme Court's substantive unwillingness to do anything to combat the inequality women and people of color experience today. While the Supreme Court willingly condemns the overt race and sex discrimination of a bygone era, it has stripped the Equal Protection Clause of its power to redress contemporary forms of discrimination. This part sets forth this fiction of equal protection, beginning with judicial rhetoric and then turning to reality.

A. The Story of Robust Equal Protection Enforcement

The fiction that equal protection doctrine protects women and people of color today is driven by the Supreme Court's own storytelling. The pages of the U.S. Reports suggest that the Court is more committed than ever to enforcing race- and sex-based equal protection for all. From affirmative action cases to abortion decisions and beyond, the Supreme Court exalts race and gender equality as among the Constitution's most precious and established principles. The Supreme Court, moreover, insists that it stands ready to enforce these principles for women and people of color. This language tells a story that equal protection doctrine, at present, invalidates all race and gender discrimination as it arises.

This story is most apparent in the Supreme Court's race decisions. Take *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*.⁴⁴ Even though *SFFA* struck down affirmative action policies designed to help people of color, the opinion cast the contemporary Court as a champion of racial equality for all.⁴⁵ Proudly claiming the legacy of *Brown v. Board of Education*, *SFFA* asserted that the Supreme Court has acted consistently since the 1950s "to vindicate the Constitution's pledge of racial equality."⁴⁶ According to the Court, invalidating affirmative action policies extended this legacy because such policies, like Jim Crow laws past, are "odious to a free people."⁴⁷ Bolstering its analogy to Jim Crow, the

44. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

45. *Id.* at 205–08.

46. *Id.* at 203–06 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

47. *Id.* at 208.

Court also urged that affirmative action disadvantages Asian-American applicants and “demean[s] the dignity and worth” of Black and Latine students.⁴⁸ Although these claims are dubious,⁴⁹ they cast the Court as a modern torchbearer of racial equality for all.

Other opinions have similarly broadcast a doctrinal commitment to racial equality for all, even as they rule against litigants of color. In *Trump v. Hawaii*, for example, the Supreme Court went out of its way to establish its race equality bona fides.⁵⁰ Although its opinion greenlit an executive policy limiting travel to the United States from several Muslim-majority countries, the majority took umbrage at the dissent’s claim that this decision resembled *Korematsu v. United States*.⁵¹ The majority called *Korematsu* “gravely wrong” and ostentatiously overruled it.⁵² This rhetoric implied that had race discrimination truly been present in the executive policy at issue, the Supreme Court would have readily remedied it.⁵³ And, it implied that the Roberts Court takes discrimination against people of color seriously.

The Court has advertised its commitment to racial equality even in cases that do not squarely present equal protection claims. In *Dobbs v. Jackson Women’s Health*, for example, the Supreme Court again claimed the legacy of *Brown*.⁵⁴ It urged that overruling *Roe v. Wade* was like *Brown*’s decision to overrule *Plessy v. Ferguson* and the “state-sanctioned segregation and generations of Black . . . suffer[ing]” it condoned.⁵⁵ *Dobbs*, moreover, vaguely invoked racial justice by noting Black women’s disparate reliance on abortion and implying that abortion proponents are motivated by a desire to suppress the Black population.⁵⁶ Similarly, in voting rights

48. *Id.* at 229–30.

49. The claim that affirmative action demeans people of color fails to grapple with the well-documented dignitary and material harms that stem from ignoring race in admissions in the context of continuing racial inequality. See Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 32–33 (2017) (noting that the Court has historically disregarded well-supported evidence of the harms of continued educational segregation in favor of unsupported claims of dignitary harm). While there is strong evidence of discrimination against Asian American students in college admissions, this “Asian Penalty” is not traceable to affirmative action policies for Black and Latine students. Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590, 597–601 (2017) (summarizing studies finding that affirmative action for Latine and Black students does not have a meaningful effect on admissions for Asian American students).

50. *Trump v. Hawaii*, 585 U.S. 667 (2018).

51. *Id.* at 710 (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

52. *Id.*

53. *But see id.* at 728 (Sotomayor, J., dissenting) (“[A] reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus.”); Sahar Aziz, *The Muslim Ban Exposes the Racialization of Religion in America*, UC PRESS BLOG (May 22, 2022), <https://www.ucpress.edu/blog/56304/the-muslim-ban-exposes-the-racialization-of-religion-in-america/> [perma.cc/7BLN-69S2] (arguing that anti-Muslim discrimination, including that underlying the Muslim travel ban, is a form of race discrimination).

54. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 268, 293 (2022).

55. *Id.*

56. *Id.* at 255 n.41. In doing so, the Court echoed Justice Thomas’s previous suggestion that abortion is “a tool of modern-day eugenics.” *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring). As Melissa Murray has explained, Justice Thomas’s account of the eugenic motivations of the reproductive rights movement relies on a misleading and incomplete

decisions, the Court has dedicated extended passages to condemning race-based voter suppression even as it limits remedies for such discrimination.⁵⁷ And, in various criminal procedure decisions, the Court has emphasized its intolerance for “egregious and unmistakable” racism.⁵⁸ These and other cases tell a story that the Supreme Court is ready and willing to step in to protect people of color from discrimination whenever it occurs.

The Supreme Court has, in more muted ways, also asserted that it is willing to enforce women’s equal protection rights. Similar to the race context, these assertions come in cases ruling against women’s equality claims. *Dobbs*, which overruled the federal right to abortion, is illustrative. Despite the fact that the plaintiffs did not bring a sex-based equal protection challenge, the *Dobbs* Court rejected the argument that abortion bans implicate women’s equality.⁵⁹ This gratuitous decision, perversely, seemed partly intended to preempt criticisms that the Court’s ruling was indifferent to gender equality. The Court, moreover, took pains to downplay the impact of its decision on women. It claimed, variously, that abortion bans are not motivated by sexism,⁶⁰ that it is impossible to know whether access to abortion improves women’s lives,⁶¹ and that eliminating the right to abortion might actually empower women.⁶² Dubious as these claims are,⁶³ they

history. See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2031–62 (2021). Any use of Black women’s disparate reliance on abortion to further this narrative, moreover, ignores that it is Black women’s continuing social and economic inequality that leads them to seek abortion at higher rates. See Bridges, *supra* note 14, at 43–44 (documenting the various factors that lead Black women to seek abortion at higher rates, including higher rates of unintended pregnancy driven by their disproportionate experiences of poverty, intimate partner violence, and sexual coercion).

57. See, e.g., *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 656 (2021) (condemning state’s historically “blatant” race discrimination in voting and “appallingly low” Black voter registration rates before adopting a rule that makes it much harder to challenge discriminatory voting laws); *Shelby Cnty. v. Holder*, 570 U.S. 529, 546–50 (2013) (expressing support for the Voting Rights Act’s dismantling of Jim Crow era voting rights restrictions before invalidating a key provision of that Act).

58. *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 209 (2017) (holding that the Sixth Amendment forbids applying the no-impeachment rule to forbid a judge from considering a juror’s clear statements that they relied on racial stereotypes or animus to convict a defendant); see also *Ramos v. Louisiana*, 590 U.S. 83, 87 (2020) (appearing to invoke the overtly racist history of non-unanimous jury rules as a reason to invalidate them under the Sixth Amendment); *Flowers v. Mississippi*, 588 U.S. 284, 315 (2019) (finding that Mississippi violated the Constitution when, over the course of six trials, it struck forty-one of the forty-two Black prospective jurors it could have struck and disparately questioned and treated Black and White prospective jurors).

59. *Dobbs*, 597 U.S. at 236–37.

60. *Id.* at 236 (urging that abortion bans do not evince animus towards women).

61. *Id.* at 288–89 (suggesting that it is impossible to know “the effects of the abortion right on the lives of women”).

62. *Id.* at 289 (explaining that “[w]omen are not without electoral or political power,” and that the Court’s decision to return abortion to the states would free “women on both sides of the abortion issue to seek to affect the legislative process.”).

63. As discussed *infra* notes 89–92, there is a good argument that abortion bans are rooted in sexism. Moreover, there is abundant evidence that abortion access promotes the physical, economic, and social well-being of women. Finally, there is little reason to believe that reversing *Roe* will empower women in the democratic process. See Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 768–71, 776–85 (2024) (noting that this claim is implausible because it ignores

preserved a façade of judicial concern about women’s equality.

The Supreme Court has also noted its willingness to enforce women’s equality in decisions beyond the equal protection context. In a recent First Amendment case, for example, the Court denied that its decision to permit a businessowner to deny service to same-sex couples signaled a retreat from longstanding constitutional sex equality principles.⁶⁴ The Court insisted that it was in no way “endorsing a ‘separate but equal’ regime that would allow law firms to refuse women admission into partnership” and that any claim to the contrary was “pure fiction.”⁶⁵ In a decision that exempted religious businesses from certain sex-equality requirements of the Affordable Care Act, moreover, the Court implied that promoting women’s equality is a compelling government interest.⁶⁶ These allusions to the continuing validity of sex equality principles are far more tepid than the Court’s race equality rhetoric. Nevertheless, they tell a story that the Court and equal protection doctrine continue to protect the rights of women.

By insisting that equal protection doctrine protects women and people of color, these cases do not merely craft a narrative about the current state of constitutional equality doctrine. They also offer an account of how prevalent discrimination against women and people of color is today. This account arises from an apparent disconnect between the Supreme Court’s rhetoric and the reality that it almost never accepts the equal protection arguments of women and people of color. Women have had virtually no success bringing equal protection claims in the twenty-first century.⁶⁷ People of color have had a little more luck.⁶⁸ While this track

significant continuing impediments to women’s political participation—including a lack of reproductive autonomy—and elides the Court’s own active role in making our institutions less democratic); Nelson Tebbe, *Does Dobbs Reinforce Democracy?*, 108 IOWA L. REV. 2363, 2371 (2023) (explaining how *Dobbs* fails to grapple with longstanding arguments that “the right to terminate a pregnancy is closely connected to political equality”).

64. 303 Creative LLC v. Elenis, 600 U.S. 570, 598 (2023).

65. *Id.*

66. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014) (assuming without deciding that “ensuring that all women have access to all FDA-approved contraceptives without cost sharing” is a compelling interest).

67. The one arguable equal-protection win for a woman came in *Pavan v. Smith*, 582 U.S. 564 (2017), where the Court struck down a law that discriminated against same-sex couples in the issuance of birth certificates. That case, however, is best understood as enforcing the right to marriage, not gender equality. *Id.* at 546 (holding that the law violated the rule that “the Constitution entitles same-sex couples to civil marriage ‘on the same terms and conditions as opposite-sex couples’” (citing *Obergefell v. Hodges*, 576 U.S. 644, 676 (2015))). While two other gender-related constitutional claims had some success, these wins do little to demonstrate the Court’s willingness to combat contemporary discrimination against women. First, in *Sessions v. Morales-Santana*, 582 U.S. 47 (2017), the Supreme Court struck down an immigration preference for “unwed mothers.” *Id.* at 59. The law, however, was a relic from the 1940s and the Court’s analysis only illustrates its willingness to combat bygone forms of sex discrimination. *See id.* at 57 (noting that the law at issue was from “an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are”). Second, in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court recognized some connection between sex equality and women’s reproductive lives. *Id.* at 736. The Court, however, did not actually advance women’s equality, but simply refrained from striking down an act of Congress that itself promoted women’s equality. *Id.* at 730.

68. They have succeeded primarily in cases that do not employ traditional race-based equal

record might seem alarming, the Court's claims about the state of equal protection doctrine suggest a more reassuring view. If it is true that equal protection doctrine stands ready to protect women and people of color, then a lack of successful equal protection claims must reflect a lack of discrimination against these groups. Women and people of color rarely win equality claims, that is, because race and gender discrimination are now rare.

The Supreme Court's rhetoric, in sum, tells a story that the equal protection doctrine guards women and people of color from discrimination today. In case after case, the Court casts itself as a champion of racial equality and, less enthusiastically, sex equality. That the Court usually deploys this rhetoric in cases ruling against women and people of color is of no import. Indeed, the Court's rhetoric suggests that any lack of successful equal protection claims by women and people of color is actually a good thing. It reflects a lack of present discrimination against these groups. In the aberrant circumstances where such discrimination does arise, the Supreme Court reassures us that it stands ready, as ever, to enforce the Equal Protection Clause for women and people of color.

B. The Reality of Minimal Equal Protection Enforcement

The story is a fiction. Although the Supreme Court advertises its ongoing commitment to the constitutional equality rights of all, it is unwilling to intercede to protect women and people of color. This is not, as the Court's storytelling suggests, because sexism and racism are no longer prevalent. It is because the Supreme Court has stripped the Equal Protection Clause of the power to combat race and gender inequality as women and people of color experience it today.

This section deploys two broad theories of equality to illustrate how equal protection doctrine does not combat the discrimination that women and people of color face today.⁶⁹ The first theory, often termed an "anti-subordination" or "substantive" theory of equality, deems a law discriminatory where it imposes certain harms on marginalized racial or gender groups.⁷⁰ The second theory, often termed an "anti-classification" or "formal" theory of equality, deems a law

protection analysis. This includes racial gerrymandering claims, which the Supreme Court made much more challenging to bring in 2024. *See Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1235 (2024) (establishing a new "presumption of legislative good faith" that plaintiffs must rebut to prove a racial gerrymandering claim). It also includes a *Batson* claim, which the Court granted only upon evidence of extremely egregious discrimination. *See Flowers v. Mississippi*, 588 U.S. 284, 315 (2019) (finding that Mississippi violated *Batson* when, over the course of six trials, it struck forty-one of the forty-two Black prospective jurors it could have struck and disparately questioned and treated Black and White prospective jurors).

69. Darren Lenard Hutchinson, "Unexplainable on Grounds Other than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 619–27 (2003) (offering a high-level summary of the many different theories of equal protection that scholars have offered over time).

70. Anti-subordination theory, which posits that laws are discriminatory where their effect is to aggravate or perpetuate the subordinate status of a historically disadvantaged group, is not the only theory that falls under this broad subcategory. Many other theories of equality also focus on a law's effects, including ones focused on distributive justice, equal citizenship, and stereotyping. *Id.* at 623–27.

discriminatory where it differentiates among people based on their race or gender.⁷¹ Such differentiation occurs where a law facially classifies or is motivated by a discriminatory purpose.⁷² While the former approach to equal protection focuses on a law's effects, the latter approach focuses on a law's purpose. These two visions of equality, though they can overlap,⁷³ are generally understood as competing ends of the possible spectrum of equal protection enforcement.⁷⁴ This section demonstrates how equal protection doctrine fails to advance either vision of equality for women and people of color.

1. Permitting Race and Gender Subordination

The Supreme Court has, most obviously, rendered equal protection doctrine inadequate to combat the subordination of women and people of color. It has done so primarily by holding that a law's effects are insufficient to state an equal protection claim. The Court set forth this limit in *Washington v. Davis*,⁷⁵ where it rejected an equal protection challenge to an employment test that disqualified a disproportionately high number of Black applicants.⁷⁶ The Court explained that such racially disparate effects are generally not enough to support an equal protection claim.⁷⁷ Instead, laws violate the Equal Protection Clause only if they facially discriminate or have a discriminatory purpose.⁷⁸ Under this rule, effects are relevant only insofar as they evidence such overt or purposeful discrimination.⁷⁹ The Supreme Court later imported this doctrinal rule into the sex equality context in *Personnel Administrator of Massachusetts v. Feeney*.⁸⁰ In *Feeney*, the Court held that a veteran hiring preference was not unconstitutional despite its severe impact on women's employment opportunities.⁸¹ The Court brushed aside the law's effect on the ground that the plaintiffs, like those in the race context, could only succeed on a sex equality claim if they could prove that the law facially classified or had a discriminatory purpose.⁸²

71. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 10 (2003).

72. *Id.*

73. A law's effects, for example, can provide important evidence of its purpose. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (explaining that "[t]he impact of the official action whether it 'bears more heavily on one race than another'" could serve as "important" circumstantial evidence of a discriminatory purpose (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976))).

74. Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 652–53 & n.5 (2024) (noting that these "two competing visions" of equality "form the very axis upon which the Equal Protection Clause turns" and collecting sources on this point).

75. 426 U.S. 229 (1976).

76. *Id.* at 233–34.

77. *Id.* at 242.

78. *Id.* at 240 ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

79. *Id.* at 241.

80. 442 U.S. 256, 274 (1979).

81. *Id.* at 271.

82. *Id.* at 274.

The Supreme Court's rejection of effects as an independent basis for equal protection claims shields many forms of state action that subordinate women and people of color. This is because state action need not facially or purposefully discriminate to impose or perpetuate race and gender inequality.⁸³ Take the U.S. criminal justice system. Although criminal laws no longer discriminate against people of color expressly,⁸⁴ the criminal law remains a powerful tool of racial subordination.⁸⁵ State actors continue to disproportionately police, arrest, convict, and punish Black and Latine people.⁸⁶ Black and Latine defendants, moreover, face disproportionate collateral consequences of conviction, including forced labor, limited employment opportunities, deprivation of civil liberties, and diminished education.⁸⁷ These material and dignitary harms produce and enforce the contemporary subordination of Black and Latine populations.⁸⁸ Yet, the *Davis* rule deems these effects insufficient to support an equal protection claim.⁸⁹

Equal protection doctrine similarly insulates laws that subordinate women. Reproductive regulations are illustrative. Laws that restrict reproductive autonomy impose serious material and dignitary harms on women, thereby creating and perpetuating their subordination.⁹⁰ When a state denies a woman an abortion, for example, she is more likely to face lasting economic insecurity, domestic violence, and worse health outcomes.⁹¹ Lax pregnancy discrimination regimes and inadequate parental leave policies exacerbate these harms by further undermining women's health, careers, and financial well-being during and after pregnancy.⁹² As numerous stories in the wake of *Dobbs* show, draconian abortion restrictions even threaten

83. See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1424 (1988) (explaining how race subordination “can be more securely entrenched by habitual patterns of action and inaction that inflict harms upon blacks without any intentional design whatsoever”); Siegel, *supra* note 35, at 1145–46 (noting that, even where states don't obviously discriminate, they act in “ways that often perpetuate, or aggravate, historic patterns of race and gender inequality”).

84. Darren Lenard Hutchinson, “*With All the Majesty of the Law*”: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 380–91, 395 (2022) (describing how the Civil Rights Movement purged most formal discrimination from the criminal law).

85. *Id.* at 377.

86. *Id.* at 396–97.

87. *Id.* at 397–98.

88. *Id.* at 377.

89. The Supreme Court has suggested that its inattention to such racialized effects is specifically designed to prevent “throw[ing] into serious question . . . our entire criminal justice system.” *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987).

90. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 377–80 (1992) (arguing that when states restrict abortion, they perpetuate women's secondary status).

91. See *Turnaway Study*, *supra* note 10.

92. NAT'L WOMEN'S L. CTR. & A BETTER BALANCE, *IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS* 10 (2013) (documenting how pregnancy discrimination, especially job loss, can “propel families into poverty” by eliminating income and health insurance coverage at a crucial time); Janet Walsh, *Failing its Families: Lack of Paid Leave and Work-Family Supports in the US* (2011), <https://www.hrw.org/report/2011/02/23/failing-its-families/lack-paid-leave-and-work-family-supports-us> [perma.cc/D2YD-KFYH] (cataloging the various harms to women's health, careers, and overall well-being that result from a lack of adequate parental leave).

women's lives and transform pregnancy loss into a traumatizing and degrading experience.⁹³ Yet, under the *Feeney* rule, these effects are not enough to support a winning equal protection claim.

Equal protection doctrine's insensitivity to effects renders it doubly inadequate to combat the subordination of women of color. Race and gender discrimination often compound to impose special burdens on women of color,⁹⁴ yet these harms are illegible under both race and sex equality doctrine. The racism and sexism that disproportionately impoverishes women of color, for example, makes them especially likely to experience unintended pregnancy and to need an abortion.⁹⁵ Simultaneously, this poverty means that women of color are more likely to be denied an abortion and to suffer worse economic and health consequences as a result of abortion denial.⁹⁶ The racism of our criminal justice system, moreover, opens Black and Latina women up to disproportionate punishment for suspected abortion.⁹⁷ Even women of color who do not seek abortion are more likely to be criminalized for adverse pregnancy outcomes, such as miscarriage, and punished for drug use or other conduct while pregnant.⁹⁸ These material and dignitary harms, however,

93. See Greer Donley & Caroline M. Kelly, *Abortion Disorientation*, 74 DUKE L.J. 1, 29–52 (2024) (describing how “[a]bortion bans have caused a steady flow of tragedy” post-*Dobbs* which has left survivors “with the compounded trauma of losing a pregnancy and nearly dying” along with “long-term health consequences”).

94. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166 (1989).

95. Black, Hispanic, and Native women have higher abortion rates in part because, due to higher rates of poverty, they have more limited access to contraception and other sexual health services. Latoya Hill, Samantha Artiga, Usha Ranji, Ivette Gomez & Nambi Ndugga, *What Are the Implications of the Overturning of Roe v. Wade for Racial Disparities?*, KAISER FAM. FOUND. (Apr. 24, 2024), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities> [perma.cc/D2YD-KFYH]. Higher rates of abortion are also likely attributable to the fact that women of color lack the economic resources necessary to raise a child. Bridges, *supra* note 14, at 43–44.

96. Women of color have fewer resources to travel out of state for abortion care, face language and immigration status as barriers to obtaining pregnancy care, and are more likely to die or experience other adverse health consequences as a result of pregnancy. Hill et al., *supra* note 95.

97. Bridges, *supra* note 14, at 50 (“[W]e should fully expect that black people will be more frequently arrested, prosecuted, indicted, and convicted for breaking the law.”); Hill et al., *supra* note 95 (explaining that women of color are already disproportionately criminalized and likely to be more so after *Dobbs*).

98. In the wake of *Dobbs*, women of color will likely be disproportionately criminalized for pregnancy loss, both because they are disproportionately likely to experience stillbirth and miscarriage and to be policed during pregnancy. Donley & Lens, *supra* note 13, at 1704–09. Even before *Dobbs*, however, states established a long record of attempting to prosecute women for pregnancy loss and other conduct during pregnancy, efforts that have always focused on poor women and women of color. ROBERTS, *supra* note 13, at 150–201 (describing states’ long history of policing and criminalizing Black women’s conduct while pregnant); PURVAJA S. KAVATTUR, SOMJEN FRAZER, ABBY EL-SHAFFI, KAYT TISKUS, LAURA LADERMAN, LINDSEY HULL, FIKAYO WALTER-JOHNSON, DANA SUSSMAN & LYNN M. PALTROW, *Pregnancy Criminalization*, in PREGNANCY JUSTICE 44 (2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf> [perma.cc/Q28K-YLC6] (collecting data on historical prosecutions of pregnancy-related conduct and noting that such prosecutions disproportionately target poor women).

cannot prove either race or gender discrimination under the Equal Protection Clause. As a result, equal protection doctrine insulates state action that subordinates women of color, along with other women and people of color, today.

2. *Permitting Race and Gender Classifications*

Equal protection doctrine's failure to combat race and gender subordination is perhaps unsurprising. By holding that laws violate the Equal Protection Clause only if they classify or have a discriminatory purpose, *Davis* and *Feeney* appear to reject an anti-subordination theory of equality in favor of an anti-classification theory of equality. This anti-classification theory of equality, as noted above, forbids purposefully differentiating individuals based on race or gender, not imposing harms on certain race or gender groups. If the Court has adopted an anti-classification approach to race and gender equality, then the proper metric of equal protection enforcement is not whether it combats subordination. The proper metric is whether equal protection doctrine combats laws that facially classify or purposefully discriminate against women and people of color.

It does not do that, either.

Equal protection doctrine does not advance an anti-classification theory of equality for women or people of color for two primary reasons. First, it employs an unduly narrow discriminatory purpose standard. The Court set out this heightened purpose rule in *Feeney*.⁹⁹ *Feeney* explained that a discriminatory purpose exists only if the state acts "at least in part 'because of,' not merely 'in spite of,' [its law's] adverse effects upon an identifiable group."¹⁰⁰ Discriminatory purpose, in other words, means something like animus towards a protected group.¹⁰¹ Subsequent cases tightened this rule and clarified its application to the race context.¹⁰² In *McCleskey v. Kemp*, for example, the Court deployed this rule to reject a race-based equal protection challenge to Georgia's death penalty regime.¹⁰³ Although the plaintiff proffered statistical evidence that race permeates the imposition of the death penalty,¹⁰⁴ the Court rejected the claim on the ground that this evidence did not show that the state had acted "*because of* an anticipated racially discriminatory effect."¹⁰⁵ *Dobbs* reaffirmed this animus rule in the sex context, asserting that abortion laws are not discriminatory because they are not based on "invidiously discriminatory animus" against women.¹⁰⁶

This animus-based definition of discriminatory purpose is artificially narrow. Even if lawmakers lack a conscious desire to harm women or people of color, race

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

100. *Id.* at 279.

101. Siegel, *supra* note 35, at 1135 (arguing that this standard required something like "malice" towards women and people of color).

102. Haney-López, *supra* note 35, at 1839–47 (detailing this development).

103. McCleskey v. Kemp, 481 U.S. 279 (1987).

104. *Id.* at 286–87.

105. *Id.* at 298, 292–93.

106. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022).

and gender can affect their decision making. Lawmakers may, for example, act based on unconscious or implicit bias against women and people of color.¹⁰⁷ This is likely what happened in *Feeney*. Lawmakers were aware that a veteran's preference would harm women, but discounted or ignored this harm based on ingrained stereotypes about women's roles.¹⁰⁸ Bias may similarly explain a case like *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, where a locality refused to rezone a plot of land for affordable housing.¹⁰⁹ Though the Supreme Court deemed this action nondiscriminatory, lawmakers probably undertook it because they failed to equally value or appreciate the interests of the Black and Brown people who would have benefitted from the housing.¹¹⁰ This kind of "selective sympathy or indifference"¹¹¹ towards the interests, lives, and suffering of women and people of color may not rise to the level of animus. But it turns race and gender into the but-for cause of government action.¹¹²

By failing to police these more subtle forms of intent, the Supreme Court underenforces an anti-classification theory of equality. In the wake of the civil rights movement, today's lawmakers are less likely to act on—or are at least more likely to conceal—overt racial or gender animus.¹¹³ Instead, race and gender often inflect their decision making in more subtle ways.¹¹⁴ Abortion restrictions, for example, may not be obviously motivated by hatred of women. But they almost certainly result from lawmakers' unspoken judgments about women's proper role¹¹⁵ and indifference to women's suffering.¹¹⁶ It may be that no mustache-twirling legislator

107. Hutchinson, *supra* note 84, at 398–99 (collecting social science research documenting persistent implicit racism in our society); Siegel, *supra* note 35, at 1136–37, 1137 n.129 (noting that *Feeney* ignores the reality of persistent race and gender bias).

108. The *Feeney* district court concluded that the law had a discriminatory purpose for this reason. *Feeney v. Massachusetts*, 451 F. Supp. 143, 148–50 (D. Mass. 1978) (concluding that lawmakers had "intentionally sacrific[ed] the career opportunities of . . . women in order to benefit veterans").

109. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

110. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 348–49 (1987).

111. Paul Brest, *The Supreme Court 1975 Term Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6–8 (1976) (arguing that "selective sympathy and indifference," or an "unconscious failure to extend to a minority . . . the same sympathy and care[] given as a matter of course to one's own group" should count as a form of discriminatory purpose).

112. Portuondo, *supra* note 43, at 1546.

113. See Siegel, *supra* note 35, at 1136–37 (describing evidence that "racial bias remains the norm among White Americans; but that . . . they are strongly inhibited in expressing the racial attitudes they consciously hold"); see also Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 982–85 (1993) (summarizing some of the psychology and social science evidence); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORN. L. REV. 1016, 1027–29 (1988).

114. Hutchinson, *supra* note 84, at 399.

115. Siegel, *supra* note 90, 360–63 (arguing that abortion prohibitions reflect gender stereotypes, including "normative judgments about women's sexual conduct" and the "assumption that motherhood is women's 'normal' condition").

116. While lawmakers may desire to preserve unborn life, their devaluation of women's interests is illustrated by the patterned way in which they enforce this interest. There are a whole range of options to protect unborn life that distribute the costs more evenly across society, such as raising taxes to provide more robust economic and social supports for women and families. Lawmakers, however,

specifically designed the child welfare system to repress Black and Indigenous people. Yet, it is only by devaluing Black and Indigenous people's parenthood, culture, and family integrity that the state can justify the havoc that this system wreaks on their lives.¹¹⁷ As the name of the Black Lives Matter movement insists, staggering police violence against Black people similarly stems from the state's persistent devaluation of Black lives.¹¹⁸ The list of devaluation-based government action goes on, from environmental policy,¹¹⁹ to immigration law,¹²⁰ and beyond.¹²¹ By ignoring this government action, equal protection doctrine ignores race- and gender-based government action as it most often manifests today.

A second feature of equal protection doctrine also undermines an anti-classification theory of equality: an unduly narrow definition of race and gender classifications. In the race context, the Supreme Court has repeatedly deemed laws facially neutral by drawing implausible distinctions between racial identity and characteristics or conduct closely related to that identity. Take *Hernandez v. New York*.¹²² There, the Court held that a prosecutor did not act based on race when he struck Latines from a jury because they understood Spanish.¹²³ To say that

choose to impose devastating costs on pregnant people alone. See *Evaluating Abortion Restrictions and Supportive Policy Across the United States*, EVALUATING PRIORITIES, [https://evaluatingpriorities.org/\[perma.cc/AV6D-PKY9\]](https://evaluatingpriorities.org/[perma.cc/AV6D-PKY9]) (providing data that shows that states with more restrictive abortion policies tend to have fewer supportive policies in place for women and families).

117. Black and Indigenous children are removed from their families at highly disproportionate rates. HUMAN RIGHTS WATCH, "IF I WASN'T POOR, I WOULDN'T BE UNFIT": THE FAMILY SEPARATION CRISIS IN THE US CHILD WELFARE SYSTEM 38–34 (2022), https://www.hrw.org/sites/default/files/media_2022/11/us_crd1122web_3.pdf [perma.cc/M7B8-Y2RG]. Individual racial bias plays some role in this disparate impact. See, e.g., *id.* at 55 (noting that medical providers are more likely to report Black children's injuries to authorities as possible abuse, even where they have similar injuries to White children). But, much of it is attributable to the high rates of poverty among Black and Indigenous families, which leads to higher findings of neglect. *Id.* at 89–100. While ensuring child welfare is a laudable goal, the state's response to such neglect betrays disregard for Black and Indigenous families. Instead of lending supports to struggling parents, the state simply removes children and often makes reunification impossible. *Id.* at 47–88. This interventionist approach destroys parental bonds, traumatizes children, and isolates youth from their cultural communities. *Id.*

118. Jelani Jefferson Exum & David Niven, *Where Black Lives Matter Less: Understanding the Impact of Black Victims on Sentencing Outcomes in Texas Capital Murder Cases from 1973 to 2018*, 66 ST. LOUIS U. L.J. 677, 680 (2022) ("Declaring 'Black Lives Matter' is a reminder that Black lives have value, too, and ought to be legally protected.").

119. Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1300–03 (1998) (arguing that consistently unequal imposition of environmental harms on communities of color reflects governmental bias against these communities).

120. Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 120 (1995) (explaining that racial bias against Latine people underlies much of immigration law); see also Daniel I. Morales, *An Immigration Law for Abolitionists (and Reactionaries)*, 13 U.C. IRVINE L. REV. 1291, 1305–07 (2023) (arguing that immigration policy is attributable to citizens' ignorance of the lives of mostly non-White immigrant populations).

121. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347 (2007) (collecting significant social and legal literature suggesting that judges' and juries' legal decision-making is affected by unconscious racism).

122. 500 U.S. 352 (1991).

123. *Id.* at 362 (explaining that "the prosecutor's reason for striking these jurors" was not "a racial classification on its face").

government action based on Spanish-speaking ability is race-neutral is blinkered; the ability to speak Spanish is one of the primary ways that Latine people are racialized.¹²⁴ The Justices have drawn even more facile distinctions between race and racialized characteristics. A full Court, for example, has blessed the use of “apparent Mexican ancestry” as a basis for police searches.¹²⁵ This suggests that even visual racial markers—such as brown skin or Indigenous features—can be facially neutral.¹²⁶ Justice Thomas, perhaps most implausibly, has suggested that the term “freedmen” is race-neutral, even though the term historically referred exclusively to Black people.¹²⁷ These cases show how the Court is willing to deem regulations facially neutral even if they target characteristics that are closely, even exclusively, linked to one racial identity.

The Court draws similarly facile distinctions between gender and characteristics related to gender identity. In *Geduldig v. Aiello*,¹²⁸ for example, the Supreme Court drew an implausible distinction between gender and pregnancy. It concluded that a disability insurance program that excluded pregnancy-related disabilities did not classify based on sex.¹²⁹ Even though the Court assumed “only women can become pregnant,”¹³⁰ it insisted that pregnancy classifications were sex-neutral because not all women become pregnant.¹³¹ *Dobbs* doubled down on this reasoning in the abortion context. It insisted that most laws that single out “a medical procedure that only one sex can undergo” are gender-neutral.¹³² The Supreme Court has even suggested that laws that explicitly single out “women” or “men” do not necessarily classify. This is illustrated by abortion regulations, which the Court treats as facially neutral even though they often explicitly regulate “women” or “female[s].”¹³³ These cases reveal an incredibly narrow definition of sex-based classifications that excludes laws that expressly single out or have a dramatically disproportionate effect on one gender group.

These narrow definitions of classifications mean that the Court underenforces

124. In particular, for Latines whose native or primary language is Spanish, race is “a primary, constitutive part of Latino racial identity.” Perea, *supra* note 35, at 1431; see also Laura C. Chávez-Moreno, *The Problem With Latinx as a Racial Construct Vis-à-Vis Language and Bilingualism: Toward Recognizing Multiple Colonialisms in the Racialization of Latinidad* 164, 170, in *HANDBOOK OF LATINOS AND EDUCATION* (2021) (“[D]espite the best efforts of those who do not want to define Hispanic/Latino based on speaking Spanish, it is a foundational definition used for the [racial] category and it remains as representative for the group.”).

125. *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976).

126. Jennifer Chacón, *Racemaking in the Courts after the Immigration and Nationality Act of 1965*, in *RACE, RACISM, AND THE LAW* (Aziza Ahmed & Guy Uriel Charles, eds., forthcoming 2025).

127. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 247 (2023) (Thomas, J., concurring).

128. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 & n.20 (1974).

129. *Id.* at 487–92.

130. *Id.* at 496–97 & n.20. This assumption is wrong. Trans and nonbinary people also get pregnant.

131. *Id.*

132. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 236 (2022).

133. This includes the abortion regulation at issue in *Dobbs*. See MISS. CODE ANN. § 41–41–191 (2018) (referring to “woman” or “women” five times). Texas’s primary abortion ban mentions “female[s]” eighteen times. TEX. HEALTH & SAFETY CODE §§ 170A.001–170A.007 (2022).

even an anti-classification theory of equality. This is most obvious in cases where the Court ignores explicit mentions of “women” or people who “appear Mexican.”¹³⁴ But, it is also true where a law singles out characteristics that have a significantly disparate effect on one racial or gender group. When lawmakers regulate “pregnancy” and “abortion,” they are well aware that the costs of their regulations fall almost exclusively on women.¹³⁵ When lawmakers gerrymander districts to minimize “Democratic” voting power, they are similarly aware that their actions will minimize non-White voting power.¹³⁶ Indeed, there is often evidence that lawmakers specifically intend these gendered and racialized results.¹³⁷ For reasons discussed above, this kind of awareness of or indifference to a law’s effects on women and people of color should raise an inference that race and gender are the but-for cause of lawmakers’ actions.¹³⁸ These regulations, in short, violate an anti-classification theory of equality. By insulating them from equal protection challenge, the Court broadly underenforces this theory of equality.

* * *

It is a myth, in the sense that is a fiction, that equal protection doctrine protects women and people of color from discrimination today. The Supreme Court certainly deploys sweeping rhetoric that suggests it is ready to invalidate all forms of race and gender discrimination as they arise. Its actions, however, tell a different story. Whether one deploys an anti-subordination or anti-classification theory of equality, equal protection doctrine does not enforce it as to women or people of color today. Thus, while the Supreme Court ostentatiously condemns the overt race and sex discrimination of bygone eras, it has stripped the Equal Protection Clause of its power to redress discrimination against women and people of color as it manifests today.

II. THE POLITICAL MYTH OF EQUAL PROTECTION

The claim that equal protection doctrine polices discrimination against women and people of color today is not just a fiction. It also serves a legitimating function. The Court relies on the fiction of robust equal protection enforcement for women and people of color to justify an increasingly skewed constitutional equality doctrine.

134. See Clarke, *supra* note 36, at 48–63 (explaining why all overt sex-based classifications, including those in the transgender context, violate anti-classification principles); see also Chacón, *supra* note 126, at 14–15 (noting how the Court’s reliance on things like “Mexican appearance” “endorse[s] racial profiling in immigration enforcement efforts”).

135. See *Dobbs*, 597 U.S. at 236 (claiming that “only one sex can undergo” abortion); *Geduldig*, 417 U.S. at 497 n.20 (1974) (claiming that “only women can become pregnant”).

136. See *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 9 (2024) (“When partisanship and race correlate, it naturally follows that a map that has been gerrymandered to achieve a partisan end can look very similar to a racially gerrymandered map.”).

137. See, e.g., *id.* at 78–99 (collecting evidence that South Carolina relied on race, not political affiliation, to redraw its district maps); Brief for Am. Hist. Assoc. & Org. of Am. Historians as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 236 (2022) (No. 19-1392), 2021 WL 4341742, at *18–26 (collecting evidence that early abortion regulations were motivated by a desire to compel women to fulfill their maternal destiny).

138. See *supra* notes 112–120 and accompanying text.

It does so in two ways. First, the Court relies on this myth to justify a broad new vision of equality for religious conservatives that is not available to women or people of color. Second, the Court deploys this new vision of religious equality to invalidate federal, state, and local laws that do real work to promote the equality of women and people of color today. The myth of robust equal protection enforcement thus legitimates an equality doctrine that retrenches race and gender inequality.

This legitimating function of this myth reveals that it is, specifically, a political myth.¹³⁹ A political myth is different from other stories not in its content, but in its function. Political myths shape individuals' understandings of political conditions.¹⁴⁰ When wielded to defend existing arrangements of power, political myths can serve a potent legitimating function.¹⁴¹ The claim that equal protection doctrine protects women and people of color meets this definition. It is a narrative that, true or not, invites the public to understand the Court's differential enforcement of race, gender, and religious equality in a particular way. This myth, specifically, casts this disparity as the neutral result of a changing social reality in which religious conservatives, not women and people of color, are the primary victims of discrimination. In doing so, this political myth frames a constitutional equality doctrine that subordinates women and people of color as the latest expression of a judicially enforced civil rights tradition that protects all Americans.

This part describes this political myth of equal protection. It begins by showing how the Court relies on the fiction of robust equal protection enforcement to legitimate a broad new vision of religious equality. It then shows how, in doing so, this myth legitimates a new tool of race and gender subordination.

A. Legitimizing a New Religious Equality Doctrine

The Supreme Court has relied on the fiction of robust equal protection enforcement to legitimate a broad new set of religious equality protections under the First Amendment. To understand this point, it is helpful to understand historical connections between equal protection and religious equality doctrine. Since the 1990 decision *Employment Division v. Smith*,¹⁴² the Supreme Court has applied some version of an equality approach to free exercise rights. Under *Smith*, laws that burden religious exercise are valid so long as they are "generally applicable" and "neutral" towards religion.¹⁴³ Historically, these two requirements paralleled the requirements of equal protection law.¹⁴⁴ *Smith* was long understood to bar the same things as equal protection doctrine does (*i.e.*, facial classifications and laws with a

139. BOTTICI & CHALLAND, *supra* note 27 at 15 (defining a political myth as a story that "grants significance to the political conditions and experiences of a social group").

140. *Id.* at 20 ("Political myths provide fundamental cognitive schemata for the mapping of a social world . . . enabl[ing] us to come to terms with . . . the world we live in."); *see also* FLOOD, *supra* note 23 (noting that a political myth need not be "true" but must serve a particular function).

141. Esch, *supra* note 29, at 364 (describing this legitimating function).

142. 494 U.S. 872 (1990).

143. *Id.* at 881.

144. Portuondo, *supra* note 43, at 1505–19 (describing the close parallels between the evolution of free exercise and equal protection doctrine over time).

discriminatory purpose). *Smith*, in fact, explicitly crafted these rules to mirror equal protection law.¹⁴⁵ In later cases, the Court also defined lack of neutrality to require something like animus towards religion, mirroring equal protection doctrine's heightened purpose rule.¹⁴⁶ These doctrinal parallels mean that, for decades, free exercise law and equal protection law deployed the same narrow formal equality rules.

Religious equality doctrine, however, has shifted dramatically in recent years. In a series of decisions dating back to 2020, the Supreme Court has developed a much more stringent religious equality standard.¹⁴⁷ The Court now applies something called a “most-favored-nation” rule of religious equality.¹⁴⁸ Under this rule, laws qualify as discriminatory “whenever they treat *any* comparable secular activity more favorably than religious exercise.”¹⁴⁹ A subset of this rule appears to deem laws discriminatory if they even contemplate enforcement discretion.¹⁵⁰ This new religious equality rule is expansive. As scholars have observed, it allows judges to deem virtually any law that burdens religiously motivated conduct discriminatory.¹⁵¹ This rule, in a few short years, has transformed religious conservatives into some of the most successful constitutional equality claimants today. They have used the most-favored-nation rule to successfully challenge a host of regulations, from vaccine mandates,¹⁵² to public health regulations,¹⁵³ to gun regulations,¹⁵⁴ to antidiscrimination laws.¹⁵⁵

145. *Smith*, 494 U.S. at 886 n.3 (adopting this definition of neutrality because it was “the only approach compatible with” equal protection doctrine).

146. *See City of Boerne v. Flores*, 521 U.S. 507, 534–35 (1997) (suggesting that the Free Exercise Clause bars only laws that have “the object of stifling or punishing free exercise” or are “motivated by religious bigotry”).

147. *Portuondo*, *supra* note 43, at 1526–37 (setting forth the timeline of the development of this new doctrine).

148. *Schwartzman & Schragger*, *supra* note 39, at 2319 (“[M]ost-favored-nation status’ mean[s] that government regulation must treat religious activities at least as well as the most favorably treated comparable secular activities.”).

149. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam); *see also* *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021) (adopting this rule in a regular majority opinion).

150. *Fulton*, 593 U.S. at 535 (holding that a law was not generally applicable because it afforded officials the discretion to make exceptions, even though the officials never actually granted an exception).

151. *See, e.g., Koppelman*, *supra* note 37, at 2253 (explaining that the most-favored-nation rule “make[s] it possible to find discrimination in any law at all”); *Laura Portuondo, Gendered Liberty*, 113 *GEO. L.J.* 707, 721–22 (2025) (noting that this rule affords judges almost unlimited discretion to conclude that a law is discriminatory); *Rothschild*, *supra* note 38, at 513 (arguing that “[u]nder the Court’s rule of religious equality . . . every law that applies to religiously motivated activity wrongfully discriminates against religion” because “[e]very law includes a favored class by virtue of covering only a limited class”).

152. *U.S. Navy SEALs 1-26 v. Biden*, 578 F. Supp. 3d 822, 838 (N.D. Tex. 2022) (concluding that a military vaccine mandate discriminated against religion by offering medical but not religious exemptions).

153. *Tandon*, 593 U.S. 61 (per curiam) (challenging COVID-related restrictions on private indoor and outdoor gatherings based on the conclusion that they discriminated against religious conduct).

154. *Antonyuk v. Chiumento*, 89 F.4th 271, 350 (2d Cir. 2023) (concluding that a gun regulation discriminated against religion because it allowed “the owners of many forms of private property . . . to decide for themselves whether to allow firearms on the premises while denying the same autonomy to places of worship”).

155. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 689 (9th Cir. 2023) (holding that a school district discriminated against religion when it applied a race,

The Supreme Court has tried to obscure this doctrinal shift, partly by reference to equal protection doctrine. It has urged that the most-favored-nation rule does nothing more than apply the formal equality rules that have long governed not just religious but also race and gender equality claims. In COVID-19 cases, for example, various Justices suggested that the most-favored-nation rule merely combats facial classifications.¹⁵⁶ In the alternative, some Justices insisted that this rule bars laws evincing discriminatory intent.¹⁵⁷ The Court doubled down on these claims in *Fulton v. City of Philadelphia*, insisting that the most-favored-nation rule simply implements *Smith*.¹⁵⁸ While these decisions do not expressly invoke equal protection law, they imply that free exercise doctrine still applies the same formal equality rules that govern race and gender equality claims. This helps to legitimate the new religious equality law by suggesting that it merely extends to religious conservatives the basic equality protections that guard women and people of color.

The Supreme Court's rhetorical allusions to equal protection law serve as a further legitimating function. The Court continually frames its free exercise decisions as standing up to the kind of overt identity-based discrimination that it condemns in the race and gender context. When overturning a state's application of an LGBTQ+ equality law in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, for example, the Court urged that it was shielding a religious baker from officials' "hostility toward [his] sincere religious beliefs."¹⁵⁹ In COVID-19 cases, the Court asserted that it was stepping in to stop officials who brazenly disparaged,¹⁶⁰ "assume[d] the worst" of,¹⁶¹ and "openly" targeted religious communities.¹⁶² In

gender, and sexuality antidiscrimination policy to a religious student group); *Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n*, 571 F. Supp. 3d 571, 613 (N.D. Tex. 2021) (finding that Title VII's antidiscrimination provisions discriminate against religion because there are exemptions for small businesses, but not religious businesses).

156. See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (statement of Gorsuch, J.) (urging that California restrictions were discriminatory because the state "openly imposed more stringent regulations on religious institutions than on many businesses . . . even assign[ing] places of worship their own row" in the text of the law); *Roman Cath. Diocese v. Cuomo*, 592 U.S. 14, 17 n.1 (2020) (per curiam) (indicating that the regulations should be subject to heightened scrutiny because they were not "neutral on [their] face"); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting from denial of application for injunctive relief) (noting that the restriction violated the principle that "[t]he minimum requirement of neutrality is that a law not discriminate on its face").

157. See, e.g., *S. Bay United Pentecostal Church*, 141 S. Ct. at 717 (Roberts, C.J., concurring) (suggesting that restrictions lacked neutrality because they "reflect[ed] . . . insufficient appreciation or consideration of the" religious "interests at stake"); *Roman Cath. Diocese*, 592 U.S. at 22 (Gorsuch, J., concurring) (suggesting that differential capacity limitations triggered scrutiny because they reflected "a judgment that what happens" in "religious places" "just isn't as 'essential' as what happens in secular spaces").

158. *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021).

159. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 634 (2018).

160. *Roman Cath. Diocese*, 592 U.S. at 16–17 ("[S]tatements made in connection with the challenged rules can be viewed as targeting the 'ultra-Orthodox [Jewish] community.'" (quoting *Agudath Israel of Am. v. Cuomo*, 979 F.3d 177, 183 (2d Cir. 2020) (Park, J., dissenting))).

161. *Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam) ("The State cannot 'assume the worst when people go to worship but assume the best when people go to work.'" (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020))).

162. *S. Bay United Pentecostal Church*, 141 S. Ct. at 717 (statement of Gorsuch, J.).

school funding cases, the Court has urged that it is battling the most “odious” kind of discrimination.¹⁶³ This language not only mimics the theatrical rhetoric of equal protection cases but also casts the Court’s interventions on behalf of religious conservatives as policing a universal red line against the worst kinds of identity-based discrimination.

The Court’s allusions to equal protection doctrine and rhetoric, in fact, invite the public to understand the new religious equality law as the latest frontier of a judicially enforced civil rights tradition that protects all Americans. By urging that lawmakers repeatedly single out and exhibit hostility to religious interests, the Court denies that it is extending any special privileges to religious conservatives. To the contrary, the Court implies that it is doing no more for religious plaintiffs than it would for women and people of color facing similar discrimination. The Court’s disproportionate policing of religious equality, that is, results from the disproportionate discrimination that religious conservatives experience today.¹⁶⁴ This narrative not only aligns with conservative movement lawyers’—and some Justices’—explicit claims that religious conservatives, particularly Christians, are today’s most persecuted minority.¹⁶⁵ It legitimates the Court’s vigorous new enforcement of religious equality as the natural result of applying longstanding, trans-substantive equality rules to a changing social reality.

The power of this story, like any good political myth,¹⁶⁶ does not depend on its truth. Nor could it. The Court’s new religious equality law does not reflect the collision of universal equality rules with a rising tide of religious discrimination. It reflects the Court’s embrace of a broad new vision of equality for religious conservatives that is not available to women or people of color. Religious plaintiffs do not win lawsuits with such frequency because they face more discrimination than women or people of color. They win these lawsuits because the new free exercise

163. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017).

164. Litman, *supra* note 43, at 47–55 (explaining how the new free exercise decisions have cast religious conservatives as the kind of “discrete and insular minority” that the Supreme Court has historically understood to warrant heightened judicial protection); Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 282 (2018) (noting that the Court has endorsed the view that “conservative Christians are a beleaguered minority religious sect subject to invidious discrimination”).

165. See Hannah Bailey, *A New Minority in the Courts: How the Rhetoric of Christian Victimhood and the Supreme Court Are Transforming the Free Exercise Clause*, 73 SYRACUSE L. REV. 199, 204–10 (2023) (cataloging the conservative Christian movement’s use of this argument over time); Luke A. Boso, *Rural Resentment and LGBTQ Equality*, 71 FLA. L. REV. 919, 973–74 (2019) (explaining how movement lawyers in cases such as *Masterpiece* urge that today’s Christians are the victims of “authorities who use public policy to persecute, oppress, and discriminate against Christians and their religious identity.” (quoting Christian Bus. Owners Supporting Religious Freedom as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617 (2018) (No. 16-111))); Koppelman, *supra* note 37, at 2286 (noting that the Justices “appear to be in the grip of a narrative in which militant secularists in government are trying to persecute religious conservatives, who have only the Court to protect them”); Litman, *supra* note 43, at 47–50 (2022) (cataloging statements by Justices Thomas and Alito where they suggested that religious and cultural conservatives are the subject of widespread discrimination today).

166. FLOOD, *supra* note 23, at 45 (noting that the “objective truth or untruth” of a political myth is unimportant).

law has made it much easier for religious plaintiffs to prove discrimination than women and people of color. This doctrinal loosening means that religious conservatives enjoy equality protections that the Court has long denied to women and people of color.

The new free exercise law has expanded protections for religious conservatives, first, by permitting them to rely on effects alone to prove discrimination. As noted in Part I, equal protection doctrine makes it virtually impossible for women or people of color to win discrimination claims based on a law's effects alone.¹⁶⁷ The most-favored-nation rule, in contrast, allows religious plaintiffs to do just that.¹⁶⁸ This is illustrated by *Tandon v. Newsom*,¹⁶⁹ where the Court struck down a COVID-19 measure that prohibited all private indoor gatherings.¹⁷⁰ Even though the regulation was facially neutral and there was no evidence of animus, the Court held that it violated religious equality.¹⁷¹ This was because the law, as applied, barred some religious conduct (in-home bible studies) but not some comparable secular conduct.¹⁷² The law's disparate effect, in other words, violated the most-favored-nation rule.¹⁷³ By relying on effects in this way, the new free exercise law allows religious conservatives to circumvent one of the most powerful barriers to successful equal protection claims.

The new free exercise law also makes it easier for religious plaintiffs to prove that lawmakers acted with a discriminatory purpose. As an initial matter, the Court much more readily finds evidence of animus in the religion context than in the race or gender context. In the former context, the Court treats official statements as smoking-gun evidence of hostility, even if they are isolated or benign in context.¹⁷⁴ In the latter, the Court treats overt expressions of racial and gender bias as insignificant. In rejecting an equal protection challenge to the Trump administration's rescission of the Deferred Action for Childhood Arrivals

167. See *supra* Section I.B.1.

168. Litman, *supra* note 43, at 20–31 (noting that the most-favored-nation rule is highly attentive to a law's effects); Portuondo, *supra* note 43, at 1529–34 (explaining how the most-favored-nation rule relies on a law's effects).

169. 593 U.S. 61 (2021) (per curiam).

170. *Id.* at 63.

171. *Id.*

172. *Id.*

173. Portuondo, *supra* note 43, at 1529–31 (making this point at greater length).

174. See *Roman Cath. Diocese v. Cuomo*, 592 U.S. 14, 17 (2020) (per curiam) (suggesting that a governor displayed religious animus based on a selectively quoted statement explaining that “the ultra-Orthodox community” would face enforcement action if it did not comply with public health regulations); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 635–36 (2018) (characterizing an official’s statement that “religion has been used to justify all kinds of discrimination throughout history” as disparaging and good evidence of hostility). As scholars have observed, these kinds of statements are poor evidence that the government took action based on hostility to religion. See, e.g., Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 146 (2018) (noting that *Masterpiece* “distorted animus doctrine in various ways, emphasizing matters of etiquette and the appearance of impropriety over the [government’s] actual justifications”); Murray, *supra* note 164, at 276 (noting that the official’s statement in *Masterpiece* was poor evidence of hostility because it was both true and an isolated statement by a single government official in a multi-person body at an intermediate level of review).

program,¹⁷⁵ for example, the Court deemed the President's repeated claims that Latine immigrants are "criminals," "animals," and "bad hombres"¹⁷⁶ poor evidence of racial animus.¹⁷⁷ In *Dobbs*, the Court similarly waved away¹⁷⁸ anti-abortion lawmakers' statements that abortion restrictions were needed to stop women from "avoiding the duties and responsibilities of married life."¹⁷⁹ This differential sensitivity to official statements makes it easier to prove animus in the free exercise context than in the equal protection context.

Even more significantly, the Court no longer seems to require animus at all to find a discriminatory purpose in free exercise cases. Though the Court peppers the new religious equality cases with references to animus and hostility, these cases reflect an obvious concern with subtler forms of purpose. In such cases, Justices have chastised the government for "insufficient appreciation or consideration of" religious interests.¹⁸⁰ In other cases, they have faulted officials for making a "judgment that what happens" in "religious places" "isn't as 'essential' as what happens in secular spaces."¹⁸¹ These statements do not reflect a concern with overt hostility to religion. They reflect a concern with mere bias against religious interests¹⁸² or "selective sympathy and indifference" to religious people's needs.¹⁸³ This definition of discriminatory purpose is not just broad. It is also exactly what the Court has rejected as overbroad in the equal protection context.¹⁸⁴ By adopting this new purpose standard, the Court thus protects religious conservatives from forms of discriminatory intent that it requires women and people of color to endure.

Finally, the new free exercise law has made it easier for religious conservatives to prove that a law classifies. The Court has declined to draw the kind of implausible distinctions between religious identity and characteristics or conduct that it draws in the equal protection context. It has held, for example, that regulations of "houses of worship" facially classify,¹⁸⁵ even though many religious people do not attend

175. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020).

176. Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 274–77 (E.D.N.Y. 2018), *rev'd in part sub nom.*, *Regents of the Univ. of Cal.*, 591 U.S. at 35.

177. *Regents of the Univ. of Cal.*, 591 U.S. at 35.

178. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 253–54 (2022).

179. Brief for Am. Hist. Assoc. & Org. of Am. Historians as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022) (No. 19-1392), 2021 WL 4341742, at *18–26.

180. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring).

181. *Roman Cath. Diocese v. Cuomo*, 592 U.S. 14, 22 (2020) (Gorsuch, J., concurring).

182. Koppelman, *supra* note 37, at 2238–39; Portuondo, *supra* note 43, at 1531–32 (explaining how the Court defines religious discrimination to include "devaluation" of religious interests); *see also* Litman, *supra* note 43, at 22 (noting that the new religious equality law eliminates a traditional intent requirement in favor of an "equal value" requirement); Tebbe, *supra* note 39, at 2424 (arguing that the new religious equality doctrine reflects a concern with "equal value," rather than discriminatory purpose "as it usually features in constitutional discourse").

183. Koppelman, *supra* note 37, at 2238–39 ("The Court has broadened its understanding of what counts as discrimination against religion, reaching beyond malice to include selective sympathy and indifference."); Portuondo, *supra* note 42, at 1540 (noting that the devaluation theory of religious equality bars "selective sympathy and indifference" to religious interests).

184. *See supra* notes 98–111 and accompanying text.

185. *Roman Cath. Diocese*, 592 U.S. at 17 (per curiam).

houses of worship.¹⁸⁶ This is generous compared to equal protection law, where the Court has pointed to the fact that not all women become pregnant to deny that pregnancy regulations classify based on sex.¹⁸⁷

These doctrinal leniencies do not simply make it easier to win religious equality claims. They reflect the Supreme Court's embrace of a theory of equality for religious conservatives that it has rejected for women and people of color. The new religious equality doctrine adopts the theory that it is discriminatory for lawmakers to "devalue" religious interests.¹⁸⁸ Whether such devaluation takes the form of hostility, bias, or "selective sympathy and indifference," it is unacceptable because it reflects unequal sensitivity to the lives and needs of religious conservatives.¹⁸⁹ No such vision of equality guards women and people of color. As noted above, the Supreme Court has deemed selective sympathy and indifference to the needs of women and people of color to be far beneath its notice.¹⁹⁰ The broad new vision of equality that religious conservatives enjoy thus bears no resemblance to that afforded women and people of color.

The Supreme Court, in short, relies on the myth of equal protection to extend a vision of equality to religious conservatives that is unavailable to women and people of color. In this way, the myth of equal protection serves its political function. By assuring the public that the Court is willing to enforce race and gender equality, this myth recasts an increasingly skewed pattern of constitutional equality enforcement in neutral terms. And it reframes a constitutional equality doctrine that protects religious conservatives alone as a doctrine that stands ready to protect everyone.

B. Legitimizing a New Tool of Race and Gender Subordination

By helping to legitimate the Supreme Court's aggressive new interventions on behalf of religious conservatives, the myth that equal protection doctrine protects women and people of color serves a further political function. The Supreme Court has increasingly invoked this broad new vision of religious equality to limit federal, state, and local laws that do vital work to promote the equality of women, people of color, and other marginalized groups. The myth of robust equal protection enforcement thus legitimates a constitutional equality doctrine that actively retrenches race and gender inequality.

The new religious equality law most obviously threatens gender and race

186. Aziz Z. Huq, *The Trouble with Classifications*, 100 NOTRE DAME L. REV. 1, 41 (2024) (pointing out that the Court "identifies religious [classifications] by looking for idiosyncratic features of" Christianity).

187. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 & n.20 (1974) (holding that a pregnancy regulation did not facially classify because not all women become pregnant).

188. See, e.g., Brownstein & Amar, *supra* note 40, at 795 ("The substantive justification offered by some proponents of MFN is that . . . government cannot devalue religion . . ."); Portuondo, *supra* note 43, at 1539 (collecting scholarship arguing that the most-favored-nation rule is justified by the need to prevent the devaluation of religious interests); Tebbe, *supra* note 39, at 2398 (describing this theory as an "equal value" approach to religion).

189. See *supra* notes 179–182 and accompanying text.

190. See *supra* notes 98–111 and accompanying text.

equality by imperiling laws expressly designed to promote the equality of women, people of color, and queer people. This is best illustrated by cases in which the Supreme Court has limited LGBTQ+ antidiscrimination laws in the name of religious equality. In *Masterpiece Cakeshop*, for example, the Court invoked the equality protections of the Free Exercise Clause to bar application of a state public accommodations law to a baker who objected to making a wedding cake for a same-sex couple.¹⁹¹ In *Fulton*, the Court similarly held that the equality protections of the Free Exercise Clause forbade requiring a religious foster care provider to comply with a local law and contractual requirement forbidding LGBTQ+ discrimination.¹⁹² In both cases, the new religious equality law unsettled longstanding consensus about the validity of public accommodations requirements, which protect the equality of LGBTQ+ people, women, and people of color alike.

Although these new religious equality challenges have only limited express protections for LGBTQ+ people so far, they also endanger express protections for women and people of color. This is most apparent in the sex context, where the Supreme Court has readily granted statutory exemptions from laws aimed to promote women's equality. In *Burwell v. Hobby Lobby*, for example, the Court exempted certain religious employers from the contraceptive coverage requirements of the Affordable Care Act (ACA) under the Religious Freedom Restoration Act (RFRA).¹⁹³ The Court reasoned that the law's express purpose of promoting women's equality was too vague to justify any burden on religious exercise.¹⁹⁴ This reasoning bodes poorly for express sex equality provisions under the new religious equality law, which applies the same level of scrutiny as RFRA. Protections for race equality may also be in peril. While some commentators claim that the Court would not limit express race equality provisions,¹⁹⁵ the most-favored-nation rule contains no such race exception on its face. And the Court's increasing absolutism in the First Amendment context suggests that no value, including racial equality, can outweigh claims of conscience.¹⁹⁶

The new religious equality law, in fact, is particularly well suited to challenging even longstanding race and gender equality norms. This is because its chosen remedy of exemptions obscures its effect on these norms. By requiring exemptions, rather than facial invalidation of laws, the new religious equality law appears to respect longstanding equality norms while providing modest accommodations for objectors.¹⁹⁷ In reality, however, these exemptions can cripple these equality norms.

191. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 640 (2018).

192. *Fulton v. City of Philadelphia*, 593 U.S. 522, 543 (2021).

193. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014).

194. *Id.* at 726–27.

195. Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67, 104 nn.185–87 (2020) (collecting sources making this argument).

196. See 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023) (upholding a religious website designer's compelled speech challenge to a public accommodations law, seemingly without applying any level of scrutiny at all).

197. See Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 112–13 (2020) (summarizing this argument).

This is particularly true due to a rise in “complicity-based” conscience claims, wherein religious objectors seek exemptions from laws that they believe make them complicit in others’ immoral conduct.¹⁹⁸ Though framed as modest requests for accommodation, these complicity claims frequently demand relief that negates the equality protections at issue.¹⁹⁹ When judges grant these exemptions, they thus functionally invalidate equality protections, even as they profess fealty to them. This double-speak permits courts to undermine longstanding equality norms in ways that would not be feasible in the political process.²⁰⁰ This makes the new religious equality law a particularly potent mechanism to challenge even longstanding race and gender equality protections.

Observing the new religious equality law’s power to undermine express race and gender equality protections, however, misses much of the threat it poses. This doctrine does some of its most important work to undermine race and gender equality by imperiling laws that never mention race or sex. The 2016 case *Stormans, Inc. v. Wiesman* illustrates the point.²⁰¹ In *Stormans*, the Court was asked to review regulations that required pharmacies to stock and timely deliver a representative assortment of drugs.²⁰² Religious pharmacies and pharmacists challenged the regulations on free exercise grounds, asserting that they required them to be complicit in others’ use of emergency contraception.²⁰³ While the Court denied certiorari, three Justices dissented to express their view that the regulations were discriminatory.²⁰⁴ According to the dissenters, the regulations “devalue[d] religious” interests because they “allow[ed] secular but not religious refusals.”²⁰⁵ The regulations, in other words, violated the most-favored-nation rule. Although this reasoning was only a dissent in 2016—when the most-favored-nation rule was not yet governing law—a majority of the Court would almost certainly require religious exemptions today.

198. See Reva Siegel & Douglas NeJaime, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2202, 2566 (2015) (defining “complicity-based conscience claims”).

199. Requests for accommodations to certain sex equality mandates in the ACA, for example, have culminated in requests for wholesale invalidation of these mandates. See Elizabeth Sepper & Lindsay F. Wiley, *The Religious Liberty Challenge to American-Style Social Insurance*, 58 U.C. DAVIS L. REV. 257, 286–87 (2024). Further, even a few exemptions from a public accommodations law can deprive protected individuals of equal access to and dignity in the marketplace. 303 *Creative LLC*, 600 U.S. at 637 (Kagan, J., dissenting) (arguing that conscience-based exemptions undercut this dual function of public accommodations law and impose dignitary harms on LGBTQ+ people). This is particularly true given empirical evidence that judicial grants of exemptions beget further requests for exemptions. See Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 J. LEGAL STUD. 75, 75 (2021) (finding that the *Masterpiece* litigation “significantly reduced the willingness to serve same-sex couples as compared with opposite-sex couples, even among previously willing vendors”).

200. See Siegel & NeJaime, *supra* note 198, at 2520–21, 2542–44.

201. *Stormans, Inc. v. Wiesman*, 579 U.S. 942, 942 (2016) (denying certiorari).

202. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1071–73 (9th Cir. 2015).

203. Brief for Appellees at 38, *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015) (Nos. 12-35221, 12-35223), 2012 WL 5915339, at *38 (“For Plaintiffs, dispensing [emergency contraception] constitutes participation in an abortion.”).

204. *Stormans*, 579 U.S. at 942 (Alito, J., dissenting).

205. *Id.* at 949.

While the regulations in *Stormans* did not mention women, a vision of free exercise doctrine that requires exemptions from them would undermine women's equality. Lawmakers adopted these regulations, in part, to solve the widespread problem of pharmacists denying women access to both regular and emergency contraception—and publicly shaming them in the process.²⁰⁶ These refusals imposed material and dignitary harms on women by increasing their risk of unwanted pregnancy and subjecting them to harassment.²⁰⁷ These harms were greatest for rural and poor women, who lack access to alternative pharmacies.²⁰⁸ The *Stormans* regulations combatted the subordinating effects of these refusals by requiring pharmacies—not individual objecting pharmacists—to dispense all drugs in a timely manner.²⁰⁹ The most-favored-nation rule, by exempting religious pharmacies from these requirements, would render these regulations impotent to solve the problem they targeted. In doing so, the new religious equality law would subordinate women without ever touching an express antidiscrimination law.

The new religious equality law can similarly subordinate people of color without invalidating antidiscrimination laws. The Court's recent conclusion that religious equality requires some public funding of religious schools,²¹⁰ for example, will likely exacerbate racial inequality. Mandatory public funding of religious schools, like other contemporary programs that “draw students and resources away from public education systems,” is likely to leave “students of color marooned in dysfunctional and under-resourced public schools.”²¹¹ People of color, moreover,

206. NAT'L WOMEN'S L. CTR., FACT SHEET: PHARMACY REFUSALS 101 (Dec. 2017), <https://nwlc.org/wp-content/uploads/2017/12/Pharmacy-Refusals-101.pdf> [perma.cc/37ZK-2SF9] (cataloging stories of people who were refused emergency contraception, harassed by pharmacists, and suffered consequences such as unwanted pregnancy as a result).

207. *Id.*

208. NAT'L WOMEN'S L. CTR., FACT SHEET: THE ACCESS TO BIRTH CONTROL ACT: ENSURING PEOPLE GET THE BIRTH CONTROL THEY NEED AT THE PHARMACY 1 (May 2024), <https://nwlc.org/wp-content/uploads/2024/05/ABCA-Factsheet-1.pdf> [perma.cc/9MCQ-5HQ3].

209. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015) (noting that the purpose of the law was to ensure “safe and timely delivery of all lawful and lawfully prescribed medications to the patients who need them”).

210. *See Carson v. Makin*, 596 U.S. 767 (2022) (holding that when a state decides to subsidize private education it cannot deny similar funds to private religious institutions); *see also* Schragger, et al., *supra* note 41, at 226, 250 (noting that the Court's reasoning in the new religious equality cases suggests it will soon deem a broader range of funding for religious schools to be constitutionally compelled).

211. Janel A. George, *Deny, Defund, and Divert: The Law and American Miseducation*, 114 GEO. L.J. 509, 542 (2024) (describing how contemporary policies that defund schools exacerbate racial inequality); *see also* Erika K. Wilson, *Racialized Religious School Segregation*, 132 YALE L.J. F. 598, 620–25, 629–31 (2022) (arguing that mandatory state funding for religious schools will worsen racial segregation and inequality in public schooling).

While advocates of public funding for private schooling claim that such schemes offer students of color a way out of underfunded public schools, evidence contradicts these claims. In Arizona, for example, which recently made private school vouchers available to all people, poor families were the least likely to use such vouchers. Eli Hager & Lucas Waldron, *In a State with School Vouchers for All, Low-Income Families Aren't Choosing to Use Them*, PROPUBLICA (Oct. 12, 2024), <https://www.propublica.org/article/arizona-school-vouchers-esa-private-schools> [perma.cc/R7L5-V9YF]. This was due to several systemic barriers to using such vouchers, including the fact that private schools are located far away from poor neighborhoods, do not offer free transportation, do not offer free lunch, and impose

will face greater consequences from the kind of constitutionally mandated exemptions from LGBTQ+ equality laws described above. Queer people of color are more likely to bear the burden of these exemptions because they are more likely than their White peers to face workplace discrimination because of their employers' religious beliefs.²¹² And, when such discrimination occurs, queer women of color have the fewest resources to recover.²¹³ Women of color, finally, will face the severest consequences from exemptions to supportive reproductive policies like that in *Stormans*.²¹⁴ In this way, the new religious equality law can subordinate people of color without ever invalidating laws that mention race.

This reality is worsened by the fact that there appears to be almost no limit to the Court's willingness to impose harms on women and people of color in the name of the new religious equality. Two cases from the October 2023 term illustrate the point. In both cases, the Justices discussed the Emergency Medical Treatment and Labor Act (EMTALA), a federal law that requires hospitals to provide certain emergency care.²¹⁵ Though the issue was not squarely presented, Justices in both cases considered whether EMTALA could require objecting doctors to provide life-saving abortion care.²¹⁶ Adopting a novel view of statutory conscience protections,²¹⁷ a majority held it could not.²¹⁸ The Justices reasoned that, insofar as EMTALA mandates life-saving abortions, objecting doctors must be exempted

other financial burdens on families not present in the public-school context. *Id.* Beyond these material obstacles, opting for private schooling means giving up certain civil rights protections. Bayliss Fiddiman & Jessica Yin, *The Danger Private School Voucher Programs Pose to Civil Rights*, CTR. FOR AM. PROGRESS (May 13, 2019), <https://www.americanprogress.org/article/danger-private-school-voucher-programs-pose-civil-rights/> [perma.cc/QVL6-EX65]. This bargain may be particularly unappealing to students of color, especially those that are queer or disabled. *Id.*

212. See Brad Sears, Neko Michelle Castleberry, Andy Lin & Christy Mallory, *LGBT People's Experiences of Workplace Discrimination and Harassment*, WILLIAMS INST. 1 (Sep. 2021) ("Nearly two-thirds (63.5%) of LGBT employees of color said that religion was a motivating factor in their experiences of workplace discrimination compared to 49.4% of white LGBT employees.").

213. See *The LGBTQ+ Women's Wage Gap in the United States*, HUM. RTS. CAMPAIGN FOUND. (June 12, 2022), <https://www.hrc.org/resources/lgbtq-womens-wage-gap> [perma.cc/D2M8-SS4U] (highlighting the wage gap between LGBTQ+ women and men and noting that it is worse for women of color).

214. As discussed *supra* Part I, women of color face special harms when their reproductive autonomy is limited. See *supra* notes 89–92 and accompanying text.

215. *Moyle v. United States*, 603 U.S. 324 (2024); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024).

216. *All. for Hippocratic Med.*, 602 U.S. at 388–90; see also *Moyle*, 603 U.S. at 334 (Barrett, J., concurring).

217. Elizabeth Sepper, *The Ever-Expanding Right to Refuse to Provide Healthcare*, BILL OF HEALTH (Sep. 23, 2024), <https://blog.petrieflom.law.harvard.edu/2024/09/23/the-ever-expanding-right-to-refuse-to-provide-healthcare> [web.archive.org/web/20240923184300/https://blog.petrieflom.law.harvard.edu/2024/09/23/the-ever-expanding-right-to-refuse-to-provide-healthcare] ("EMTALA—and patients' interests in life and health—had long been understood to prevail over providers' religious objections."); Reva B. Siegel & Mary Ziegler, *Abortion's New Criminalization: A History-and-Tradition Right to Healthcare Access After Dobbs and the 2023 Term*, 111 VA. L. REV. 413, 436 (2025) (noting that the Court's absolutist approach to conscience exemptions contradicts its historical attention to third-party harms).

218. *All. for Hippocratic Med.*, 602 U.S. at 388–90; see also *Moyle*, 603 U.S. at 334 (Barrett, J., concurring).

from this requirement.²¹⁹ Religious providers must be exempted, that is, even at the cost of their patients' lives.²²⁰ This reasoning reveals a Court that is willing to impose extreme harms—even death—on third parties in the name of religious interests. This absolutism in protecting religious interests will fall disproportionately on women and people of color, who, as noted above, most benefit from the affirmative protections that the new religious equality law threatens.

The myth of equal protection, in short, is a political myth. It functions to legitimate exercises of judicial power that devalue and subordinate women and people of color. While the Supreme Court proudly declares its commitment to the equality of all, it has stripped equal protection doctrine of any power to combat discrimination against women and people of color. This political myth does more than leave women and people of color without protection. It actively retrenches race and gender inequality by casting it as the latest expression of a judicially enforced civil rights tradition that protects all Americans.

III. THE REALITY OF EQUAL PROTECTION AND COURT REFORM

As a political myth, the claim that equal protection doctrine protects women and people of color has great power to shape our politics. Political myths, by changing how individuals understand political conditions, also change how individuals respond to those conditions.²²¹ The myth of equal protection appears to have such an effect on our constitutional politics. In particular, this myth shapes political debates about the Supreme Court's power. This part begins by showing how the myth of equal protection appears to artificially limit appetite for reforms that would directly or indirectly limit the Supreme Court's power. This myth does so by relying on and reinforcing one of the most popular defenses of this power: a minority-protective theory of judicial review.

This part then shows how understanding the reality of equal protection clarifies the politics of Court reform. In particular, it provides two reasons to support reforms even if—and, in fact, because—they will limit the Court's power. First, the reality of equal protection undermines a common objection to reforms that limit the Supreme Court's power. Second, the reality of equal protection highlights a democratic legitimacy problem with the Court's present power over constitutional equality law. The reality of equal protection, in short, suggests that there is far less downside and far more upside to limiting the Supreme Court's power than skeptics might suspect.

219. *All. for Hippocratic Med.*, 602 U.S. at 388–90; see also *Moyle*, 603 U.S. at 334 (Barrett, J., concurring).

220. The Court clarified this point by noting that it would exempt a doctor, “even in a so-called healthcare desert, where other doctors are not readily available.” *All. for Hippocratic Med.*, 602 U.S. at 388.

221. BOTTICI & CHALLAND, *supra* note 27, at 20 (noting that political myths’ power to shape individuals’ political understandings also alters how people “*feel* about the world and *act* within it”).

A. The Mythical Case Against Reform

The Supreme Court's insistence that it uses its power to protect women and people of color comes at a time when this power is subject to growing contestation. Although academics and politicians have long debated the proper role of the Court,²²² these debates have intensified in recent years.²²³ In 2021, for example, former President Joe Biden acknowledged that Supreme Court reform had become a political issue by convening a presidential commission on the matter.²²⁴ In July 2024, President Biden proposed some limited reforms to the Supreme Court.²²⁵ Other Democratic politicians have more aggressively endorsed Court reform. In 2023, for example, lawmakers introduced multiple bills that would, among other things, add seats to the Supreme Court,²²⁶ impose term limits on the Justices,²²⁷ and enforce ethics requirements on them.²²⁸ And, in 2024, Democratic leaders formed a "Court Reform Now" task force to develop further proposals for reform.²²⁹ Politicians at the highest levels of government, in short, are increasingly questioning the Court's unchecked power in our constitutional system.

Against this backdrop, the Court's assertion that equal protection doctrine protects women and people of color is unsurprising. This story appeals to a longstanding defense of its own power. The Supreme Court has long justified its authority to review democratic enactments for consistency with constitutional equality principles by claiming that it uses this power to protect minority rights. This defense of judicial review and supremacy emerged after the *Lochner* era, a period now synonymous with judicial overreach.²³⁰ In the wake of *Lochner*, a chastened Court urged that it would no longer routinely police the policy judgments of the

222. *Presidential Commission Report*, *supra* note 31, at 34–59 (providing an overview of debates about the Supreme Court's power since the nation's founding).

223. *Id.* at 76 ("In 2020, more than 400 articles appeared in the *New York Times*, *Wall Street Journal*, *Washington Post*, and *USA Today* invoking the term 'Court packing' in the context of the Supreme Court, in contrast to approximately 100 articles in 2019.").

224. Exec. Order No. 14023, 86 Fed. Reg. 19569 (Apr. 19, 2021) (establishing by executive order the Presidential Commission on the Supreme Court of the United States).

225. *Fact Sheet: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, THE AM. PRESIDENCY PROJECT (July 29, 2024), <https://www.presidency.ucsb.edu/documents/fact-sheet-president-biden-announces-bold-plan-reform-the-supreme-court-and-ensure-no> [perma.cc/6F52-8K5K].

226. *See, e.g.*, Judiciary Act of 2023, S. 1616, 118th Cong. (2023) (proposing to add four justices to the Supreme Court).

227. *See, e.g.*, Supreme Court Tenure Establishment and Retirement Modernization Act of 2023, H.R. 5566, 118th Cong. (2023) (proposing term limits for Supreme Court justices).

228. *See, e.g.*, Supreme Court Ethics Act, S. 325, 118th Cong. (2023) (proposing a binding code of ethics for Supreme Court justices); Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. (2023).

229. Benjamin S. Weiss, *SCOTUS Expansion, Term Limits on the Menu for New House Task Force*, COURTHOUSE NEWS SERV. (May 15, 2024), <https://www.courthousenews.com/scotus-expansion-term-limits-on-the-menu-for-new-house-task-force/> [web.archive.org/web/20250725122924/https://www.courthousenews.com/scotus-expansion-term-limits-on-the-menu-for-new-house-task-force/].

230. *See* David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (describing the features of *Lochnerism*).

political branches.²³¹ Instead, it would only invalidate legislation in special cases. In *United States v. Carolene Products*,²³² the Court explained that it would apply a “more searching judicial inquiry” where, among other things, laws interfered with the political process or were “directed at” or motivated by “prejudice against discrete and insular minorities.”²³³

The contention that judges use their power to protect minority rights has, over time, transformed into one of the most popular justifications for judicial review. More than a decade after *Carolene Products*, John Hart Ely developed the Court’s sketch of proper judicial authority into a full-fledged theory of judicial review.²³⁴ This theory offered a needed response to the “counter-majoritarian difficulty” of judicial review, the apparent democratic deficit created by allowing unelected judges to decline to enforce laws enacted by democratic majorities.²³⁵ Ely argued that judicial review was justified as a means to remedy distortions in the democratic process.²³⁶ One such distortion occurs where majorities “systematically disadvantage[] some minority out of simple hostility or . . . prejudice[.]”²³⁷ While judicial review in such circumstances might be counter-majoritarian in a technical sense, it could enhance democracy by ensuring that majorities do not irrationally discount the interests of minority groups.²³⁸

The myth of equal protection relies on and reinforces this minority-protective justification of judicial power. As described *supra* Section I.A, the Supreme Court loudly advertises its commitment to protecting women and racial minorities from all laws that target them or are based on prejudice against them.²³⁹ In its free exercise cases, the Supreme Court casts its interventions as necessary to protect an embattled minority, religious conservatives, from a rising tide of hostility.²⁴⁰ In both contexts, that is, the Court purports to deploy its power if, and only if, a law is directed at or based on prejudice against protected gender, racial, or religious groups. This rhetoric and doctrine suggest that, when the Supreme Court invalidates democratic enactments on constitutional equality grounds, it does so in accordance with its legitimate role in guarding all minority interests from irrational prejudice.

231. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–99 (1937) (“Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.”).

232. 304 U.S. 144 (1938).

233. *Id.* at 153 n.4.

234. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

235. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (2d ed. 1986) (“The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now . . .”).

236. ELY, *supra* note 234, at 72–103.

237. *Id.* at 103.

238. *Id.*

239. *See supra* Section I.A.

240. *See supra* notes 155–164 and accompanying text.

This story has succeeded in shaping the politics of Court reform. In particular, this story appears to limit appetite for reforms that would directly or indirectly limit the Supreme Court's power. The most common objection to such reforms, in fact, appears to be a concern that limiting the Court's power could imperil minority rights.²⁴¹ Legal academics have repeatedly voiced concern that reforms that threaten the Court's power would jeopardize the Court's important function of enforcing equality rights against overweening majorities.²⁴² Even some academics who generally support Court reform have cautioned against reforms that would directly or indirectly limit the Court's power on the ground that they might threaten minority rights.²⁴³ Beyond legal academics, popular political commentators have warned in newspaper articles and op-eds that Court reforms that threaten the Court's power, intentionally or not, would threaten minority rights.²⁴⁴

Evidence suggests that a minority-protective defense of judicial power shapes the public's views of Court reform, too. Although the public appears to support some modest Court reform measures, it remains skeptical of more aggressive reforms.²⁴⁵ Evidence suggests this skepticism is shaped by the public's perceptions

241. *Presidential Commission Report*, *supra* note 31, at 153 (“[C]ritics of proposals to disempower the courts worry that such reforms might undermine protections for individual rights, particularly minority rights”); Nikolas Bowie, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, Written Statement to the Presidential Commission on the Supreme Court of the United States 9 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [perma.cc/VC7Z-SVFD] (“[T]he general argument for judicial review is that the intervention of federal courts may be necessary to protect political minorities from a dysfunctional political process.”); Doerfler & Moyn, *supra* note 31, at 1738–39 (“The most common objection to disempowering reforms to the Supreme Court focuses on the need for it to protect . . . minority rights against hostile majorities.”).

242. *See, e.g.*, Noah Feldman, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, Written Statement to the Presidential Commission on the Supreme Court of the United States 8–9 (June 30, 2021), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf> [perma.cc/HXU8-XZ3M] (arguing that aggressive Court reform would “powerfully undermine the court’s institutional legitimacy, and thus its ability to protect . . . fundamental rights” including “equality”); William G. Ross, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, Written Statement to the Presidential Commission on the Supreme Court of the United States 6 (June 30, 2021) (arguing that Court reform would undermine the Court’s role in protecting “racial, religious, political, and ethnic minorities whose rights were ignored or impugned by Congress, the President, and state governments”); Bayefsky, *supra* note 31, at 1323 (cautioning against disempowering reforms because “[t]o lose the safeguard of the federal judiciary would be to neuter a potential source of protection for minorities’ rights”).

243. *See, e.g.*, Epps & Sitaraman, *supra* note 31, at 167 & n.81 (arguing against disempowering reforms on the ground that it is possible that “political actors have become so accustomed to being reined in by courts that, once set free, they would trample important rights”); Siegel, *supra* note 31, at 82 (arguing against Court-packing on the ground that it would limit the power of the Court “to hold governmental institutions accountable for violations of the constitutional rights of individuals and groups that lack political power”); Tribe, *supra* note 31 (arguing that disempowering the Supreme Court is ill-advised because it would “abandon[] the idea of an independent guardian of . . . minorities”).

244. *See, e.g.*, French, *supra* note 32 (cautioning against Court-packing proposals because “majorities do not always want to protect minority rights”); Marcus, *supra* note 32 (arguing against jurisdiction-stripping on the ground that they might lead to later encroachments of minority rights).

245. Dan Morrison, *Americans Want To Rein in Supreme Court Justices, Poll Finds*, USA TODAY (Aug. 9, 2024), <https://www.usatoday.com/story/news/politics/elections/2024/08/09/supreme-court-reform-poll/74724236007/> [perma.cc/PZ5S-YX6R] (describing poll findings that seventy percent

of the Court's role in enforcing minority rights. One study found, for example, that Americans who are more firmly committed to "the protection of the political rights of minorities . . . express greater institutional support for the judiciary."²⁴⁶ This suggests that Americans support the Court, at least in part, because they believe it protects minority rights. A more recent study suggests that Democrats—the group most likely to support Court reform—are most vulnerable to this misconception.²⁴⁷ This study found that, while Americans have long overestimated how liberal the Supreme Court is, Democrats today are disproportionately likely to make this mistake.²⁴⁸ This misperception likely distorts their views of Court reform. As the study found, "[i]f people, particularly Democrats, actually knew the court's conservative positioning with accuracy, they would likely be more supportive of making institutional changes to the court."²⁴⁹

The myth of equal protection may not persuade everyone. To shape our politics, however, a political myth need only persuade some.²⁵⁰ There is evidence that the myth of equal protection does just that. By relying on and reinforcing a minority-protective theory of judicial power, this myth appears to bolster skepticism of Court reforms in both academic and popular discourse.

B. *The Real Case for Reform*

The reality of equal protection shows that this minority-protective skepticism of Court reform is misguided. It shows that the Court does not protect minority rights across the board, but instead protects minority interests it favors and undermines those minority interests it disfavors. Recognizing this selective protection and subversion of minority rights provides two reasons to embrace Court reform, including reforms that would directly or indirectly limit the Court's power. First, this reality shows that there is far less downside—and far more upside—to limiting the Court's power than proponents of minority rights might suspect. Second, this reality reveals that the Court uses its power over constitutional equality law in democratically illegitimate ways. This democratic legitimacy problem provides an affirmative basis to limit the Court's power over constitutional equality law.

of Americans support a binding code of conduct for the Supreme Court, sixty-three percent support an 18-year term limit for Justices, and thirty-eight percent support expanding the number of Justices).

246. Shawn Patterson Jr., Matt Levendusky, Ken Winneg & Kathleen Hall Janieson, *The Withering of Public Confidence in the Courts*, 108 JUDICATURE 1, 31 (2024) (quoting Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 648 (1992)).

247. Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, 119 PROC. NAT'L ACAD. SCI. 1 (2022), <https://www.pnas.org/doi/epub/10.1073/pnas.2120284119> [perma.cc/J32P-5H9T].

248. *Id.* at 3–4 (noting that (1) from 2010 to 2021, most Americans expected the Court to be more liberal than it actually was and (2) by 2021, Democrats were more likely than Republicans to consistently underestimate the Court's conservatism).

249. *Id.* at 5.

250. FLOOD, *supra* note 23, at 44 (explaining that a political myth often has disbelievers and need only be "accepted as valid in its essentials by a social group" to function).

1. Undermining the Minority-Rights Objection

The reality of equal protection doctrine, first, deflates the objection that judicial reforms threatening the Court's power would imperil minority rights. It shows that this objection both overestimates how much work the Court does to protect minority rights and underestimates how much damage the Court does to the same. As described in Part I.B., the Court fails to protect the rights of women and people of color.²⁵¹ This failure does not stem from a lack of discrimination against these groups. Women and people of color routinely face harms that the Court deems discriminatory when they befall religious conservatives.²⁵² Nor does the Court's failure to protect women and people of color stem from any claim that these groups do not warrant judicial protection. As noted in Part I.A., the Court proudly asserts its continued commitment to protecting women and people of color from discrimination.²⁵³ Moreover, these groups face the kind of systemic disadvantages in the political process that entitles them to protection under a minority-protective theory of judicial review.²⁵⁴

Beyond showing that the Court fails to use its power to protect minority rights, the reality of equal protection also shows that the Court often uses its power to undermine minority rights. As described in Section II.B., the Supreme Court aggressively uses its power over religious equality law to invalidate or imperil laws that promote race and gender equality.²⁵⁵ In doing so, the Court not only reverses the gains of civil rights movements past but also prevents democratic institutions from making forward progress on race and gender equality. This active judicial

251. See *supra* Section I.B.

252. *Id.*

253. See *supra* Section I.A.

254. Whether a group warrants protection under a minority-protective theory of judicial review does not turn on whether that group is a numerical minority, but instead on whether that group suffers systemic disadvantages in the political process. This is because minority-protective judicial review is supposed to correct such distortions in the democratic process. See ELY, *supra* note 234, at 103 (arguing that judicial review is warranted where majorities “systematically disadvantage[] some minority out of simple hostility or . . . prejudice[]”). People of color warrant protection under this theory because they face systemic barriers to political participation and prejudice in the political sphere. See ELY, *supra* note 234, at 135 (describing racial minorities as exemplars of groups requiring protection under his theory of judicial review); Michael Waldman, *Growing Racial Disparities in Voter Turnout*, BRENNAN CTR. 7–16 (March 6, 2024), <https://www.brennancenter.org/media/12347/download> [perma.cc/ACE2-ZJ5A] (showing that voter turnout gaps between White and non-White voters have grown in the past ten years); see also Stephanie L. Canizales & Jody Agius Vallejo, *Latinos & Racism in the Trump Era*, 150 DÆDALUS 150, 151 (2021) (noting that White racial resentment towards voters of color increasingly drives electoral outcomes in the United States).

While women are not a numerical minority, they too face the kinds of systemic barriers to political power that entitle them to protection. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (applying heightened review to a gender classification because “women still face pervasive . . . discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena”); Murray & Shaw, *supra* note 63, at 768–72 (explaining that women face family-related barriers to political participation, are underrepresented in federal, state, and local political bodies, contribute less money to political campaigns, and are often subject to laws passed during a time when women lacked any political representation at all).

255. See *supra* Section II.B.

subversion of race and gender equality measures reveals that the Court's unchecked power imposes significant costs on minority rights. Coupled with the Court's failure to protect women and people of color, these costs suggest that unrestrained judicial power realizes the very harms to minority rights that skeptics of reform fear.

Noting the Court's malign effects on the rights of some minorities, however, may seem to ignore the Court's protection of religious minorities. The Supreme Court has insisted that its frequent interventions on behalf of religious conservatives protect this group from growing majoritarian hostility and disregard.²⁵⁶ This minority-protective cast²⁵⁷ of the new religious equality law distinguishes it from other areas of constitutional equality doctrine, such as affirmative action, where the Court uses its power to protect politically powerful majority groups.²⁵⁸ While elevating majority interests over minority interests in this way is plainly inconsistent with a minority-protective theory of judicial review,²⁵⁹ elevating the interests of one minority group over another is less obviously so.

The fact that the new religious equality doctrine protects the interests of some religious minorities, however, does not vindicate a minority-protective theory of the Court's power. As an initial matter, the Court does not protect religious minorities across the board.²⁶⁰ The Court uses its power primarily to protect the interests of conservative Christians. While the Court has readily found discrimination against conservative Christian plaintiffs, for example, it has been unmoved by obvious evidence of anti-Muslim animus in the law.²⁶¹ This selective approach is likely to worsen as progressive believers bring more claims under the new religious equality doctrine.²⁶² This narrow protection of religious conservatives reveals that the Court

256. See *supra* notes 155–164 and accompanying text.

257. Schragger, et al, *supra* note 41, at 253–54 (noting that the new religious equality law is “explicitly cast as minority protective”).

258. Bridges, *supra* note 14, at 135–67 (arguing that the Court has adopted a double standard in race discrimination cases that prioritizes the interests of White people and threatens legal protections for people of color); Haney-López, *supra* note 35, at 1862–74 (explaining how the Court extends broader equality protections to White people than to people of color, and has used these protections to undermine laws that promote the equality of people of color); Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 9–58 (2013) (explaining how the Court has adopted a double standard in its equal protection cases that extends greater protections to majority groups at the expense of minority groups).

259. Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1430–31 (2017) (arguing that the Supreme Court, by “afford[ing] special protections . . . to politically *powerful* entities” protects “precisely the opposite of the kind of groups who animated the theory at the outset”).

260. Schragger, et al, *supra* note 41, at 283 (noting that the Court has been “less than receptive” to claims of many minority religious groups).

261. See *Trump v. Hawaii*, 585 U.S. 667 (2018) (declining to find anti-Muslim discrimination despite clear evidence of animus); Tebbe, *supra* note 39, at 2464–69 (explaining how the *Trump v. Hawaii* plaintiffs should have had a strong claim under the new religious equality doctrine).

262. In response to growing free exercise challenges to abortion bans, for example, conservative commentators have begun to proffer theories for why this doctrine does not require exemptions for pro-choice believers. See, e.g., Brief for Professors Stephanie H. Barclay & Richard W. Garnett as Amici Curiae Supporting Appellant-Defendants’ Petition to Transfer, Individual Members of Med. Licensing Bd. v. Anonymous Plaintiff 1, 233 N.E.3d 416 (Ind. Ct. App. 2024) (No. 22A-PL-2938); THOMAS JIPPING, HERITAGE FOUND., PRO-LIFE LAWS DO NOT THREATEN RELIGIOUS FREEDOM, (2024), https://www.heritage.org/sites/default/files/2024-08/LM358_0.pdf [perma.cc/Q3DU-2T5W]. For

is protecting an even smaller sliver of minorities than its decisions claim. It also indicates that the Court is protecting precisely those minorities whose interests are the most likely to be protected in majoritarian processes already.²⁶³

One need not dispute the propriety of protecting conservative Christians under a minority-protective theory of judicial review, however, to see that the Court's narrow enforcement of their rights does not vindicate a minority-protective defense of its power. These narrow equality protections reveal that the Court, at best, enforces minority rights in a highly selective way. From the perspective of race and gender equality, this selective enforcement of minority rights is demonstrably worse than nothing. It comes at the expense of the rights of women and people of color. The problem with this patterned enforcement of minority rights, however, runs deeper. As the next subsection shows, the Court's selective protection and subversion of minority rights suggest that the Court uses its power over constitutional equality law in democratically illegitimate ways.

2. *Uncovering a Democratic Legitimacy Problem*

The Court's patterned protection of minority rights does not simply counter a minority-protective objection to Court reform. It provides an affirmative theoretical basis to embrace reforms that would limit the Supreme Court's power. The Court's selective subversion and protection of minority rights, specifically, reveals a democratic legitimacy problem at the heart of the Court's power over constitutional equality law. This democratic legitimacy problem suggests that continued, unrestrained judicial power over constitutional equality law comes at the expense of foundational principles of democracy and self-government.

To appreciate how the reality of equal protection uncovers a democratic legitimacy problem with the Court's power, it is helpful to elaborate a central assumption of the minority-protective theory that undergirds it. A minority-protective theory of judicial review depends, at base, on the premise that judges are generally more sympathetic to minority interests than the majoritarian institutions they police. It is true that scholars often frame judges' special competency to protect minority interests as flowing from their relative insulation from the political processes.²⁶⁴ But this insulation from political winds only matters if judges are

scholarship explaining why these attempts to exclude religious equality challenges to abortion bans are unpersuasive, see Sepper, *supra* note 39, at 206 (“[I]n response to the religious liberty of abortion seekers, some advocates and scholars have called for heightening the burdens on plaintiffs and limiting the meaning of religious exercise to ritual, dogma, and compulsion.”); David Schraub, *Liberal Jews and Religious Liberty*, 98 N.Y.U. L. REV. 1556, 1586 (2023) (arguing that conservative advocates’ “press for [a] highly particular and sect-specific understanding of religious obligation should be seen as a pivot towards express Christian preferentialism”); and Schwartzman & Schragger, *supra* note 39, at 2333–40 (arguing that many who oppose religious exemptions to abortion laws functionally argue that liberal believers cannot assert free exercise claims).

263. See Litman, *supra* note 43, at 64–65 (noting that the interests of conservative religious groups are well-represented in state and federal governments); Murray, *supra* note 164, at 281 (noting that the Court’s focus on protecting “evangelical Christian and White” men inverts the political process theory’s usual requirement that a protected group lack political power).

264. ELY, *supra* note 234, at 103.

generally more sympathetic to minorities to begin with.²⁶⁵ If judges harbor as much (or more) prejudice to minority groups as the public, insulation from majority influence won't make them any more likely to protect minorities. A minority-protective theory of judicial review thus depends on the premise that judges are "elite sympathizers" who are more likely to understand, respect, and ultimately protect minority interests than the general public and the majoritarian institutions they control.²⁶⁶

The Court's patterned protection of the equality rights of women, people of color, and religious conservatives proves this premise of superior judicial sympathy false. Time and again, the Supreme Court has insisted that it is equally concerned with the rights of racial, gender, and religious minorities. Time and again, the Supreme Court has professed to apply the same equality rules to the claims of women and people of color. Yet, when rubber meets road, the Court extends a vision of equality to religious conservatives that it is unwilling to extend to women and people of color. Even worse, the Court affirmatively subordinates the interests of women and people of color to religious conservatives.

This gulf between constitutional equality rhetoric and reality suggests that the Justices lack the superior sympathy for minorities that a minority-protective theory of judicial power presupposes. If the Justices possess the broad commitment to minority rights that they profess, their patterned enforcement of the rights of women, people of color, and religious conservatives is damning. It suggests that the Justices—despite their best efforts—simply do not understand the needs, interests, and experiences of women and people of color in the same way that they understand the needs of religious conservatives. This reveals that the Justices are not elite sympathizers, but selective ones. Even worse, it shows that the Justices exhibit the very selective sympathy and indifference that their power is supposed to police.

Once it becomes clear that the Justices have no special capacity to comprehend the interests of minority groups, a political process theory of the Court's power begins to crumble. It reveals that the Court does not simply engage in a neutral, non-substantive practice of ensuring that laws adequately account for minority interests. Instead, the Court engages in a practice of elevating the interests of minorities it favors over minorities it disfavors, even when they have equally plausible claims to protection. This practice of differential minority rights enforcement is not driven by some superior judicial discernment of all minority interests at stake. It is driven by the Justices' bias against or blindness to the interests of women and people of color. Understood in this light, judicial review is, at best, a mechanism for replacing the prejudices of the polity with the prejudices of judges. At worst, it is a mechanism for judges to displace the considered value judgments of the polity with their own.

265. Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 779–80 (2022) ("[O]nly if the masses are comparatively bigoted do we do better to rely upon officials insulated from popular demands.").

266. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1405 (2006).

A minority-protective theory of judicial power becomes even more attenuated in light of evidence that democratic bodies can be better at sympathizing with minorities than the Supreme Court. A robust scholarly literature provides evidence that majoritarian institutions often do a better job of protecting minority rights than the Court.²⁶⁷ The religious equality cases described in this Article add to this evidence. While the Supreme Court has been quick to label any law that burdens religious conservatives the product of disregard, the facts of many of these cases suggest that lawmakers took at least some account of religious interests. In the COVID-19 cases, for example, many of the public health regulations that the Court invalidated contained explicit exceptions for houses of worship.²⁶⁸ The ACA's contraceptive mandate, similarly, contained an exemption for religious institutions and religious nonprofits.²⁶⁹ And, the pharmacy regulations in *Stormans* contained an exemption for individual objecting pharmacists.²⁷⁰ These exemptions suggest that lawmakers did not fail to grasp religious interests, but instead made some effort to accommodate them. Their failure to absolutely protect these religious interests thus does not suggest indifference or obliviousness to religious interests, but a desire to balance those interests with the interests of others. This ability to recognize and consciously weigh multiple minority interests at once appears to be more than the Supreme Court Justices can do.

In this way, the reality of equal protection reveals a democratic legitimacy problem at the heart of the Court's constitutional equality enforcement. Constitutional theorists, and the Supreme Court itself, have responded to the countermajoritarian difficulty of judicial review by urging that judicial review can be

267. See, e.g., Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 298 (2002) (arguing that democratic institutions are well-suited to protecting civil rights because "democratic procedures are relatively good at identifying policies that are in everyone's interest"); James D. Nelson, *Disestablishment at Work*, 134 YALE L.J. 1890, 1949–51 (2025) (noting that majoritarian bodies, including Congress and state legislatures, have demonstrated a better capacity to balance competing constitutional values in the workplace than many judges); Waldron, *supra* note 266, at 1405 (arguing that "elective institutions may be better at protecting minority rights because electoral arrangements will provide a way of channeling popular support for minority rights into the legislature"); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 991 (2005) (noting that the political branches have some institutional advantages in protecting individual rights).

268. In *Tandon v. Newsom*, for example, the plaintiffs acknowledged that the regulatory scheme they challenged "allow[ed] indoor religious gatherings at 'houses of worship.'" Emergency Application for Writ of Injunction or in the Alternative for Certiorari Before Judgment or Summary Reversal at 19, *Tandon v. Newsom*, 593 U.S. 61 (2021) (No. 20A151). Other COVID regulations that the Court struck down similarly imposed more lenient rules on houses of worship than on other places. See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1131 (9th Cir. 2021) (explaining that California regulations "permit[ed] unlimited attendance at outdoor worship services and deem[ed] clergy and faith-based streaming services 'essential,'" which the plaintiffs admitted was more lenient than restrictions on some other places); *Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 224 (2d Cir. 2020) (noting that New York regulations forbade all kinds of gatherings and businesses from being open, but allowed houses of worship to hold services subject to a capacity limit).

269. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 698 (2014).

270. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1072 (9th Cir. 2015) ("[T]he parties agree that the foregoing rule does *not* require an [objecting] individual pharmacist to dispense medication . . .").

a tool to correct democratic processes when they unfairly discount the interests of minorities. This may be true in theory. But, in practice, the Court does not use its power in this way. Instead, at least in constitutional equality cases, the Court uses its power to enforce the Justices' own impressions that certain minority interests should prevail over others. Whether the Justices are aware that they are making such value judgments does not change the fact that they are making them. Nor does it change the fact that they are imposing these substantive value judgments on majorities who disagree. In these cases, judicial review does not strengthen democracy. It displaces it.

Recognizing this democratic legitimacy problem with constitutional equality doctrine provides an affirmative basis to limit the Supreme Court's power over it. It suggests that the Court lacks the institutional advantage that supposedly justifies its power to displace democratic judgments. While a fulsome discussion of specific Court reforms is beyond the scope of this Article, recognizing this democratic legitimacy problem also provides some guidance about what kind of reforms would be best. It suggests that lawmakers should either (1) constrain the Court such that it reliably complies with a valid theory of judicial review or (2) shift the Court's power over constitutional equality enforcement to more democratic institutions.

This Article, however, does not purport to resolve all aspects of the ongoing debate over the Supreme Court's power. It may be, for example, that some alternative justification for judicial authority vindicates the Court's current use of its power over constitutional equality enforcement. In particular, the Court and its defenders might urge that some originalist or historical justification adequately accounts for the Court's conduct. Such a defense, however, is not immediately apparent. Prominent originalist and conservative scholars have argued that strong judicial review is unjustified.²⁷¹ And neither the text of the Constitution nor founding-era judicial practice obviously require judicial supremacy.²⁷² Some have also suggested that too serious a challenge to the Supreme Court's power might undermine the rule of law²⁷³ or the Court's ability to check an authoritarian president.²⁷⁴ There is evidence, however, that the Supreme Court itself is playing an increasingly important role in undermining the rule of law and enabling presidential overreach.²⁷⁵

271. See, e.g., Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1987) (arguing that the executive and legislative branches have as much a claim to the power to interpret the Constitution as the Court); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (contesting judicial supremacy on expressly originalist grounds).

272. *Presidential Commission Report*, *supra* note 31, at 153; Ilan Wurman, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, Written Statement to the Presidential Commission on the Supreme Court of the United States 5–7 (June 30, 2021) (arguing that historical evidence contradicts a robust vision of judicial supremacy).

273. Epps & Sitaraman, *supra* note 31, at 167–68 (arguing that reforms that disempower the Supreme Court might erode the “rule of law” by making people see it “as just another political institution”).

274. Siegel, *supra* note 31, at 81–82 (“The Court provides a check against the dramatic expansion of executive power since the start of the twentieth century, a development that poses a risk of authoritarianism if a would-be authoritarian ascends to the presidency.”).

275. THE INTERCEPT BRIEFING: *Executive Lawlessness: Leah Litman on the Supreme Court Enabling Presidential Overreach* (Intercept, July 18, 2025) (quoting Professor Leah Litman explaining

Ultimately, however, this Article does not attempt to address, much less refute, all potential defenses of the Court's power.

This Article, further, does not claim that reforming the Court's power over constitutional equality doctrine would be sufficient to solve the democratic legitimacy problem it has identified. On the contrary, reforms to other areas of the Court's power are likely warranted, too. Constitutional liberty jurisprudence, for example, appears to suffer from the same kind of selective sympathy and indifference to minority interests that plagues the Court's equality doctrine.²⁷⁶ The Supreme Court's enforcement of statutory rights, too, appears marred by such biases.²⁷⁷ These examples suggest that any reform of the Court's constitutional equality enforcement power should form part of a more holistic judicial reform. Further, this Article does not suggest that the Court is the only institution in need of reform. Indeed, Congress, too, likely needs reforms to effectively fulfill its constitutional and democratic functions.²⁷⁸

Although this Article does not resolve all debates about Court reform, however, it urges that it is time to rid these debates of the pernicious myth of equal protection. The Supreme Court, simply put, does not protect the equality of women and people of color. While the Court may do some work to protect some religious minorities, this work comes at the expense of democratic protections for women and people of color with equal claims to protection. This reality of uneven equality enforcement reveals that the Court's immense power rests, in significant part, on a fiction. And it reveals that acquiescing to the Court's power means displacing democratic decisions about how best to balance and protect individual rights with the judgment of Justices who, at best, cannot comprehend the needs, desires, or interests of women and people of color.

how, in the first months of President Trump's second term, the Supreme Court has facilitated presidential overreach and greenlighted lawlessness, such as by limiting juridical relief for the Executive's violation of the Fourteenth Amendment's birthright citizenship guarantee). *See also* LEAH LITMAN, *LAWLESS: HOW THE SUPREME COURT RUNS ON CONSERVATIVE GRIEVANCE, FRINGE THEORIES, AND BAD VIBES* (2025).

276. The Court has extended robust liberty protections to religious conservatives alone, often at the expense of women and queer people who have equally plausible liberty interests at stake. Portuondo, *supra* note 151, at 719–45.

277. The Court has been hawkish in enforcing statutory protections for religious conservatives, even as it limits statutory protections for women, LGBTQ+ people, and people of color. *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1464–95 (describing the Supreme Court's aggressive enforcement of statutory religious liberty protections); Siegel & NeJaime, *supra* note 198, at 2522–32, 2566–78 (describing how the Supreme Court has interpreted statutory religious liberty protections increasingly broadly and in ways that harm women and queer people). Indeed, the Court has suggested, with no explanation, that statutory protections for religious liberty might trump statutory antidiscrimination protections for women, people of color, and queer people. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 682 (2020) (“Because RFRA operates as a kind of super statute . . . it might supersede Title VII’s commands in appropriate cases.”).

278. *See generally* THE PRINCETON INITIATIVE ON RESTORING THE CONSTITUTIONAL POWERS OF CONGRESS, REPORTS (2024), <https://csdp.princeton.edu/document/2876> [perma.cc/6RRG-V2S7] (suggesting Congress has ceded much of its constitutional authority and proposing reforms to ensure its effective functioning).

CONCLUSION

Myths can be powerful things. In this case, the political myth of equal protection encourages submission to a system of constitutional equality enforcement that tolerates and produces substantial racial and gender inequality. In doing so, this myth invites inaction in the face of the stories that opened this Article. This myth tells us, for example, that because no court stopped the suffering of Amber, Nicole, Brittany, and Samantha, these women must not have experienced discrimination. This myth tells us, further, that attempting to reform a Court that retrenches the inequality of people like Amber, Nicole, Brittany, and Samantha would be dangerous. Because this myth exploits longstanding liberal narratives about the Court's salutary role in our democracy, it stymies political action.

Political myths only work, however, if people believe them.²⁷⁹ By challenging the myth of equal protection, this Article provides the tools to limit its influence on our politics. The reality of equal protection shows that the Supreme Court cannot be counted on to protect women like Amber, Nicole, Brittany, and Samantha. Instead, it can be counted on to prevent—and even reverse—progress on race and gender equality. This judicial course of conduct does not enhance our democracy but displaces it. Understanding this reality of equal protection frees us to see our constitutional politics for what they really are. And it clears the way for the political action needed to make equal protection for all a reality.

279. BOTTICI & CHALLAND, *supra* note 27, at 24 (“[F]or a narrative to work as a political myth, it must . . . be able to coagulate and reproduce significance.”); FLOOD, *supra* note 23, at 45 (explaining that a myth “needs to be believed to be true by a social group if it is to have the particular functions which are fulfilled by myths”).